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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 11

FEDERAL TRADE COMMISSION, PETITIONER

vs.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 14, 1951
CERTIORARI GRANTED MARCH 3, 1952

In the

United States Court of Appeals

For the Seventh Circuit

No. 9584

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order to Cease and Desist Entered by the Federal Trade Commission.

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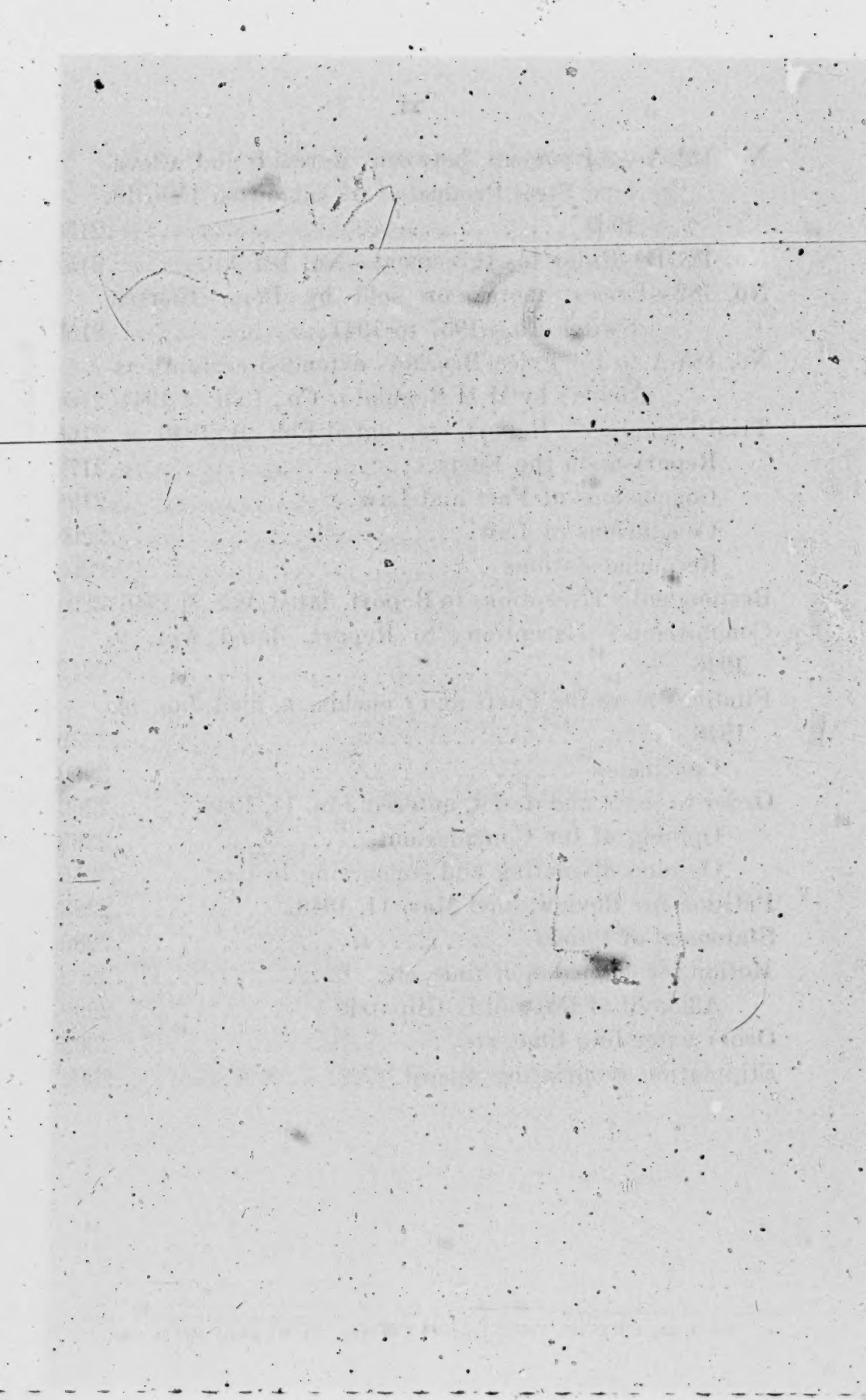
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1 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION, ss:

In the Matter of
Minneapolis-Honeywell
Regulator Company } Docket No. 4920

I, Wm. P. Glendening, Jr., Acting Secretary of the Federal Trade Commission, and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above entitled matter, except as hereinafter certified, consisting of:

Part 1—Pleadings
Part 2—Testimony (Pages 1 to 947, incl.)
Part 3—Testimony (Pages 948 to 1897, incl.)
Part 4—Testimony (Pages 1898 to 2818, incl.)
Part 5—Exhibits (Comm. Ex. 1 to 99, incl.)
Part 6—Exhibits (Comm. Ex. 100 to 212, incl.)
Part 7—Exhibits (Resp. Ex. 1 to 59, incl.)
Part 8—Exhibits (Resp. Ex. 60 to 123, incl.)
Part 9—Exhibits (Resp. Ex. 124 to 169, incl.)
Part 10—Exhibits (Resp. Ex. 170 to 186, incl.)

and separate original exhibits marked:

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4920-1	4920-1	4920-1	4920-1	4920-1		

That Commission Exhibits 195, Contract between Standard Products Company and Minneapolis-Honeywell Regulator Company—1939, was lost while in use at trial table.

That also transmitted herewith is a full, true, and complete copy of the Trial Examiner's Report and Exceptions related to this proceeding.

2 That this transcript and Trial Examiner's Report and Exceptions are certified to the United States Circuit Court of Appeals for the Seventh Circuit, pursuant

to the filing in said Court of a petition for review of an Order to Cease and Desist, dated January 14, 1948, entered by the Federal Trade Commission in the above indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 5th day of April, A. D. 1948.

Wm. P. Glendening, Jr.,
(Seal) *Acting Secretary.*

4 BEFORE FEDERAL TRADE COMMISSION.

(Caption—4920)

COMPLAINT.

Count I.

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Minneapolis-Honeywell Regulator Company, hereinafter referred to as respondent, has violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One: Respondent Minneapolis-Honeywell Regulator Company is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its general office and principal place of business at 2747 Fourth Avenue, South, in the city of Minneapolis, state of Minnesota. It is now and for more than three years last past has been engaged in the manufacture of automatic temperature controls for oil, gas and coal heating plants and industrial operations and in the sale thereof principally to oil burner manufacturers and also to jobbers, wholesalers and dealers in oil burner equipment located throughout the several states of the United States, the territories thereof, and in the District of Columbia, causing said products when sold, to be transported from the places of manufacture in the states of Minnesota, Indiana, Pennsylvania, and through distribution points

in other states of the United States, to the purchasers thereof located in states other than the states of manufacture. There is now, and has been for more than three years last past, a constant current of trade and commerce in said products between and among the various states of the United States, the territories thereof and in the District of Columbia.

The said respondent is the principal manufacturer of automatic temperature controls in the United States, the total volume of sales of said products by the said respondent, annually, during the past three years, constituting more than 60% of the total number of automatic temperature controls sold annually in the United States to burner manufacturers for domestic heating plants and to contractors and dealers in domestic automatic heating equipment. The respondent in the sale of automatic temperature controls as aforesaid, has entered into and now has in effect annual contracts or agreements with manufacturers of oil burners for domestic heating plants for a number of sets and units of automatic temperature controls equal to approximately the manufacturers annual requirements of such products, and the number of oil burner manufacturers having such contracts with said respondent has constituted for more than three years last past, and now constitutes a majority of all the manufacturers of oil burners for domestic heating plants within the United States.

In the course and conduct of its said business as herein described, respondent has been for more than three years last past and now is in substantial competition in the sale of automatic temperature controls in commerce between and among the various states of the United States, the territories thereof, and in the District of Columbia, with approximately six other corporations, persons, firms and partnerships.

Paragraph Two: In the automatic operation of a domestic oil burner, three types of controls are required and used and are usually, but not necessarily, sold in sets consisting of (1) a thermostat which is placed in the room or space to be heated, (2) a limit control which is a device placed on the heating plant to control the temperature or pressure in the heating plant, such as aerostat for hot air heating plants, aquastat for hot water heating plants and vaporstat for vapor heating plants, and (3) a primary control which controls the cycle of operation of the automatic

burner so as to prevent an explosion, such as a protectorelay. Some domestic oil burner manufacturers, in addition, equip their domestic oil burners with a fan control, the fan being operated as an extra limit control. Many domestic oil burner manufacturers, particularly those who also manufacture furnaces, purchase several thermostats and primary controls, using them as zone controls in the heating of large spaces.

The primary control sometimes referred to as a combustion control, a master control, or a safety control is an essential element in every domestic oil burner installation. The respondent owns or controls most of the existing patents on said primary controls (protectorelay) but there are many thermostats and limit controls being manufactured and sold by said competitors of respondent which could be and are satisfactorily and safely used by oil burner manufacturers, furnace manufacturers and contractors interchangeably with the thermostats and limit controls manufactured and sold by the respondent.

Paragraph Three: Respondent in the course and conduct of its said business as hereinbefore described in the year 1936 and prior thereto entered into, or attempted to enter into, written agreements with all its domestic oil burner manufacturer customers under the terms of which the purchaser is obligated to purchase his requirements of automatic temperature controls from the respondent, said controls to be purchased in sets consisting of one thermostat, one limit control and one primary control at a combination price per set. Said agreements contained the following provisions:

"It is specifically agreed that other control equipment is not to be considered as part of a set within the terms of this contract because the Company's costs are figured to cover a complete set of controls and the following breakdown prices are purely for enforcing purposes. It is agreed that the purchasers' yearly purchases will consist of at least 90% as many thermostats and 100% (but at the company's option not more than 125%) as many limit controls as primary controls. * * * The purchaser agrees that at least 95% of his control requirements consisting of thermostats, primary controls and limiting devices will be purchased from the Company."

Beginning in January 1937, the respondent discontinued the foregoing provision with respect to the 95% of the customer's control requirements in its contracts with its

domestic oil burner manufacturer customers, and since that time has not entered into contracts with its domestic oil burner manufacturer customers containing said provision.

7 The respondent in the year 1939 and in subsequent years in all such agreements with its domestic oil burner manufacturer customers has included similar set prices with the following provision:

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of satisfactory operation nor assume any service responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices."

Paragraph Four: As a result of the acts and practices of the respondent set forth in Paragraph Three herein for more than three years last past a substantial number of oil burner manufacturers for domestic heating plants have been induced to purchase either their entire requirements or a majority of their requirements of automatic temperature controls from the respondent, and competitors of the respondent have been prevented from selling their thermostats and limit controls in substantial quantities to the oil burner manufacturers for domestic heating plants purchasing primary controls from the respondent.

Paragraph Five: Respondent in the course and conduct of its said business has for more than three years last past adopted or pursued the policy or practice of granting or attempting to grant, under threat of infringement suit, a non-exclusive license to certain of its competitors under license agreements to manufacture and sell a combination furnace control system wherein the limit control, a fan control, and a thermostat, neither covered by patent, are operated together under a system patent covering "furnace control" issued to one Edward E. Freeman and

known as the Freeman Patent, owned and controlled by said respondent. In consideration for the granting of said license the respondent exacted and received royalties
8 from licensees of 50c per unit manufactured under said license. In said license agreement the license is granted on the express condition that the prices, terms and conditions of sale of combination furnace controls made in accordance with the terms of the agreement shall not be more favorable to the customer than those fixed from time to time by the licensor for its own products embodying the invention covered by the agreement, and that the licensee will sell said controls only at prices and on terms not more favorable to the customer than those set forth in a price schedule issued from time to time by the licensor. Said price schedule attached to and made a part of said agreement contains net minimum prices to be observed by the manufacturers for a combination furnace control and also those to be observed by jobbers and wholesalers as well as retail dealers.

Respondent for more than three years last past has sold a combination furnace and fan control embodying the said Freeman patent and in connection therewith it manufactures the fan switch but not the fan and manufactures the limit switch and the thermostat. The sales of said combination furnace and fan control by the respondent have substantially increased beginning with the year 1939 when said respondent began to issue licenses to its said competitors as aforesaid.

Paragraph Six: Respondent in the course and conduct of its said business manufactures and sells combustion stoker switches to furnace manufacturers throughout the United States and said respondent has followed the policy of selling said combustion stoker switches to its said customers under so-called exclusive license agreements whereby the said customers are granted licenses to use and sell said combustion stoker switches in combination with other devices under a domestic heating system of maintaining stoker fire which includes stoker switches and which is manufactured under a system patent of which the said respondent was an exclusive licensee, when as a matter of fact respondent well knew that the said patent did not cover or include the said stoker combustion switch.

Paragraph Seven: The acts and practices of the respondent as herein alleged are all to the prejudice of competitors of respondent and of the public; have a danger-

cus tendency to and have actually hindered or prevented competition in the sale of automatic temperature controls for use in domestic heating plants in commerce within the intent and meaning of the Federal Trade Commission
9 Act; have unreasonably restrained such Commerce in automatic temperature controls for use in domestic heating plants; have a dangerous tendency to create in respondents a monopoly in the sale of said products; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Count II.

The Federal Trade Commission having reason to believe that Minneapolis-Honeywell Regulator Company, a corporation, hereinafter called respondent, has violated and is now violating the provisions of Section 3 of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13), hereby issues its complaint against said respondent and states its charges with respect thereto as follows, towit:

Paragraph One: For its charges under this paragraph of this Count said Commission relies upon the matters and things set out in Paragraph One of Count I of this complaint to the same extent and as though the allegations of said paragraph of said Count I were set out in full herein, and said Paragraph One of said Count I is therefore incorporated herein by reference and made a part of the allegations of this Count.

Paragraph Two: For its charges under this paragraph of this Count said Commission relies upon the matters and things set out in Paragraph Two of Count I of this complaint to the same extent and as though the allegations of said paragraph of said Count I were set out in full herein, and said Paragraph Two of said Count I is therefore incorporated herein by reference and made a part of the allegations of this Count.

Paragraph Three: For its charges under this paragraph of this Count said Commission relies upon the matters and things set out in Paragraph Three of Count I of this complaint to the same extent and as though the alle-

gations of said paragraph of said Count I were set out in full herein, and said Paragraph Three of Count I is therefore incorporated herein by reference and made a part of the allegations of this Count.

Paragraph Four: For its charges under this paragraph of this Count said Commission relies upon the matters and things set out in Paragraph Four of Count I of this complaint to the same extent and as though the allegations of said Paragraph Four of Count I were set out in full herein, and said Paragraph Four of said Count I is therefore incorporated herein by reference and made a part of the allegations of this Count.

Paragraph Five: In the course and conduct of its said business described in Paragraph One, Two, Three and Four of Count I of this complaint respondent, in the course of commerce between and among the various states of the United States and the District of Columbia as described in said Paragraphs One and Two of said Count I of this complaint, for more than three years last past or thereabouts, has made sales and contracts for the sale of automatic temperature controls for heating plants on the condition, agreement or understanding that the purchasers thereof should not deal in or use any automatic temperature control for heating plants of a competitor or competitors of said respondent. The effect of said sales and contracts for sale and of such condition, agreement or understanding have been or may be to substantially lessen competition or tend to create a monopoly in a line of commerce, namely, the interstate sale and distribution of automatic temperature controls for heating plants.

Paragraph Six: The aforesaid acts of respondent, Minneapolis-Honeywell Regulator Company, constituted a violation of the provisions of Section 3 of the hereinabove mentioned Acts of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act).

Count III.

The Federal Trade Commission having reason to believe that Minneapolis-Honeywell Regulator Company, a corporation, hereinafter called respondent, has violated and is now violating the provisions of Section 2 of the Act of Congress entitled "An Act to supplement existing laws

against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914 (the Clayton Act) as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13), hereby issues this its complaint against said respondent and states its charges with respect thereto as follows, to-wit:

11 Paragraph One: For its charges under this paragraph of this Count said Commission relies upon the matters and things set out in Paragraph One of Count I of this complaint to the same extent and as though the allegations of said paragraph of said Count I were set out in full herein, and said Paragraph One of said Count I is therefore incorporated herein by reference and made a part of the allegations of this Count.

Paragraph Two: For its charges under this paragraph of this Count said Commission relies upon the matters and things set out in Paragraph Two of Count I of this complaint to the same extent and as though the allegations of said paragraph of said Count I were set out in full herein, and said Paragraph Two of said Count I is therefore incorporated herein by reference and made a part of the allegations of this Count.

Paragraph Three: In the course and conduct of its said business described in Paragraph One and Two of Count I of this complaint respondent, Minneapolis-Honeywell Regulator Company, has been for more than three years last past and is now discriminating in price between different purchasers buying automatic temperature controls for heating plants of like grade and quality by selling its said products to some of its customers at lower prices than it sells said products of like grade and quality to other of its customers, many of whom are competitively engaged one with another in the resale of said products within the United States. The respondent during said period of time has engaged in the following discriminatory practices and methods of determining the prices at which it sells its said products to its said customers:

(1) Respondent has classified its customers as follows: (a) oil burner manufacturers, (b) oil burner jobbers, (c) oil burner wholesalers—Class A, (d) oil burner wholesalers—Class B, and (e) dealers.

(2) Respondent publishes list prices for its said products, with discounts regularly and usually allowed to each respective class of trade, said discounts varying from 25

per cent up to 45 per cent, depending upon the product and the service rendered, that is, whether its customer is a dealer, jobber or wholesaler. Oil burner manufacturers who purchase approximately 95% of respondent's temperature controls for oil business are usually granted the maximum trade discount or approximately 45 per cent from the list price when buying in minimum quantities.

12 (3) Respondent sells its said products, particularly thermostats, limit controls and primary controls in units and in sets to manufacturers of oil burners under contracts providing for annual discount arrangements, including seven separate and distinct price brackets, with net prices fixed in proportion to the quantity requirements of the customer under the contract.

(4) Respondent sells its said contract customer buying up to 50 sets annually at a base price which has varied from time to time, but which is approximately 45 per cent less than the list price in effect, and such customers buying in annual quantities in excess of 50 sets are sold at varying discriminatory prices applicable to the different quantity brackets in effect, the most favored customers being sold at discriminatory prices ranging respectively from approximately 45 per cent less than the base price in 1938, to approximately 30 per cent less than the base price in 1940.

Paragraph Four: The effect of the said discriminations in price mentioned in Paragraph Two and Three hereof has been or may be substantially to lessen competition in the line of commerce in which respondent is engaged and to injure, destroy and prevent competition between the respondent and its competitors, and to injure, destroy and prevent competition between the customers of said respondent in the sale and distribution of automatic temperature controls for heating plants, and has been and may be to tend to create a monopoly in said line of commerce in the various localities or trade areas in the United States in which said respondent and its competitors are engaged in the sale and distribution of said products.

Paragraph Five: The foregoing acts and practices of respondent are violations of subsection 2(a) of Section 1 of the said Act of Congress approved June 19, 1936, entitled "An Act to amend Section 2 of an Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes' approved October 15, 1914, as amended U. S. C. Title 15, Sec. 13 and for other purposes."

Wherefore, The Premises Considered, the Federal Trade Commission on this 23rd day of February, A. D., 1943 issues its complaint against said respondent.

Notice.

Notice is hereby given you, Minneapolis-Honeywell Regulator Company, respondent herein, that the 2nd day of April, A. D., 1943, at 2 o'clock in the afternoon, is 13 hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall

be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

14 Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief, directed solely to that question, in accordance with Rule XXIII.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 23rd day of February, A. D., 1943.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

16 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—4920) * *

ANSWER OF RESPONDENT MINNEAPOLIS-HONEYWELL REGULATOR COMPANY.

Comes now the respondent Minneapolis-Honeywell Regulator Company, a Delaware corporation (hereinafter called respondent), by Messrs. Cravath, de Gersdorff, Swaine & Wood, and Messrs. Bair & Freeman, its attorneys, and answers the complaint herein as follows:

Answer to Count I.

1. Answering paragraph One of Count I of the complaint, respondent admits that it is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its general office and principal place of business at 2747 Fourth Avenue South, Minneapolis, Minnesota; that it is now, and for more than three years last past has been, engaged in the manu-

17 facture of automatic temperature controls for oil, gas and coal heating plants and certain industrial operations and in the sale of automatic temperature controls for

oil heating plants principally to oil burner manufacturers, and also to wholesalers (who are sometimes called jobbers) and dealers in oil burner equipment and controls located in various states of the United States, territories thereof, and in the District of Columbia; that respondent causes automatic temperature controls, when sold, to be transported from the places of manufacture by respondent in the States of Minnesota and Indiana, and through distribution points in certain other states of the United States, to the purchasers thereof located in states other than the states of manufacture; that prior to about 1942 there was a constant current of trade and commerce in said products between and among various states of the United States, territories thereof, and in the District of Columbia, that in the course and conduct of its said business prior to about 1942 respondent was in substantial competition in the sale of automatic temperature controls in commerce between and among various states of the United States, territories thereof, and in the District of Columbia, with many other corporations, persons, firms and partnerships; that respondent is one of the principal manufacturers of automatic temperature controls in the United States; that in past years it
18 entered into annual contracts or agreements with many manufacturers of oil burners for domestic heating plants for numbers of sets or units of automatic temperature controls, and that in some instances the quantities specified in such contracts may have been approximately equal to the manufacturer's annual requirements of such products.

Respondent is without knowledge as to the allegations of said paragraph One of Count I that the number of oil burner manufacturers which had contracts with respondent for a number of sets or units of automatic temperature controls approximately equal to such manufacturer's annual requirements thereof has constituted for more than three years last past, or now constitutes, a majority of all the manufacturers of oil burners for domestic heating plants in the United States, and that its total volume of sales of automatic temperature controls for domestic oil burners during the past three years has constituted more than 60% of the total number of automatic temperature controls sold annually in the United States to burner manufacturers for domestic heating plants and to contractors and dealers in domestic automatic heating equipment.

Except as hereinbefore specifically admitted or otherwise answered, respondent denies each and every allegation contained in paragraph One of Count I.

19 Further answering said paragraph One, respondent avers that:

During the year 1942 and at the present time, approximately 90% of its facilities have been and are now devoted to production for the war effort and have no relation to the domestic oil burner control business. By reason of war conditions and of the United States Government's restrictions on the manufacture and sale of oil burners, the domestic oil burner business and the business of manufacturing and selling automatic temperature controls for such oil burners, as those businesses existed prior to 1942, have practically ceased.

Prior to about 1942 respondent was engaged in substantial competition in the manufacture and sale of automatic temperature controls for oil burners with many more than six other manufacturers of such controls. In past years respondent had annual contracts in effect with a substantial number of the oil burner manufacturers in the United States providing for the sale to the manufacturers by respondent of automatic temperature controls for domestic oil burners in quantities as specified in said contracts, which quantities have always been specified by number except in relatively few instances prior to 1939 where the manufacturer did not desire to purchase a specified number

20 of such controls. In such last-mentioned instances such annual contracts stated that the purchaser agreed to purchase his "requirements", or "season's requirements", of respondent's controls, but neither such provision nor any other provision of any agreement or understanding between respondent and its customers was interpreted by respondent, or, on information and belief, by its customers, to prohibit the latter from purchasing domestic oil burner controls from competitors of respondent, or in fact has had any such effect. Many of respondent's oil burner manufacturer customers who had annual contracts with respondent likewise had contracts with competitors of respondent for the purchase of automatic temperature controls for domestic oil burners and the majority of respondent's said customers also regularly purchase and deal in automatic temperature controls for domestic oil burners manufactured by competitors of respondent. Respondent's prices for primary controls and thermostats for oil burners are

invariably higher than those of its competitors for similarly functioning products. Its contracts with customers are voluntarily entered into by its customers and do not limit or in any way directly or indirectly preclude such customers from dealing in or using controls made by respondent's competitors.

2. Answering paragraph Two of Count I of the complaint, respondent admits and avers that three types of controls are required and used in the operations of a
21 domestic oil burner and are usually, but not always, sold in sets, consisting of (i) a thermostat, which is placed in the room or space to be heated, (ii) a limit control, which is a device placed on the heating plant to prevent the temperature or pressure in the heating plant from exceeding a certain safe level, and (iii) a primary control, which controls the cycle of operation of the automatic burner so as to start and stop it when heat is needed or no longer needed (as governed by the thermostat) and to prevent a hazardous condition from occurring when there is a failure of combustion; that an Aquastat, an Airstat, a Pressuretrol and a Vaporstat are limit controls, and a Protectorelay is a primary control, manufactured and sold by respondent under trademarks and names owned by respondent; that some domestic oil burning furnaces are also equipped with a fan control which controls the operation of a fan for driving warm air to the space to be heated; that some domestic oil burner installations include more than one thermostat, the thermostats being used as zone controls in the heating of multiple spaces; that the primary control is sometimes referred to as a combustion control, a master control, or a safety control and is an essential element in every pressure or rotary type domestic oil burner installation (but not an essential element in domestic oil burner installations of the so-called vaporizing or pot types); and that limit controls of the line voltage type manufac-
22 tured and sold by a number of competitors of the respondent could be and are satisfactorily and safely used by oil burner manufacturers, furnace manufacturers and contractors interchangeably with limit controls of such type sold by respondent on installations where respondent's primary controls are used.

Respondent denies that it owns or controls most of the existing patents on primary controls and denies that there are many thermostats being manufactured and sold by com-

petitors of respondent which could be or are satisfactorily and safely used by oil burner manufacturers, furnace manufacturers and contractors interchangeably with the thermostats sold by respondent on installations where respondent's primary controls are used.

Except as hereinbefore specifically admitted or otherwise answered, respondent denies each and every allegation of said paragraph Two.

Further answering said paragraph Two, respondent avers that:

The thermostat and primary control are essential operating mechanisms of an oil burner control system. Respondent manufactures thermostats and primary controls for a particular and distinctive control circuit for electrically controlling the operation of an oil burner and such thermostats and primary controls of its manufacture are de-
23 signed especially to work one with the other in that circuit for bringing about such electrical control of the oil burner. Respondent furnishes oil burner manufacturers and other customers with such electrical circuit layouts for controlling the operation of an oil burner, and its thermostats and primary controls are particularly designed to work one with the other in a proper cooperative relationship for electrically bringing about the sequence of operation and control of an oil burner as set out in such electrical circuit layouts. Thermostats and primary controls manufactured by respondent for use with domestic oil burners do not give satisfactory and efficient performance in the ordinary installation unless the proper primary control of respondent's manufacture and the proper thermostat of respondent's manufacture are used on the same installation and it is often dangerous to mix primary controls and thermostats made by different manufacturers in the same installation. From the point of view of the user, the most satisfactory and efficient operation of an oil burner as customarily installed is attained when it is equipped with a primary control and a thermostat manufactured by the same concern; and it is and has been for many years the custom for manufacturers of domestic oil burners to equip their burners with sets of automatic temperature controls in such fashion that all controls (primary, thermostat and limit control) on a single burner are made
24 by the same manufacturer, whether they be controls manufactured by respondent or by one of its competitors.

3. Answering paragraph Three of Count I of the complaint, respondent admits that in January, 1937, respondent discontinued in all cases the provision at that time contained in some of its contracts with oil burner manufacturers providing as follows:

"The Purchaser agrees that at least ninety-five (95) percent of his control requirements, consisting of Thermostats, Primary Controls and Limiting Devices, will be purchased from the Company";

that since January, 1937, respondent has not entered into contracts with any domestic oil burner manufacturer customers containing said quoted provision; that the provisions quoted in the third paragraph of said paragraph Three of the complaint were contained in some (but not all) of the contracts entered into by respondent with domestic oil burner manufacturing customers for the years 1940 and 1941 (the balance of said customers having contracts containing a provision similar to the 1941 contract provision hereinafter quoted in this paragraph 3 of this answer); and that some of such contracts for sales during the year 1940 were entered into in December, 1939.

Except as hereinbefore specifically admitted, respondent denies each and every allegation contained in said paragraph Three of Count I.

Further answering said paragraph Three, respondent avers that:

Respondent's form of 1937 annual contract for manufacturers of domestic oil burners purchasing respondent's controls in sets (some of which were presented to customers in December of 1936) contained, among other provisions, the following language:

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls."

Some, but not all, of respondent's 1937 contracts also contained the following:

"The Purchaser agrees that at least ninety-five (95) percent of his control requirements, consisting of Thermostats, Primary Controls and Limiting Devices, will be purchased from the Company"

On January 28, 1937, all such contracts were amended by striking therefrom the last sentence hereinabove quoted by which the purchaser agreed to purchase at least 95% of its control requirements consisting of thermostats, primary controls, and limiting devices from respondent, and by releasing said oil burner manufacturers therefrom. Said sentence was contained in the annual contracts only for
26 a period of less than thirty days, with the result that it never became operative, and no customer was ever required by respondent to comply therewith.

In the normal course of its business respondent entered into contracts with manufacturers of domestic oil burners who preferred to contract for the purchase of its controls in units, which contracts contained substantially the following provision (which is the exact language contained in such contracts for the year 1941):

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this Agreement ..... units or more of the Company's automatic temperature controls. The Company's thermostats and primary controls are specifically designed to operate one with the other, and because it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, the Company does not give any assurance of satisfactory operation nor assume any service responsibility if its controls are used with other makes."

The prices, terms and conditions of sale to oil burner manufacturers who contracted to purchase in sets and to those who contracted to purchase in units were identical; contracts for purchase in sets quoted prices on a unit basis (and not on a set basis) and contracts for purchase in units quoted prices on the same unit basis.

Respondent's purpose in promoting the sale of its automatic temperature controls to manufacturers of domestic oil burners in sets rather than in separate units was
27 to insure proper temperature control and the proper sequence of operation of each installation and thus to avoid the unsatisfactory, inefficient and often dangerous

results which arise from mixing controls of more than one manufacturer on the same installations. Particularly is this true in the case where a thermostat and primary control of different manufacturers are mixed. Respondent's conduct in promoting the sale of its said controls as aforesaid was made in good faith to protect and insure the ultimate user (the purchasing public) in getting the results which should be expected when purchasing heating equipment and to protect the good name and good will attached to respondent's products which would be impaired by inefficient and often dangerous performance of its products resulting from the mixing of controls.

4. Respondent denies each and every allegation of paragraph Four of Count I of the complaint, except that respondent admits that for more than three years last past a substantial number of manufacturers of domestic oil burners have purchased from respondent a majority of their requirements of automatic temperature controls for use as part of their domestic oil burners.

5. Answering paragraph Five of Count I of the complaint, respondent admits and avers that for more than
28 three years last past it has adopted and pursued the policy of offering, and when its offer has been accepted of granting, non-exclusive licenses to a number of its competitors under a patent issued to one Edward E. Freeman known as the Freeman Patent No. 1,813,732, owned by respondent, to make, use and sell a combination furnace and fan control embodying the essence of the advance in the art made by Freeman and as covered by the Freeman patent; that each said license is granted on the express condition that the licensee's prices, terms and conditions of sale of such combination furnace and fan controls manufactured and sold under said license agreements shall not be more favorable to the licensee's customer than those fixed from time to time by the licensor for its own combination furnace and fan control embodying the essence of the advance in the art made by Freeman and as covered by the Freeman patent; that respondent for more than three years last past has sold such combination furnace and fan controls and has also manufactured a fan switch, limit switch and thermostat, but not the fan; and that respondent's sales of said combination furnace and fan control substantially increased during the period from January 1, 1939, to December 31, 1941.

Respondent denies that the price schedule attached to and made a part of its said license agreement, or any other provision of said agreement, provided for net minimum prices to be observed by jobbers, wholesalers, or retail dealers.

Except as hereinbefore specifically admitted or otherwise answered, respondent denies each and every allegation contained in said paragraph Five of Count I.

Further answering said paragraph Five, respondent avers that:

Respondent has granted to five of its competitors non-exclusive licenses under the Freeman patent similar to the license hereinabove described and has not refused to grant such licenses to any other competitors; the royalty provided for in each of said license agreements is 25¢ per unit combination furnace and fan control manufactured and sold under said license; and said combination furnace and fan control manufactured and sold under said license is not usable anywhere except in the Freeman patented arrangement. Respondent has not made any complaint of infringement of the Freeman patent except in cases where a competitor's product, manufactured and sold without a license from respondent, has involved the essence of the Freeman invention and is usable only for such purpose. Respondent's conduct in granting said licenses in the exact form hereinabove described, including prices, terms and conditions of sale of combination furnace and fan controls manufactured and sold under the Freeman patent, and in suing an unlicensed competitor who manufactured and sold a combination furnace and fan control which could be used only as advertised by said unlicensed competitor and only in an installation infringing the Freeman patent, has been approved in the case of *The Mercoid Corporation* v. *Minneapolis-Honeywell Regulator Company*, 133 Fed. (2) 811 (C. C. A. 7th, December 23, 1942) (petition of The Mercoid Corporation for re-hearing denied March 27, 1943), as within respondent's rights as owner of the Freeman patent and as not constituting any violation of the Federal anti-trust laws.

6. Answering paragraph Six of Count I of the complaint, respondent admits that in the course and conduct of its business it manufactures and sells combustion stoker switches to stoker and furnace manufacturers (as well as others) in various parts of the United States; that in con-

nection with each such sale respondent grants to the purchaser a license to use such combustion stoker switches in an installation with other devices for operating a heating system for maintaining the fire from going out when there are low heat requirements, which combustion stoker switches are manufactured and sold under a patent under which respondent has, for several years, had an exclusive license, with the right to grant sub-licenses to others.

31 Except as hereinbefore specifically admitted, respondent denies each and every allegation of said paragraph Six.

Further answering said paragraph Six, respondent avers that:

The patent referred to in said paragraph Six is the Cross Patent No. 1,758,146 and the combustion stoker switches referred to therein, when installed and used by respondent's customers, as advertised by respondent, embody the essence of the advance in the art made by Cross and covered by the Cross Patent and are not usable anywhere except in the Cross patented arrangement. The Cross Patent No. 1,758,146 was held valid by the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Smith* v. *Mid-Continent*, 106 Federal (2d) 622 (1939). Respondent under its said exclusive license with the right to grant sub-licenses did enter into a sub-license agreement with one of its competitors, Detroit Lubricator Corporation, of Detroit, Michigan, and respondent has offered sub-licenses under its exclusive license agreement to others of its competitors. Respondent's use of the Cross Patent, as aforesaid, has been approved in the case of *Mid-Continent Investment Company* and *Minneapolis-Honeywell Regulator Company* v. *The Mercoid Corporation*, 133 Fed. (2d) 803 (C. C. A. 7th, December 23, 1942) (petition of The Mercoid Corpora-

32 tion for re-hearing denied March 27, 1943), as within respondent's rights as licensee of the Cross Patent, and as not constituting any violation of the Federal anti-trust laws or unfair competition.

7. Respondent denies each and every allegation of paragraph Seven of Count I of the complaint.

Answer to Count II.

8. For its answer to paragraph One of Count II of the complaint, respondent relies on the matters and things set forth in paragraph 1 of this answer to the same extent and as though said paragraph 1 of this answer were set forth in full herein and said paragraph 1 of this answer is therefore incorporated herein by reference and made the answer to paragraph One of Count II of the complaint.

9. For its answer to paragraph Two of Count II of the complaint, respondent relies on the matters and things set forth in paragraph 2 of this answer to the same extent and as though said paragraph 2 of this answer were set forth in full herein and said paragraph 2 of this answer is therefore incorporated herein by reference and made the answer to paragraph Two of Count II of the complaint.

10. For its answer to paragraph Three of Count II of the complaint, respondent relies on the matters and things set forth in paragraph 3 of this answer to the same extent and as though said paragraph 3 of this answer were set forth in full herein and said paragraph 3 of this answer is therefore incorporated herein by reference and made the answer to paragraph Three of Count II of the complaint.

11. For its answer to paragraph Four of Count II of the complaint, respondent relies on the matters and things set forth in paragraph 4 of this answer to the same extent and as though said paragraph 4 of this answer were set forth in full herein and said paragraph 4 of this answer is therefore incorporated herein by reference and made the answer to paragraph Four of Count II of the complaint.

12. Respondent denies each and every allegation of paragraph Five of Count II of the complaint.

13. Respondent denies each and every allegation of paragraph Six of Count II of the complaint.

Answer to Count III.

14. For its answer to paragraph One of Count III of the complaint, respondent relies on the matters and things set forth in paragraph 1 of this answer to the same extent and as though said paragraph 1 of this answer were set forth in full herein and said paragraph 1 of this answer is there-

fore incorporated herein by reference and made the answer to paragraph One of Count III of the complaint.

15. For its answer to paragraph Two of Count III of the complaint, respondent relies on the matters and things set forth in paragraph 2 of this answer to the same extent and as though said paragraph 2 of this answer were set forth in full herein and said paragraph 2 of this answer is therefore incorporated herein by reference and made the answer to paragraph Two of Count III of the complaint.

16. Answering paragraph Three of Count III of the complaint, respondent admits that it has been for more than three years last past and is now selling automatic temperature controls for domestic oil burners to some of its customers at lower prices than it sells said products of like grade and quality to others of its customers; that respondent publishes list prices for its said products, with discounts regularly and usually allowed to wholesalers (sometimes called jobbers) and to dealers; that said discounts vary from 25% to 43.75% (or 25% and 25%), depending on and varying with the trade channel in which the purchaser is engaged, such as dealer and wholesaler (or jobber), and in the case of the wholesaler also varying with quantity purchased and the service rendered to respondent; that oil burner manufacturers purchase the great majority of automatic temperature controls for domestic oil burners sold by respondent; that respondent has sold its said products, particularly thermostats, primary controls and limit controls, in units and in sets to manufacturers of oil burners under contracts providing for net prices under separate and distinct price brackets; that the net prices to the oil burner manufacturers varied with the number of sets or units which the customer contracted to buy annually; and that the difference between the highest and lowest prices at which automatic temperature controls were sold to manufacturers of domestic oil burners in 1940 was substantially less than that difference in 1938.

Except as hereinbefore specifically admitted, respondent denies each and every allegation of said paragraph Three of Count III.

Further answering said paragraph Three, respondent avers that:

Respondent in the sale of its automatic temperature controls for domestic oil burners has recognized the three

channels of trade and distribution long ago established by the heating trade generally and recognized and followed by this respondent prior to the advent of controls for domestic oil burners, and now also followed by the domestic oil burner and automatic temperature control industries, including the respondent, to-wit, (i) manufacturers of heating equipment, who ordinarily sell their products including the accompanying controls as original equipment therewith to wholesalers, (ii) wholesalers (sometimes called jobbers) who ordinarily sell both complete heating units
36 and also separate automatic temperature controls to dealers, and (iii) dealers, who are retailers selling to the ultimate user. Respondent has sold automatic temperature controls for domestic oil burners (i) to manufacturers of domestic oil burners for use as original equipment therewith, (ii) to wholesalers for resale to dealers, and (iii) to dealers for resale to the ultimate user. Respondent's sales to wholesalers and dealers have been for resale other than as original equipment on any domestic oil burners they may resell. Such controls are ordinarily sold by wholesalers and dealers for repair, replacement or auxiliary equipment beyond that furnished by the original oil burner manufacturers as part of their original equipment. Respondent's prices and discounts vary among said three channels of trade, as do those of respondent's competitors in the manufacture and sale of automatic temperature controls for domestic oil burners.

Respondent's differences in prices or discounts among said three classes have not been such that any effect thereof may or did substantially lessen competition or tend to create a monopoly in any line of commerce, or injure, destroy or prevent competition with respondent, or with members of said different classes, or with customers of any of them.

Respondent does not recognize as an oil burner manufacturer any purchaser who will not agree to buy at
37 least 50 sets or 150 units annually, although it does sell a few controls to purchasers not belonging in any of the aforesaid recognized trade channels, such customers purchasing less than 50 units annually receiving a discount of 25% and 15% from list, and such customers agreeing to purchase at least 50 units and not more than 150 units annually receiving a discount of 25% and 25% from list.

Respondent's several manufacturer's quantity brackets

determining its prices for automatic temperature controls sold for domestic oil burners in the year 1941 were as follows:

Annual Bracket Amount	Bracket Price
50 to 349 sets or 150 to 1,049 units	Bracket I price
350 to 999 sets or 1,050 to 2,999 units	Bracket II price
1,000 to 2,499 sets or 3,000 to 7,499 units	Bracket III price
2,500 to 4,999 sets or 7,500 to 14,999 units	Bracket III-A price
5,000 to 7,499 sets or 15,000 to 22,499 units	Bracket IV price
7,500 to 9,999 sets or 22,500 to 29,999 units	Bracket IV-A price
In excess of 10,000 sets or 30,000 units	Bracket V price

The differences in respondent's prices for its said products to purchasers in the several quantities set forth above
38 made no more than due allowance for differences in the cost to respondent of manufacture, sale and delivery thereof resulting from the differing methods and quantities in which said products were to such purchasers sold and delivered.

In addition, none of the prices charged by respondent in the sale of its automatic temperature controls to manufacturers of domestic oil burners was less, but in almost all cases such prices were greater, than the prices at which such manufacturers could and in most cases did purchase from competitors of respondent automatic temperature controls for oil burners which controls perform substantially the same functions as do those manufactured and sold by respondent. Some manufacturers paying higher prices for respondent's automatic temperature controls were able to and often did sell their oil burners complete with controls at prices below those which other similar manufacturers paying lower prices for respondent's automatic temperature controls sold their oil burners.

The differences in price at which respondent has sold its automatic temperature controls to manufacturers of automatic oil burners have not been such that the effect thereof

may or did substantially lessen competition or tend to create a monopoly in any line of commerce, or injure, destroy, or prevent competition with respondent or with
39 any of its customers, or with customers of any of them.

The prices for standard primary and limit controls and thermostats for domestic oil burners charged by respondent to any wholesaler who contracts with respondent to purchase annually $750 worth of its controls and to place an initial order for and maintain in its inventory controls in the amount of $200, were 7.5% of the list price less than the prices to wholesalers who did not elect so to contract. A wholesaler who entered into such a contract is referred to by respondent as a "Class A" wholesaler and the status of Class A wholesaler was available on equal terms to every wholesale customer of respondent. The services and facilities furnished by Class A wholesalers were of great value to respondent in the distribution and sale of its products. The aforesaid difference in price to Class A wholesalers was not in excess of the value to respondent of the services rendered to it by said Class A wholesalers. Furthermore, said difference in price has not been such that the effect thereof may or did substantially lessen competition or tend to create a monopoly in any line of commerce, or injure, destroy, or prevent competition with respondent, or with any of its customers, or with customers of any of them.

17. Respondent denies each and every allegation of paragraph Four of Count III of the complaint.

40 18. Respondent denies each and every allegation of paragraph Five of Count III of the complaint.

Wherefore respondent demands that the complaint of the Federal Trade Commission in this proceeding be dismissed.

Minneapolis - Honeywell Regulator Company,
by W. L. Huff,
(Corporate seal) *Vice-President.*

Cravath, de Gersdorff, Swaine & Wood,
15 Broad Street,
New York, N. Y., and
Bair & Freeman,
135 South LaSalle Street,
Chicago, Illinois,
Attorneys for Respondent, Minneapolis-Honeywell Regulator Company.

42 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—4920) * *

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 10th day of August, A. D. 1943.

Commissioners:

Garland S. Ferguson, Chairman, Charles H. March, Ewin L. Davis, William A. Ayres, Robert E. Freer.

SUBSTITUTE ORDER APPOINTING TRIAL EXAMINER AND CHANGING TIME FOR TAKING TESTIMONY.

Whereas, Charles A. Vilas, a trial examiner of this Commission, was heretofore appointed to take testimony and receive evidence in this proceeding, pursuant to authority vested in the Federal Trade Commission under an Act of Congress (38 Stat. 717; 15 USCA, Section 41), and whereas, the said Charles A. Vilas, by reason of illness will be unable to continue therein,

It Is Therefore Ordered that W. W. Sheppard, a trial examiner of this Commission, be and he hereby is designated and appointed to take testimony and receive evidence in this proceeding in the place and stead of Charles A. Vilas, trial examiner heretofore appointed.

It Is Further Ordered that the taking of testimony in this proceeding begin on Thursday, August 12, 1943, at ten o'clock in the forenoon of that day (central standard time) in Room 1123, New Post Office Building, Chicago, Illinois, instead of August 10, 1943, as heretofore ordered.

Upon completion of testimony for the Federal Trade Commission, the trial examiner is directed to proceed immediately to take testimony and evidence on behalf of the respondent. The trial examiner will then close the case and make his report upon the evidence.

By the Commission:

A. N. Ross,
Acting Secretary.

(Seal)

1 BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—4920)

Room 1123,
New Post Office Building,
433 West Van Buren St.,
Chicago, Illinois,
Tuesday, August 10, 1943.

Met, pursuant to notice, at 10 a. m. C. W. T.

Before:

Charles A. Vilas, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, and B. R. Shute, 15 Broad Street, New York, N. Y., and Bair & Freeman, by Mr. Will Freeman, 135 South La Salle Street, Chicago, Ill., appeared for the Respondent.

2 PROCEEDINGS.

Trial Examiner Vilas: Let the record show Docket No. 4920, Minneapolis-Honeywell Regulator Company, hereby convenes according to notice from the Commission.

Also let the record show that because of the sudden illness of the Examiner assigned to hear this case, the case is now adjourned to meet at the same place on Thursday, August 12th, 1943, at ten o'clock a. m., it being impossible to get a substitute Examiner in Chicago prior to that time.

(Whereupon, at 10:15 a. m., August 10, 1943, the hearing in the above-entitled matter was adjourned.)

3 Room 1123,
New Post Office Bldg.,
433 West Van Buren St.,
Chicago, Illinois,
Thursday, August 12, 1943.

Met, pursuant to notice, at 10 a. m. C. W. T.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and B. R. Shute, Esq., 15 Broad Street, New York, New York, and Bair & Freeman, by Will Freeman, 135 South La Salle Street, Chicago, Ill., appeared for the Respondent.

4 PROCEEDINGS.

Trial Examiner Sheppard: All right, gentlemen. Come to order.

Mr. Reporter, you may show the reconvening of the hearing pursuant to the agreement, to proceed before me instead of Trial Examiner Vilas, in the matter of Minneapolis-Honeywell Regulator Company, Docket No. 4920, in the office of the Federal Trade Commission in Chicago, at ten o'clock a. m. on this 12th day of August, 1943.

Show the appearance of Everett F. Haycraft, for the Commission; Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric and B. R. Shute, 15 Broad Street, New York, and Bair & Freeman, by Mr. Will Freeman, 135 South La Salle Street, Chicago, Illinois, for the Respondent.

Mr. Haycraft, did Mr. Vilas read into the record the Commission's instructions as to briefs and so forth?

Mr. Haycraft: No.

Trial Examiner Sheppard: I had better do that, so that all of these gentlemen will understand it.

Gentlemen, here are the Commission's late instructions in relation to the handling of exhibits, which I think you ought to know about. With reference to the transcript of

these proceedings, the Respondent and other parties interested may obtain copies of the transcript by purchase from the Official Reporter, who is not a Government em-
5 ployee, at rates fixed by contract between the Reporter and the Government.

Photostatic copies of exhibits which may be needed, will be furnished by the Commission upon application thereto at certain rates, which are also in the contract. I have the old rates here. The new rates you can get from the Reporter.

All the exhibits and the entire record may be inspected at the headquarters of the Commission at Washington. The exhibits will be marked for identification by the Reporter only, in accordance with the specifications of his contract with the Commission.

Exhibits marked for identification remain in the custody of the attorney until received in evidence. Exhibits received in evidence remain in the custody of the Reporter until forwarded to the Commission at Washington, unless in specific instances the Trial Examiner may order otherwise. Exhibits are not available for public inspection until filed in the office of the Docket Section at the headquarters of the Commission in Washington.

Now, gentlemen, as you know, I have had no time to analyze this complaint, and I do not know anything about the case. I will just have to take it as we go along. I want to make a clear and concise record. In all these cases we need all the light on them that we can get, so I am going
6 to be very broad in my interpretation of the reception of the testimony and let your objections be few and far between. We want all the facts in the case, and it may be that we can shorten the taking of testimony as we go along by certain agreements and stipulations, which may make our way lighter than we expect it to be now.

Off the record, Mr. Reporter.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Miss Reporter, let the record show that the Examiner will receive Commission's Exhibit No. 1 for the record.

(The document referred to was marked COMMISSION'S EXHIBIT NO. 1 and was received in evidence.)

7 Trial Examiner Sheppard: Now, Mr. Haycraft, I am ready to go ahead with anything you have to offer.

Mr. Haycraft: I wish first to offer in evidence as Com-

mission's Exhibit No. 1, the stipulation as to the facts which have been worked out between counsel for the Commission and counsel for respondent.

This, of course, is to be admitted subject to the approval of the Commission, but, I assume it will be approved as it has already been approved by the assistant chief counsel, so I am offering it in evidence at this time as Commission's Exhibit No. 1.

Trial Examiner Sheppard: All right. Any objection, gentlemen?

Mr. Gilpatric: May the record show, without challenging the competency of any part of the stipulation, the respondent objects on the ground of materiality and relevancy to a portion of the stipulation beginning with Paragraph 8, page 10, and continuing through page 14, the beginning of the paragraph beginning with the words "Respondent in the year 1938, etc.", also with the last paragraph of Paragraph 9 on page 17, on the ground that these portions of the stipulation relate to an act of the respondent which took place prior to 1938 and which has not occurred since that time, and which we say is not relevant or material to the issues in this case.

Trial Examiner Sheppard: All right. Let the objection be noted.

Mr. Haycraft: If that is being done at this time, I suppose that I should also note an objection to certain statements in there for the same reason, I can make the same objection as to the relevancy and materiality.

I object to the statement on page 4 beginning at the seventh line from the bottom with the words "The total volume, and so forth, respondent's sales," I object to that statement ending on the top of page 5, inasmuch as it refers to products which were not contemplated in the complaint, in the type of particular device and I also object to the first paragraph on the top of page 20 as to the relevancy and materiality.

Trial Examiner Sheppard: All right. Let those objections be noted, Miss Reporter.

Mr. Haycraft: As my first witness, Mr. Examiner, I wish to call Mr. A. H. Lockrae.

Trial Examiner Sheppard: Have you got a subpoena?

Mr. Freeman: He has been produced by the respondent at the request of the Commission.

ARTHUR H. LOCKRAE, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination.

By Trial Examiner Sheppard:

Q. Give us your full name, please.
A. Arthur H. Lockrae.
Q. And your address, Mr. Lockrae?
A. My home address is 2831 Benton Boulevard, Minneapolis.
Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. What is your occupation, Mr. Lockrae?
A. I have charge of the sales in our heating controls division.
Q. Heating controls division, sir?
A. Division.
Q. Of the Minneapolis-Honeywell—
A. Yes, sir.
Q. —Regulator Company?
A. Yes, sir.
Q. How long have you had that position?
A. Well, I served in that capacity, the same duties. I was assistant manager of sales for a while, and then manager of sales, duties approximately the same since 1928,—'27.
Q. As such, what are your duties?
A. Those attendant to general sales management.
Q. Will you briefly describe the items sold in your division, the heating controls division?
A. Practically all of the controls that we sell are those that go directly to the heating equipment manufacturers, and to the trade handling those products.
Q. Well, just in order to make the record clear, what are the heating controls?
A. Thermostats, limit controls, primary controls and what are termed miscellaneous controls. The first three named comprise a set of controls.
Q. A set of controls which is necessary to furnish control of the heating unit?

A. Yes, sir.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. These heating controls are intended for use on oil burners?

A. Yes, sir.

Q. And other types of burners as well?

A. That is right.

Trial Examiner Sheppard: That means gas and what else?

The Witness: Stokers, coal.

By Mr. Haycraft:

Q. Would you say that the principal part of your sales were to manufacturers, equipment manufacturers and trade in oil burners?

A. Say that again, please?

Mr. Haycraft: Will the Reporter read it?

(The question above referred to was read by the Reporter.)

The Witness: That represented a very substantial portion of our heating equipment sales. It would be
12 greater than either of those sales to gas or to the stoker field.

Q. Has that been true all through this period of time?

A. Yes, sir.

Mr. Freeman: What period of time are you referring to, since 1928, Mr. Haycraft?

Mr. Haycraft: Yes, sir.

The Witness: That would be true.

Mr. Haycraft: Now, the stipulation that you have gives the definition, Mr. Examiner, of these various controls. I could bring it out in testimony at this time, if you wish.

Trial Examiner Sheppard: Describe the controls.

Mr. Haycraft: I will ask him a question and get it in that way.

Mr. Freeman: I am wondering if I could have the Examiner's statement read, please.

(The statement above referred to was read by the Reporter.)

Mr. Freeman: Just so Mr. Haycraft asks the question specifically as to what product, whether we are talking about oil burners, or something else. There are different types

of controls. Just so we all understand what we are talking about.

13 Mr. Haycraft: I am going to direct all of my questions to oil burners.

Mr. Freeman: Of the domestic heating type?

Mr. Haycraft: Of the domestic heating type, the one that the average household would use, one like I have myself, something like that.

By Mr. Haycraft:

Q. Now, I believe there are two definite types of oil burners that are controlled by temperature controls, the pressure type, or gun type, and the rotary type.

A. Yes, sir.

Q. The pressure type and the gun type are used as interchangeable terms?

A. Yes, sir.

Q. Now, in the operation of oil burners there are three types of temperature controls required, is that correct?

A. That is right.

Q. The first is what?

A. Room thermostat.

Q. What function does that perform?

A. It controls the temperature within the enclosure at which it is located, or—

Q. (Interposing) In the room where it is placed.

A. Or the space to be heated.

Q. The second is a limit control?

14 A. Yes, sir.

Q. Will you define that?

A. The limit control is a device used on the heating plant, whether it be steam, or hot water, or warm air, and it performs a safety function. In other words, it is set to keep the heating plant at a certain temperature or pressure limits.

Q. Just so that we will have the terms as we go along. Now, what term do you apply to the limit control produced and sold by your company?

A. The limit control that is used with the warm air furnace is called an Aerostat; that used with a hot water heating system is called an Aquastat, and that used with a steam boiler is called Pressuretrol.

Q. And also Vaporstat, is that the name of one of them?

A. A Vaporstat where a vaporheating system is involved, which is small in comparison with the others.

Q. That Pressuretrol is spelled P-r-e-s-s-u-r-e-t-r-o-l?
A. That is right.
Q. The third device is a primary control. Will you describe the function of a primary control?
A. The primary control is an actuating device which starts and stops your oil burner at the command of the room thermostat. It stops your oil burner in the event the limit control reaches its setting, and it also performs
15 the duty of controlling the abnormal discharge of oil. Is that clear?
Q. You mean within the furnace?
A. Within the furnace or the heating plant.
Q. What is the name given by the Respondent to that device which it sells?
A. Protectorelay.
Mr. Gilpatric: I will say, Mr. Examiner, attached to our stipulation you will find pictures of these devices.
Trial Examiner Sheppard: I will look at them later.
Mr. Haycraft: I am trying to make it as complete as I can as we go along.
Trial Examiner Sheppard: Yes.

By Mr. Haycraft:

Q. Now, in addition to the three you have just described, do you also have some oil burners with an installation employing a fan control, which operates a fan for driving warm air to the space to be heated?
A. Yes, sir.
Q. Now, that requires a number of thermostats, does it not?
A. Not necessarily, Mr. Haycraft.
Q. It could?
A. Well, the fan control, speaking purely of fan controls, that is an instrument that is installed in the bon-
16 net of a warm air furnace; and one of its functions is to keep the heat, the hot air to be distributed to the enclosure, until the temperature within the bonnet is up to the prescribed amount. In other words, you don't want to blow cold air into the enclosure; you want to blow just warm air; so it prevents the fan from starting until that temperature has been reached.
17 Q. Now, you say that the primary control is sometimes known as a combustion control or a master control.
A. That's right.

Q. Also as a safety control?

A. That's right.

Q. Would you say it was an essential element in every oil burner installation?

A. It is an essential element.

Q. That is, the two types we are talking about?

A. Yes, sir.

Q. The pressure type and rotary type?

A. That's right.

Q. Now, directing your attention particularly to the years 1936, if you can—1935 and 1936, there might be something in '35, during that period of time and all down to the present, what was your sales set-up? Did you have branches through which you sold, or where you had salesmen employed, and so on?

A. We had branches during those years and subsequent years throughout the country in the major population centers where heating was required.

Q. Will you name the branches and where they are located?

A. That is quite a job, Mr. Haycraft. I might omit some of them. I will try.

Q. I will have it understood, of course, if you do we 18 can add it later.

A. All right. Now, let me qualify this. In our set-up we have what we term the "Branch", then we have what we term a "district office," that was under the jurisdiction of the branch. Now, is it your desire to have just our branches or our branches and the district offices?

Q. The branches and the district offices working under each branch.

A. All right.

Q. And the general territory covered.

Mr. Freeman: As of now, or as of 1936?

Mr. Haycraft: Beginning with 1936.

Mr. Freeman: Because there have been some changes.

Mr. Haycraft: If there have been some changes, indicate the changes if you can, as you go along.

Trial Examiner Sheppard: Do you have there something?

Mr. Freeman: We have a catalog that will help.

Mr. Haycraft: Give it to the witness if it will help him.

Trial Examiner Sheppard: Yes, if that will assist him.

The Witness: Los Angeles, San Francisco—

By Mr. Haycraft:

Q. Los Angeles, do you have any district offices under that?

19 A. No. I am not differentiating here between district offices and the branches. I am reading both.

Q. Will you indicate which is which as you go along?

A. Yes. Los Angeles is a district office. San Francisco is a branch office. Hartford, a district. My memory is going to fail me on some of these, because we list cities where I am not certain that we actually maintained an office.

Q. Well, do you have a salesman working out of there?

A. We have a salesman working out of there so, including those as district offices, Bridgeport, Connecticut, Washington, D. C.

20 Q. Go ahead.

A. Washington, D. C., a district office. Atlanta, a branch office. Chicago, a branch office. Peoria, a district office. Indianapolis—

Q. Branch or district?

A. We had a change occur there. I am not just certain of the year. If you are talking about 1935 or '36, I would say it was a branch office. Davenport, Iowa, district. Des Moines, Iowa, district. Mason City, Iowa, district. Louisville, Kentucky, district. New Orleans, district. Portland, Maine, district. Baltimore, district. Boston, branch. Springfield, Massachusetts, district. Detroit, Michigan, branch. Fenton, district.

Q. Fenton?

A. Fenton.

Q. What state is that?

A. That is Michigan. Kalamazoo, Michigan, district. Minneapolis, Minnesota, branch. Kansas City, Missouri, branch. St. Louis, Missouri, branch. Omaha, a district. Albany, New York, a district. Buffalo, New York, district. New York City, branch. Syracuse, a district. Charlotte, North Carolina, district. Cincinnati, Ohio, district. Cleveland, Ohio, branch. Toledo, Ohio, district. Tulsa, Oklahoma, district. Portland, Oregon, district. We construe Portland as a branch. I am sorry. Harrisburg, Penn-

21 sylvania, district. Philadelphia, branch. Pittsburgh, branch. Providence, Rhode Island, branch. Memphis, Tennessee, district. Dallas, Texas, a branch. Houston, Texas, a branch. Richmond, Virginia, district. Seattle, Washington, a district. Milwaukee, Wisconsin, a branch.

I would like to call to your attention again that some of these districts and branches are reversed in years. Just when that occurred, I can't tell you.

Trial Examiner Sheppard: All right.

22 Mr. Freeman: May the record show the catalogues from which you just read the places where the Company has branch offices and district offices. Either give the date of the catalogue or the catalogue number.

The Witness: That is what I am trying to find; 1941 catalogue, issued August 1, 1941.

Mr. Freeman: Off the record, if we may.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. Now, at these branches that you have named, what sort of sales force do you have at those places?

A. We have nominally a branch manager or sales manager, with a number of salesmen, depending on the product sold out of that branch and the quantity of each of the various classifications of our business.

Q. Your company is engaged in the sale of a number of other items besides temperature controls?

A. Yes, sir.

Q. Do you have any way of estimating the percentage of your business in your division to the total sales of the company through the branches?

A. Without referring to the record, Mr. Haycraft, I would rather not hazard a guess. That information

23 can be furnished.

Q. Would you say that it is a substantial portion of your business?

A. Yes, sir; it is a substantial portion.

Q. At these district offices in the other towns you have named, you also have salesmen performing the same function?

A. Those are usually more limited in activities. At the district office we sometimes have one man, rather than salesmen, or we may have two men or three men, depending on the conditions that exist in that particular area.

Q. What are the duties of these salesmen?

A. The same as the duties of any salesmen.

Q. Let us restrict ourselves to these salesmen.

A. To sell our products and get the business.

Q. Do they have anything at all to do with the servicing of the product?

A. These salesmen, particularly in the smaller localities, are always, I might say, qualified to take care of minor service difficulties.

Q. And what class of trade do they call on in the course of their duties?

A. These salesmen would directly call on the manufacturers within the territory, on the wholesalers handling our heating controls, and often times on the dealers handling our heating controls.

24 Q. Will you elaborate somewhat upon this method of distribution. From your experience, how much, or rather, to which of these classes of trade are the principal sales made?

A. The principal sales are made to the manufacturers.

Q. That is manufacturers of what?

A. Oil burners, since that is what we are talking about at the moment.

Q. Oil burners?

A. That is right.

Q. Do these salesmen located in these various territories call upon the manufacturers of the oil burners in their territories?

A. That is right.

Q. Do you personally also call upon oil burner manufacturers?

A. Yes, sir.

Q. About what proportion of your time would you say is spent in calling upon oil burner manufacturers?

A. Well, it would vary from year to year, but it would actually be a small percentage of my personal time that would be devoted to that class of work.

Q. What do you devote most of your time to?

A. Most of my time is at the office in Minneapolis, directing our sales.

25 Q. Now, with respect to the—first, I will ask you this as to the oil burner manufacturers. In calling upon the oil burner manufacturers, what was the policy of the company during the years of 1936 on with respect to the sale of temperature controls on oil burners? Were they spot sales, or were there contracts entered into, or just what were the methods employed?

A. It has been our practice for that period of time to have individual sales agreements with manufacturers.

Q. Covering what period of time?

A. They are usually written on a calendar year basis.

Q. What time of the year do you usually enter into those?

A. Well, it is our endeavor to have these sales agreements prepared along in early December, if possible, of the previous year, for submittal for the following year's business.

Q. Can you tell us approximately how many such contracts were entered into in 1936?

Mr. Freeman: I think it would be better if we can refer to the records. We have stipulated that, and it is a known fact. There is no use of asking the witness to guess at it.

Trial Examiner Sheppard: Is it in the stipulation?

Mr. Haycraft: I think it is.

26 Mr. Freeman: It is in the stipulation. We might just as well have the facts.

Mr. Haycraft: I will withdraw the question, Mr. Examiner.

Trial Examiner Sheppard: Very well.

27 Q. What was your policy with respect to the negotiating of those contracts? Were they negotiated by the salesmen or by your office? Just tell us how that was done. I am talking about the oil burner manufacturing contract.

A. Possibly it would be well if I gave you a little resume of our general procedure along that line.

Trial Examiner Sheppard: That would be advisable.

The Witness: These contracts or sales agreements were prepared in Minneapolis. We had them in the field where various offices—

By Mr. Haycraft:

Q. Branch offices?

A. Branch offices, where we have a meeting of the various personnel that were involved, for the handling of these contracts with the various manufacturers on the quantities, peculiarities and the current problems that evolved around each account. That was discussed at these meetings. Then the contracts were given to the various salesmen involved, and they interviewed the customers and se-

cured their signatures to the sales agreements, to the contract.

Q. And then they would submit them to the home office for approval and signature?

A. The issuance of the contract by the home office constituted the approval of the contract, and they were usually signed by the official either at the home office or the
28 branch manager in the field.

Q. Then were they countersigned later by any other official of the company?

A. No, sir. Only one of the company's official's name is necessary.

Q. Well, the branch managers, I take it, then, were authorized to sign these agreements?

A. Yes, they were, certain of the branch managers.

Q. Did you sign some as sales manager?

A. During the interval of time we are discpssing, I think I can safely answer no.

Q. Usually who did sign as representing the company?

A. Well, as stated—you mean in Minneapolis, for example?

Q. Yes.

A. Well, it would be Mr. C. B. Sweatt.
29 A. Or Mr. Pauling.

Q. What were their titles?

A. Mr. Sweatt, vice president, executive vice president in charge of all sales; Mr. Pauling is vice president in charge of all control activities. That would probably be more apt than "controls." Other officials might sign a contract, if they were out of town, or something of that sort.

Q. During that time was a Mr. Nicholson, vice president of New York City—

A. (Interposing.) Mr. Michelson.

Q. (Interposing.)—authorized to sign?

A. He was authorized to sign.

Q. Was he vice president of the company?

A. Yes, sir.

Q. How do you spell that name?

A. M-i-c-h-e-l-s-o-n.

Q. Suppose that the salesman was unable to get the manufacturer to sign the contract presented to him? What was the procedure then?

A. Well, it would all depend on the circumstances surrounding the situation.

Q. Give us an illustration.

A. There are very few of those cases that would arise. It is hard to start to think of a specific one right now.

Q. These contracts all provide for prices, do they not?

30 A. Yes, sir.

Q. And what determines the price that goes into the contract?

A. They have a schedule of what we term price brackets that are based on the quantity.

Q. Beginning in—first I think I better direct your attention to Commission's Exhibit No. 1, and ask you if Table No. 1 following page 19, contains all of the bracket prices during the period of time 1937 on through 1941.

A. To my knowledge that shows the complete schedule. All the various quantities are shown here.

Q. Was there any change between 1936 and 1937, to your memory?

A. I am sorry. I don't remember.

Mr. Freeman: If that is material, we will get that for you.

Mr. Haycraft: Yes.

By Mr. Haycraft:

Q. There are some changes indicated in this exhibit from year to year?

A. Yes, there have been changes.

Mr. Haycraft: I was wondering if there were any changes.

Mr. Freeman: Had we known you wanted the price bracket structure for 1936, we would have been just

31 as glad to prepare that as for 1937, as any other year.

Mr. Haycraft: It just so happens that was all fixed up.

By Mr. Haycraft:

Q. Who determined those bracket prices?

A. They were determined by several individuals in our home office.

Trial Examiner Sheppard: You mean by "bracket price" the price for the three—

The Witness: (Interposing.) Yes, and the corresponding—

Trial Examiner Sheppard: (Interposing.) Thermostat and limit control and—

The Witness: (Interposing.) Primary controls, that is right.

By Mr. Haycraft:

Q. Are these prices based on sets?

A. Yes, sir.

Q. That is, the sets—

A. (Interposing.) The price; let me make this clear, if I can. All of our prices are based on the individual units which we manufacture and sell. The manufacturer,—and that has been customary throughout my experience in this business since 1924,—that they always think in terms of a set of controls, because that constitutes their cost of
32 control that is going on an oil burner, and while we individually price each instrument in determining the price of a set of controls, the three instruments involved are added together and that constitutes the set price.

Trial Examiner Sheppard: In other words, if I get you right,—I want to ask this quesetion to get the setup,—these three are sold together. Two of them wouldn't do any good?

The Witness: Two of them would not make the installation complete.

Trial Examiner Sheppard: That is what I say. You have got to have the three separate things to make the whole thing?

The Witness: That is right, accepted as being necessary for the proper functioning of an oil burner.

Trial Examiner Sheppard: And each one of these has a separate price?

The Witness: That is right.

Trial Examiner Sheppard: And yet you said when you make your contracts you sell the whole as a unit, at a specified amount for all three?

The Witness: Well, we list each instrument individually. We do not list in our contracts a set of controls at so much money.

Trial Examiner Sheppard: You do not?

33 The Witness: It is listed as thermostats, limit controls and primary controls, of which there are many individual types, and we also, of course, have contracts that specify units and not sets of controls.

Mr. Haycraft: I might clear this up, Mr. Examiner, by a couple more questions.

Trial Examiner Sheppard: All right.

Mr. Haycraft: It is in the stipulation, but—

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. In the printed part of these contracts, I am referring to set contracts, there is a blank space to determine the number of sets?

A. That is right.

Mr. Haycraft: In other words, the contract calls for sets, but the different items going to make up the sets—

Trial Examiner Sheppard: I understand.

Mr. Freeman: I do not think the Examiner is yet clear that in no place in the contracts do we specify the price by the set.

Trial Examiner Sheppard: He just told me that.

Mr. Freeman: Just so that is clear.

Trial Examiner Sheppard: All right.

Mr. Haycraft: I guess we will have to put in something on the contracts.

34 Mr. Freeman: Go ahead: In fact, I was just going to suggest you put in at least one as typical.

Trial Examiner Sheppard: I thought possibly there was one in here.

Mr. Haycraft: The language is in there.

Trial Examiner Sheppard: Put it in, so I will have something to go by.

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Haycraft: I am going to ask to have these marked.

Trial Examiner Sheppard: Miss Reporter, give each one of those a separate number, beginning with 2, through 10.

(The papers referred to were marked Commission's Exhibits 2, 3, 4, 5, 6, 7, 8, 9 and 10 for identification.)

Trial Examiner Sheppard: Is there any objection, gentlemen, to those?

35 Mr. Freeman: It is not a question of looking at them, we have copies, we want our exhibit number to appear on the same particular one.

Trial Examiner Sheppard: All right. Miss Reporter, let

Exhibits Nos. 2 to 10 be accepted for the information of the Examiner.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 2, 3, 4, 5, 6, 7, 8, 9, and 10, were received in evidence.)

Mr. Haycraft: The record does not show what they are.

Trial Examiner Sheppard: Yes.

Mr. Haycraft: They will, in a minute. We want the record to show just what they are.

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Freeman: Exhibit No. 2 is the agreement with the Automatic Burner Corporation of Chicago, Illinois, dated January 7, 1938.

Commission's Exhibit No. 3, is the contract with Quiet Heet Manufacturing Corporation of Newark, New Jersey, dated January 27, 1938.

Commission's Exhibit No. 4, is the agreement with
36 Electrol Heat, Inc., of Clifton, New Jersey, dated September 27th, 1938 by Electrol, and dated September 29th, 1938 by Minneapolis-Honeywell.

Commission's Exhibit No. 5, is the agreement with May Oil Burner Corporation, Baltimore, Maryland, dated Februdry 14th, 1938, and by Respondent February 24th, 1938.

Commission's Exhibit No. 6, is the agreement with Williams Oil-O-Matic, Bloomington, Illinois, dated February 16th, 1938.

Commission's Exhibit No. 7, agreement with Herco Oil Burner Corporation, of Lancaster, Pennsylvania, dated February 3rd, 1938.

Commission's Exhibit No. 8, agreement with Paragon Oil Company, Brooklyn, New York, dated March 3rd, 1938, also bearing the receiving stamp of the Minneapolis-Honeywell, as of March 5th, 1938.

Commission's Exhibit No. 9, agreement with Petroleum Heat and Power Company of Stamford, Connecticut, dated January 3, 1938.

And Commission's Exhibit No. 10, agreement with Cleveland Steel Products Corporation, of Cleveland, Ohio, dated April 14th, 1938.

37 Mr. Haycraft: Will you identify these documents, please?

(The documents referred to were marked Commission's Exhibits 11-A, 11-B, 11-C and 11-D and 12-A, 12-B, 12-C and 12-D, for identification.)

Mr. Freeman: Exhibit No. 11 is a photostatic copy of an agreement with Timken Silent Automatic Co., of Detroit, Michigan, which is undated, and which has not been signed by Minneapolis-Honeywell Regulator Company.

Mr. Haycraft: It represents the form that was used, and it is one that was submitted.

Mr. Freeman: We will agree with you that it is a form, and it represents a kind that was submitted by the Respondent to the Timken Silent Automatic on December 2, 1935.

Trial Examiner Sheppard: All right. Exhibit No. 12?

Mr. Freeman: Exhibit No. 12 is an agreement with Timken Silent Automatic Division of Timken Detroit Axle Company, Detroit, Michigan, dated February 19, 1936.

Mr. Haycraft: I ask that these exhibits be marked.

(The documents referred to were marked Commission's Exhibits Nos. 13, 14, 15 and 16, for identification.)

38 Mr. Freeman: Exhibit No. 13 is a form of agreement used by the Respondent with respect to sets in the year 1937.

Exhibit No. 14 is a form of agreement used by the Respondent with respect to sets in the year 1939.

Exhibit No. 15 is a form of agreement used by Respondent with respect to sets in the year 1940.

And Exhibit No. 16 is a form of agreement used by Respondent in connection with the sets in the year 1941.

Trial Examiner Sheppard: Now, Mr. Reporter, the Examiner will accept for the record Exhibits 11 and 12, and up to and including Exhibit No. 16 for the record.

(The documents referred to heretofore marked for identification COMMISSION'S EXHIBITS NOS. 11-A, 11-B, 11-C, 11-D, 12-A, 12-B, 12-C, 12-D, 13, 14, 15 and 16, were received in evidence.)

Mr. Gilpatric: May we record, Mr. Examiner, our objection to the introduction and admission of Exhibits 11 and 12 on the ground that they appear to cover periods of time prior to the period covered by the allegations in the complaint?

Trial Examiner Sheppard: I will note your objection. I presume it is sort of a background.

By Mr. Haycraft:

Q. Well, Mr. Lockrae, as I understand it, Commission's Exhibits 2 through No. 16, represent the changes that
39 were made in your set contracts with oil burners during the period of time from December 1936—December, 1935, which is practically January, 1936, through 1941?

Mr. Freeman: You mean changes in the contracts?

Mr. Haycraft: Changes in the contracts.

The Witness: Obviously that would be true.

By Mr. Haycraft:

Q. Are they a full set?

A. Yes.

Q. I think I was questioning you with respect to prices, as to how these prices were made up; and I will ask you this question: What was the basis for the different prices made in the various brackets, quantity brackets I am referring to now, and the bracket prices in Exhibit No. 1, the different prices in these brackets?

A. Yes, I think I understand it. You mean the basic reason for the difference in price between our various quantity prices?

Q. That is right.

A. We realize that it is considerably more expensive to sell merchandise, the same controls, in one quantity than it is in another. We had to have different prices between the different brackets to justify the cost of doing business to the customers falling in those given brackets.

Trial Examiner Sheppard: Different localities?

40 The Witness: Different size customers.

Mr. Freeman: The quantity purchased.

The Witness: The quantity purchased, yes.

By Mr. Haycraft:

Q. Well, have you made any accounting study, any study of your business in 1935 or 1936, or in subsequent years, upon which you base these various quantity prices in these brackets?

A. We never made what we can say was an audited study. We did make, as you know, Mr. Haycraft, a study in 1938 or '39, I have forgotten just which year.

Q. During the course of this investigation?

A. During the course of this investigation, to satisfy ourselves, at least in some measure, that the prices between

brackets were being based somewhat upon difference in cost.

41 Q. But prior to that time you hadn't made such a study?

Mr. Freeman: You mean prior to the passage—

By Mr. Haycraft:

Q. Prior to the year 1938, when you made the study during the course of our investigation.

A. To my knowledge no such study was made.

Q. Now, what use, if any, was made by you or your salesmen of these inspected price notations, in soliciting contracts or agreements with oil burner manufacturers?

A. Mr. Haycraft, you realize that our business with these various manufacturers has continued year after year. We, therefore, always have a connected record of the quantity of their purchases in each given year.

Trial Examiner Sheppard: And their requirements?

The Witness: And their requirements of our controls. We always take into consideration, among other things, the quantity that each customer purchased in the previous year. That was quite a long yardstick in measuring the prospective purchases for the current year. Does that answer your question?

By Mr. Haycraft:

Q. Well, did you discuss such matters with your customer, or prospective customer?

A. Upon occasion, yes.

Q. Is it true that in all instances your customers were users of your devices from the very beginning, or

42 were there instances where they had been or were using competitive devices?

A. Both cases would obtain.

Q. Were there instances where they were using some of your devices and some competitive devices at one and the same time?

A. That would also be true in some cases.

Q. Who were your competitors during that period of time, 1936 through 1941, in the sale of temperature controls to oil burner manufacturers?

A. Is that question concerning sets of controls, Mr. Haycraft?

Q. Well, we will first consider sets of controls, and

then consider the individual units. Make the division, if you wish.

A. Sets of controls with the Penn Electric Switch Company.

Q. Where was it located?

A. Goshen, Indiana.

Q. Goshen?

A. Goshen, Indiana.

Q. When did they come into the field with sets?

A. I am sorry, I cannot tell you, but it was far ahead of the period we are discussing.

Q. With sets?

A. Yes.

43 Then there was Mercoid Corporation.

Q. Where are they located?

A. Chicago.

Q. When did they come into the field with sets?

A. Far beyond the time that we are discussing. Perfex Corporation, Milwaukee.

Q. When did they come into the field with sets?

A. I cannot tell you the exact date, but I am quite sure it was prior to 1936.

Q. It was about that time, wasn't it?

A. I am just not positive, but it was in that neighborhood, somewhere.

Q. And they had sets at that time?

A. They had sets at that time. Then, during this period we also had the General Electric Company, who were manufacturing.

Q. What did they manufacture?

A. They manufactured the thermostat limit controls, primary controls. They were used on burners which they manufactured, and which competed with our customers.

Q. What was that again?

A. They were used on burners which they manufactured, and which competed with our customers.

Q. Then it is not true that they sold to oil burner manufacturers in competition? They didn't solicit
44 the oil burner manufacturing trade?

A. Yes.

Mr. Freeman: I am glad you used the word "solicit". That is different.

The Witness: That would be true.

By Mr. Haycraft:

Q. It wouldn't?

A. It would be true.

Mr. Freeman: They did or did not solicit? I didn't get that.

45 A. They did not. When you speak of complete sets, you understand for the period of time from 1936 on. And there was Delco Appliance, Division of General Motors, at Rochester, New York.

By Mr. Haycraft:

Q. How did they get into the trade?

A. They manufactured their own primary control and thermostat and purchased their limit control.

Q. Who made their limit control?

A. We made their limit control.

Q. And where did they sell the sets?

A. They sold them in conjunction with their own burners, again in competition with our manufacturers.

Q. By "our manufacturers" you mean your customers?

A. Yes, or other burner manufacturers.

Q. But did they solicit burner manufacturers?

A. Not to my knowledge.

Q. What you are saying there with respect to the General Electric and Delco, is that your devices were in competition with their devices on the oil burner, that is, all oil burners; that is, your customers and their burners?

A. That is right.

Q. All right, go ahead. What else? Who else?

A. I think that would cover those manufacturing sets of controls, we sold during that period of time.

Q. What manufacturers of individual devices?

46 A. I don't know that I can recall the entire list.

Q. The principal.

A. There are several. White-Rogers, of St. Louis.

Q. What did they sell?

A. Thermostats, and limit controls, fan controls.

Q. What is that?

A. Fan.

Q. They are a form of limit controls, are they?

A. Well, to the control we spoke of earlier, that control the fan in the furnace.

Q. They did not manufacture a primary?

A. They did not sell a primary. Then there is General Controls, Los Angeles. They also manufactured thermostats and limit controls.

Q. Did these manufacturers attempt to sell these thermostats and limit controls to oil burner manufacturers to whom you were selling?

A. I have never encountered any attempt on the part of the General Controls to sell in the oil heating field. I have never encountered any sales of thermostats, or of the limit controls of White-Rogers to the oil burner field. They have sold their fan controls and other devices in that field. There are several other manufacturers that make thermostats and limit controls.

Q. We are interested in those that were competing
47 with you in the sale of their devices to oil burner manufacturers. That is the one we want to hear from. What other ones, besides those you already designated, were there during that period?

A. When you put the question that way, I would like to refer to our records before I answer it.

Q. You can make a note of that and answer it later.

Mr. Freeman: That is right. We will do it after lunch.

Trial Examiner Sheppard: Whenever you want me to give you that time, say so.

By Mr. Haycraft:

Q. During this period of time, 1936 on, did any of these, Penn Electric Switch or Mercoid or Perfex attempt to sell limit controls or thermostats, or primary controls in units to the same trade that you were calling on, that is, the oil burner manufacturers?

A. To my knowledge those concerns priced their units individually, that is, the thermostat, limit controls, and the primary controls. Whether or not they tried to sell those controls individually to the oil burner manufacturer, I can't say. I would be very skeptical, however, if any of them—

Q. (Interposing) I do not want your skepticism. I want your information, your knowledge.

48 A. Let me put it this way, Mr. Haycraft.

Q. We want to get the facts.

A. It is the custom of the oil burner manufacturers to buy his control that he uses on a particular model of his

burner, direct from one manufacturer. They do not want to divide the responsibility, when it comes to the control.

Mr. Haycraft: I am going to move to strike that, Mr. Examiner, from the record, because it is not information that this witness has.

49 Mr. Freeman: We think this is very pertinent. He has asked about these other companies.

Mr. Haycraft: I did not ask him that.

Mr. Freeman: And he is testifying as to what he actually knows.

Mr. Haycraft: He is testifying as to what is in the minds or knowledge of his customers. I submit that that testimony should come from the customers, that the testimony of those customers is the best evidence on that.

Mr. Freeman: Why not reframe the question?

Mr. Haycraft: The question was all right, the answer was not responsive to my question, and I move to strike it.

Trial Examiner Sheppard: Mr. Reporter, will you read the question back again?

(Question above referred to was read by the Reporter.)

Mr. Haycraft: That is as to his own knowledge.

Trial Examiner Sheppard: Read the answer.

(The answer above referred to was read by the Reporter.)

Trial Examiner Sheppard: Now, from the interruption, strike it, and I will let you go ahead from there and add whatever you want.

50 The Witness: I think then that the answer I gave originally, I didn't know General controls sold for the individual units—

By Mr. Haycraft:

Q. You mean the Penn Electric and Mercoid or Perfex? I am talking about those three; Penn Electric Switch, Mercoid Corporation and Perfex?

A. I can say that all of those sold their controls in sets, and certainly sold them in individual units to the manufacturer.

Q. Did they solicit the accounts?

A. Yes, sir.

Q. That you solicited?

A. Yes, sir.

Q. Do you have any other instance besides Delco where you furnished or sold one of these controls to some of

your customers and the customers bought other controls, from other manufacturers?

Mr. Gilpatric: I object to that question, Mr. Examiner, because it assumes a state of facts not shown. Delco does not buy controls from other manufacturers, it makes its controls.

Mr. Haycraft: All right, I will amend the question to read: Makes their own controls or buy them from other manufacturers?

51 Trial Examiner Sheppard: All right, now you may answer.

The Witness: I know of only one manufacturer who buys controls from two different control manufacturers and mixes them in the same set.

By Mr. Haycraft:

Q. What manufacturer is that?

A. Timken Silent Automatic.

Q. Did you ever sell the American Radiator?

A. Yes, sir.

Q. What do you sell them?

A. We sold them our complete set of oil burner controls.

Q. Did you also sell them some separate units to be used with other units of their own manufacture; that is, manufactured by their own subsidiary?

A. We sold the American Radiator a lot of miscellaneous units, Mr. Haycraft. Now, whether they were used on the same installation, the same boiler installation, frankly, I don't know.

Q. Are you familiar with the Detroit Lubricator Company?

A. Yes, sir.

Q. What do they do?

A. That is one I should perhaps have mentioned earlier when I mentioned General Controls and White and Rogers, because they do make thermostats.

52 Q. Who does?

A. The Detroit Lubricator?

Q. Where are they located?

A. Detroit.

Q. Where do they get their primary controls?

A. They get their primary controls from the Penn Electric Switch Company.

Mr. Freeman: Are you talking about the Detroit Lubricator Company?

Mr. Haycraft: Yes.

Mr. Freeman: Or the American Radiator Company?

Mr. Haycraft: The Detroit Lubricator Company, which is a subsidiary of the American Radiator Company, as I understand it.

The Witness: That is correct.

By Mr. Haycraft:

Q. What does the Detroit Lubricator Company do with the three units, the one from the Penn Electric Switch and the two of the other manufacturers, if you know?

A. I know this, Mr. Haycraft, that they sell a set of controls comprising those units just mentioned to the American Radiator Company.

Q. For use on furnaces manufactured by the American Radiator?

A. For use on furnaces manufactured by the
53 American Radiator, on oil burners manufactured by the American Radiator. I also know, Mr. Haycraft—

Q. (Interposing) Do you know whether they sell to anyone or not besides that?

A. I don't believe that they sell the primary control to anyone else.

Q. You don't know that?

A. I don't know, but I am pretty positive of it.

Q. I am going to ask you now, so that we will have an understanding from now on, that I want your testimony as to what you know. You may get that, your knowledge from observation or official records of your own organization, but I am going to ask you not to surmise or guess.

A. Let me supplement that last answer then. The Penn Switch makes this control for the Detroit Lubricator, and they put their name-plate on that control.

Mr. Freeman: Whom do you mean by "they"?

The Witness: Detroit Lubricator. I know that they sell it to the American Radiator Company.

By Mr. Haycraft:

Q. That is as far as you know?

A. I can add this, that from all of our reports from the field and from personal observation, I have never known them to sell it to any one else.

Q. Now, do your salesmen do anything besides call on

oil burner manufacturers in the sale of your tempera-
54 ture controls?

A. As I said before, they call on wholesalers, and also call on dealers.

Q. Now, those wholesalers, where are they located? What is their function in the distribution of your product?

A. They are located pretty widely throughout the country, and their duty is like all wholesalers, to supply the demand of the dealers in their locality.

Q. The dealers, who are they? What do they do?

A. They are the class of trade that does business direct with the ultimate consumer.

Q. That is, they sell the ultimate consumer of furnaces?

A. And oil burners.

Q. And oil burners?

A. Yes.

Q. Or a furnace with an oil burner?

A. That is right.

Trial Examiner Sheppard: And what kind of controls?

The Witness: I beg your pardon?

By Mr. Haycraft:

Q. Who are the dealers?

Trial Examiner Sheppard: Yes, who are the dealers?

The Witness: They are the retailers.

55 By Mr. Haycraft:

Q. Who are they? Are they coal dealers, or oil dealers, or what?

A. They could be oil dealers singly, or they might handle oil burners, stokers, furnaces and boilers, and so on and so forth.

Q. As a usual proposition don't you usually do business with the dealers in fuel oil or furnaces, or things of that kind, as a general proposition?

A. Well, that is true in a lot of cases, Mr. Haycraft, they are fuel oil dealers, and a lot of them are dealers in fuel oil and some of them are not. Some dealers will be selling furnaces and boilers, very likely.

Q. Isn't that where your principal distribution is, through the oil dealer?

A. A great deal through the oil dealers, and through the dealers in oil burners.

Q. Now, where is your usual sale? Is it not to the oil burner dealer, for installation in a furnace in the

consumer's home, or a heating unit which has an oil burner in it?

A. Yes. They could directly handle both.

56 Q. Now, in addition to that, aren't there contractors and builders who build houses buying furnaces for heating units?

A. That's right.

Q. How do you classify them, as jobbers or dealers?

A. No, no. We would classify them merely as a dealer, because they are doing business with prospective users.

Q. Now, your salesmen call on dealers?

A. Our salesmen call on dealers.

Q. The same salesman who is calling on the manufacturers?

A. In many cases, yes.

Q. And in some cases not?

A. Well, our salesmen are usually allotted a specific territory. If that territory happened to include a manufacturer, he would undoubtedly call on that manufacturer.

Q. But his primary duty would be to call on dealers?

A. No. He would be just as responsible for sales to the manufacturer as to the dealer.

Q. Do you have manufacturers in all the territories you have referred to? Aren't there some territories without manufacturers?

A. Well, as I said in the beginning, Mr. Haycraft, where heating was required. For example, in New Orleans we wouldn't have a man down there to sell heating equipment, because there is very little use for it.

Q. There are a number of other appliances that 57 you would be selling there?

A. That's right.

Q. Just for the record, to make the story complete, what other devices are they selling?

A. Well, they could be selling our air conditioning equipment, our refrigeration equipment, our industrial controls for processed work.

Trial Examiner Sheppard: In addition to the air conditioning equipment and refrigeration?

The Witness: Yes.

By Mr. Haycraft:

Q. I just want to get the picture. I take it all these salesmen are under your supervision?

A. They are directly responsible to their branch managers.

Q. And he, in turn, is responsible to you?

A. That's right.

Q. So far as the heating unit—

A. (Interposing). He is responsible to the home office, that's right.

Q. Approximately how many salesmen did you have calling on them throughout the United States during that period of time?

A. Of course, this is a guess. I cannot tell—I cannot be accurate on that, Mr. Haycraft. I would say it would vary. We have approximately a hundred, a few more or a few less.

58 Mr. Freeman: I think the Examiner should know we are not talking about the year 1942, because we are engaged primarily in war work, so whatever we are talking about, whatever this witness testifies to, it is always the year 1941 as a cut-off. In 1942 we had no selling facilities, we were doing war work.

Trial Examiner Sheppard: I get that.

Mr. Freeman. That is where these men ought to be today.

By Mr. Haycraft:

Q. Now, what is the nature of the solicitation? What is the nature of the solicitation? What do the salesmen do when they call on the dealers?

A. They call on the dealers to take care of any control requirements that he might have along all of our lines. He doesn't try to sell the dealer. The controls that he needs will come with his oil burner, but, there are other special applications where controls are needed, a circulator is needed, or a low water cut-off, and things of that sort, and then he also assists that dealer in any way that he can with the problems that may have come up since the last time he saw them. In other words, he renders general sales service.

Q. Does he call on dealers handling competitive burners?

A. Well, they wouldn't be on the payroll, if they 59 didn't, Mr. Haycraft.

Q. And in doing so, what is their function?

A. Their function is to try to sell M-H equipment.

Q. In other words, if a dealer is handling furnaces with

oil burners equipped with Mercoid or Perfex or Penn Electric, it is his function to try to interest him in M-H controls?

A. Naturally.

Q. Now, as to the jobbers, who are the jobbers and what are their functions?

A. You can call them jobbers or wholesalers. They are the same to our way of thinking.

Trial Examiner Sheppard: I was going to ask you make that distinction between the two.

The Witness: They are the same. These wholesalers are set up in various localities and, as you probably know, they do a general business with the dealers in their vicinity. Th y stock equipment of various types, electrical wire, conduit, copper tubing, electrical fittings, tanks, controls.

By Mr. Haycraft:

Q. What do they stock of your product?

A. That would depend upon the demand in their particular territory.

Q. Do they stock the oil burner complete?

A. They may sell oil burners complete.

Q. And stocked with your control, and equipped
60 with your control?

A. Not necessarily. They might be our controls or competitive controls.

Q. That is what I am getting at.

A. Yes.

Q. I take it your salesmen perform the same function, call on them as they would on dealers?

A. Essentially so, to promote the sale of our equipment.

Q. There is no way that you can determine the length of time that the average salesman would spend calling on the respective trade, is there?

A. No. We can only judge that from experience, Mr. Haycraft. We know about how many calls a man might make in a given territory, on a dealer, or he might make if he were devoting his time to simply the wholesale trade, because that consumes more time. We have a reporting system.

Q. Could you tell how much time he spent on the automatic temperature control as compared with a refrigeration device?

A. Yes, because in general, Mr. Haycraft, our men who do this class of work, they are devoting their efforts par-

ticularly to heating controls. If accidentally they might run into something like refrigeration, they would turn that over to the salesman who was handling that.

61 Q. Would you say that the solicitation of heating temperature controls are seasonal, that there are times when much more time would be spent? At different times of the year would more time be spent than others?

A. Well, our men work twelve months a year, and we hope they are working all the time. Now, they are busier during the fall months and during the winter months than they are the other times; during winter than they are during the summer, it happens particularly so, because those are called the oil months in the season.

Q. I suppose from the fact that you enter into annual agreements with the manufacturers, that most of their time would be calling on manufacturers, and that would be in the fall, late fall?

A. That is not true.

Q. Along in December?

A. No, sir. We call on those manufacturers throughout the entire year. We simply cannot sign a contract and then forget them until the fall, because of the nature of our work, the amount of work we have to do with them.

Q. What do you have to do between times?

A. Well, there are a multiple of things coming up all the time, in conjunction with the manufacturer's business, and our salesmen call regularly to see what has transpired in the business, or what might have transpired, in our

62 minds, that would be of interest to that manufacturer, in making future sales.

Q. How many calls do you make daily, monthly or weekly?

A. It depends largely on the size of the account involved. The salesman might call on one of the major manufacturers, and spend two or three days there. He might call on two smaller manufacturers in the same day, that is, in a sales day.

Q. Then when would he come back again? Do they call periodically?

A. They call periodically.

Q. How often?

A. We try to have them call on the major manufacturers at least once a month. The smaller manufacturer, perhaps they see them every six weeks, or once a month,

or in the same city as the larger manufacturer, we try to have them see them as frequently as possible.

Q. So that their functions, I take it, in between times, are sort of trouble shooters, is that it?

A. No, I don't think you could say that.

Q. You do not have to keep them sold, under a signed contract?

A. We certainly do have to keep them sold.

Q. If they bought any other automatic temperature control during the term of that contract, they would
63 breach the contract?

A. No, I take exception to that, violently.

Q. You expect them to live up to the terms of the contract?

A. We hope they will live up to the terms of the contract. They will not get hung if they don't.

Q. Is it one of the functions of the salesmen that call periodically on the manufacturers to assist them in living up to the terms of the contract?

A. Our salesmen actually calling on an account, they try to keep posted on what is going on.

Q. Do you keep track in your office, and do you communicate with your salesmen with respect to whether or not the manufacturers take the devices as contracted?

A. We maintain the records, Mr. Haycraft, that disclose that automatically from our shipments month by month.

Q. Suppose that you find, or have you found in some instances, that your shipments do not go out as fast, or not as much of them, as you would expect under the contract?

A. We might run into that information. You never can tell. It depends on the size of the contract, or buying habits. Some manufacturers will buy heavily in the early months of the year.

Q. Do you induce that by giving extra discounts?

A. No, sir, we have not.

Q. Haven't you, in a few instances?

64 A. No, we had a plan, I think that is what you have in mind, at one time, where they gave pre-season commitments. I think that probably is what you have in mind.

Q. Yes. If they would take a certain proportion of their season's requirements in the early months of the year—

A. (Interposing.) That is right.

Q. (Interposing.) You would give them an extra discount?

A. I just am hazy on that, Mr. Haycraft. I would like to refresh my recollection on that.

Q. All right.

Trial Examiner Sheppard: Do you want to take a little relaxation?

The Witness: No, I don't want to.

Trial Examiner Sheppard: What time do you want to adjourn for lunch?

Mr. Haycraft: Twelve-thirty until two. Would that be all right?

Mr. Freeman: Fine.

Trial Examiner Sheppard: I thought you might not be feeling all right. Go ahead.

The Witness: I am all right.

By Mr. Haycraft:

Q. You stated that you had reports from your salesmen as to these calls that they make on manufacturers?

A. Yes.

65 Q. Wholesalers and dealers?

A. That is right.

Q. And in these reports I assume they report competitive conditions?

A. Naturally.

Q. Do you in turn also have correspondence with your manufacturing customers?

A. Oftentimes.

Q. Have you, from time to time, had correspondence with respect to the making or renewal of these agreements and contracts?

A. There is some correspondence on that, Mr. Haycraft; because of the nature of the way in which we handle these contracts, there just would not be much correspondence to handle, between the salesmen and person interviewed. It is signed, and he sends it in, and that is that.

Q. In other words, you would look first to your reports of the salesman?

A. That is right.

Trial Examiner Sheppard: Is this company a considerably old company, this Honeywell?

The Witness: Pardon me.

By Trial Examiner Sheppard:

Q. How old is the company?

A. Well, the formation of the Minneapolis Heat
66 Regulator Company goes back to about fifty-five years ago, and Honeywell Division of the business goes back to roughly, I would say, perhaps 1915, '14, '13, along in there somewhere. I don't remember.

By Mr. Haycraft:

Q. How long have you been with them?

A. I was with the Honeywell Company, in 1924, until their consolidation in Minneapolis in 1927, and then when—with Minneapolis-Honeywell since that time.

Q. At that time, 1927, Minneapolis-Honeywell Company was not engaged in the manufacture of as many devices as it is at the present time? In other words, it has expanded since that time?

A. If you are speaking again of just oil burners, they are still building the three types of control. If we are speaking of the over all picture, why, they have expanded many, many times.

Q. Did they acquire the Time-O-Stat Company?

A. Yes.

Q. That was about 1931?

A. Right around '30, '31.

Q. They manufactured oil burner controls?

A. They manufactured oil burner controls and other specialties.

Q. Their plant was at Indianapolis?

A. No, sir, it was at Elkhart, Indiana.

67 Mr. Freeman: Might I ask a question? Are you going into the Robinson-Patman end of this case, because I notice you are asking a question about what the salesmen do, about how much time they spend, and so forth. I had gathered from my preceding conference with you, you were going to exclude from this hearing anything with respect to the Robinson-Patman matter. There are three sections to this complaint, your Honor. Does that agreement still go, that you are not going to dig into the Robinson-Patman matter? I have no objection, if that is what you want to do.

Mr. Haycraft: I am merely getting a background. I am not going any further.

Mr. Freeman: This does not have anything to do with the Robinson-Patman Act.

Mr. Haycraft: I am not going to develop anything on the Robinson-Patman in this hearing.

Mr. Freeman: In this hearing. Just so we understand it this way.

68 Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. Now, Mr. Lockrae, are you familiar with the Automatic Burner Corporation of Chicago?

A. Yes, sir.

Q. Have you made any contacts there directly yourself?

A. Yes, sir.

Q. Who was the man that you contacted, or your salesman?

A. Several people there, Mr. Hirsch, Mr. J. H. Hirsch. We always see him if he is there, and his son, Joe Hirsch, the purchasing agent, and so forth.

Q. How long have you been calling on them?

A. Well, that goes back quite a long ways, Mr. Haycraft. I would say shortly after 1928 or '9, along in there.

Q. What type of burner do they manufacture?

A. They manufacture three types of burners.

Q. Have they during this entire period?

A. Yes, sir. They manufacture a rotary burner, and the gun or pressure burner, and also the vaporizing type of burner.

Q. Now, with respect to the rotary type, is that their principal burner?

69 A. No, the main type is the gun type. The gun type is the big volume type.

Q. During the period of time since 1936 on they have been your customer for sets under contract?

A. They have been our customer since that time.

Q. And do you know whether or not during that period they have purchased or used any temperature control equipment from competitors?

A. Yes, sir; I know they have.

Q. You know they have?

A. Yes, sir.

Q. For which type of burner?

A. I couldn't say as to that, because that type of control could be used on either burner.

Q. In other words, the competitive controls could be used on either burner?

A. Yes.

Q. Do you know whether or not your temperature controls are standard equipment on any of their burners?

A. I think during this period of time they considered our controls as standard equipment.

Q. On all their burners?

A. On the gun type and the rotary type of burner.

Q. On both the gun type and the rotary type?

A. Yes. They are equipped with these other con-
70 trols from our competitors at the same time, and use them on some of the burners.

Q. Do you know the circumstances under which such purchases were made?

A. I couldn't tell you that, I don't know.

Q. Do you have any records indicating the quantity of temperature controls or the number of sets that they have used in the years preceding January, 1938?

A. You mean of our controls?

Q. 1937, I should say.

A. You mean of our controls purchased by Automatic Burner Corporation?

Q. Yes.

A. Yes, those records do exist.

Q. Calling your attention to Commission's Exhibit No. 2, which is the contract dated January 3, 1938, which calls for 7,500 estimated sets, do you know whether or not that is more or less than the number of sets that they purchased in preceding years?

A. Without referring to the records, I could not say.

Q. Do you have those records available?

A. I can get that information for you.

Q. In other words, that question is to be followed by other questions. I want to know the volume of sales to that customer for the preceding years, 1936 and 1937,
71 before 1938. Did you, in calling on Mr. Hirsch, attempt to get him to standardize on Minneapolis-Honeywell controls on both his gun and rotary type?

A. We do, Mr. Haycraft, in calling on Mr. Hirsch or any other account, try to sell them all the controls that we possibly can.

Mr. Haycraft: I think I would like to have an answer responsive to that question, Mr. Examiner.

Trial Examiner Sheppard: Read the question.

(The question above referred to was read by the Reporter.)

The Witness: Yes.

Mr. Freeman: I think you should define what you mean by the word "standardize."

Mr. Haycraft: I would prefer to have the witness do that.

Mr. Freeman: You asked him for that.

Mr. Haycraft: I am sure he is familiar with it.

Mr. Freeman: But you used the term.

Mr. Haycraft: I am taking the term from the correspondence which he wrote.

Mr. Freeman: Ask him that.

Mr. Haycraft: I think he knows what I mean.

The Witness: My interpretation of the word, Mr. Haycraft is, that when an oil burner manufacturer stand-
72 ardizes on a particular type of control, it is the type of control that he sells as standard equipment on his burner. In other words, if he puts out his literature to dealers, and so on and so forth, it lists that type of control. The information that he puts on the literature includes this particular type of control. That in our parlance is what we mean by standardization.

By Mr. Haycraft:

Q. Is there any advantage to the manufacturer of temperature controls to have the manufacturer of oil burners standardize on his equipment?

A. Certainly there is.

Q. And what is that advantage?

A. The advantage is that they can sell more controls.

Q. As you have already tetsified, they advertise your controls in their catalogues?

A. Yes, sir. I would like to add one thing about this word "standardization" and my interpretation of it, Mr. Haycraft, and that is that that did not necessarily preclude the purchase of any competitive controls.

Q. No, but it would necessarily be restricted to those competitive controls where they were demanded by the customers of the manufacturer of oil burners, would it not?

A. These other controls that they might manufacture or want to sell throughout the year.

73 Q. But doesn't the definite meaning of the word "standardization" mean that it would be a standard control on that burner and would be advertised as such?

A. That is right.

Q. Do you know whether or not anything was said to Mr. Hirsch in the solicitation of his account as to his requirements of temperature controls, whether they would be more or less from year to year, and whether an attempt was made to increase the volume of sales to the Automatic Burner Corporation?

A. Well, I think, Mr. Haycraft, that it is pretty hard to answer anything like that.

Q. I will withdraw it and put it this way: During that period of time from 1936 to 1941, was the M-H temperature controls standard or not on the Automatic Burner?

A. It was standard. Of course, anyone could get the other type of control if they wanted it.

Mr. Haycraft: I move to strike the latter part of the answer and ask to have him answer the question, as to whether it was standard on their burner.

Trial Examiner Sheppard: Yes, you can do that.

The Witness: They might also have listed a competitive type of control as standard.

By Mr. Haycraft:

Q. Not what they might have, I want to know what
74 they did.

A. I don't know.

Q. Did you ever discuss that with Mr. Hirsch at all?

A. No, I don't recall any such discussion as that.

Q. Mr. Lockrae, could there be more than one standard equipment on the same burner?

A. Often times, Mr. Haycraft, a burner may have,—a burner manufacturer will list two or three different types of controls, and the dealer takes his choice.

Q. None of them are standard?

A. Yes, they are all standard with the manufacturer.

Q. Can you give me an illustration of that?

A. Yes, I think I can give them. Let us take the Century Engineering Company, for example.

Mr. Freeman: They are located at Cedar Rapids, Iowa.

The Witness: They list both our controls and the Penn Electric Switch.

Trial Examiner Sheppard: Do you mean they may be used interchangeably?

The Witness: Yes, the dealer can get either one he wants; and there are many, many others who do the same thing.

By Mr. Haycraft:

Q. What sort of a contract did you have with the
75 Century Engineering?

A. We have one of our standard contract forms.

Q. What do you provide as to the quantity, and so forth?

A. I have just forgotten what quantities they fall in, Mr. Haycraft, whatever the bracket is in the quantity that is shown in the contract.

Q. The contract does not show the brackets, does it?

A. No, the quantity of a given bracket.

Q. Do you still call on the Century Engineering Company and sell them?

A. Yes, we call on them quite frequently.

Q. Did you make any attempt to get them to standardize on Minneapolis-Honeywell controls?

A. I certainly did.

Q. Exclusively?

A. I was not successful, however.

Q. You never did?

A. I never did, no.

Q. You never got them to standardize on your temperature controls on their oil burners?

A. We would have been very happy to. They were using the Mercoid control and they were using the Penn Switch control, and finally we sold them our control. As I recall, they gave up their Mercoid control, and standard-
ized on Penn and M-H controls. And their purchases
76 of M-H controls were far superior to those of Penn Switch.

Q. Did you take care of that account yourself personally? Did you make calls out there, or did you have correspondence with them?

A. I made calls, yes; and we had correspondence with them like we do with any other company.

Q. In preparing your testimony to testify, have you looked up to see whether there was any correspondence on that subject matter?

A. With Century Engineering?

Q. Yes.

A. No, I did not check into the correspondence files of that particular account, Mr. Haycraft.

Mr. Haycraft: Have you folks got anything on that?
Mr. Gilpatric: No.
Mr. Freeman: We followed what you asked us to look up.
Mr. Gilpatric: You want the recent requirements?
Mr. Freeman: You wrote us a letter and we followed exactly what you asked for, so that this witness is not prepared to reply to that question.
The Witness: I did look up what you asked for and had other people helping me.

77 By Mr. Haycraft:

Q. Did you look up Century Engineering?
A. I don't recall having looked at that folder at all.
Q. Will you do that?
A. Yes. The correspondence that you want there, does that refer to any particular subject?
Q. The attempt to get them to handle your product exclusively.
Mr. Freeman: We will look through all of these files, and we are now looking through all of these files to answer that question.
Trial Examiner Sheppard: You try your best to sell them your product.
The Witness: Naturally, like we try to sell any one else our goods.
Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. Are you familiar with the account of the Cleveland Steel Products?
A. Yes, sir.
Q. With whom did you deal there? First, before we leave Century Engineering, who did you deal with there?
A. Mr. E. J. Lattner.
Q. Now, the Cleveland Steel Products, who did you deal with there?

78 A. Primarily with Mr. J. L. O'Brien, who had charge of their oil burners and heating units.
Q. Now, for a number of years you had been selling them temperature controls for their rotary burner, had you not?
A. We sold them controls for several years. Whether they used—it was applicable to either type of burner practically, either the rotary or the gun type.

Q. What did they actually use it for? That is what I am asking, not what they could. I want to know what they did do?

A. I couldn't answer that because I don't know where they used those controls, any more than any other customer who manufactures two types of burners, because they could be used on either type of burner.

Q. Did you attempt to get the Cleveland Steel Products to standardize on Minneapolis-Honeywell Temperature Controls on their burners?

A. Yes, sir.

Q. Were you successful in attempting to get them to standardize on the rotary type burners in 1935?

A. You are going back quite a long ways, Mr. Haycraft, I know that they used some of our controls in 1935, but whether they were used just on the rotary burner or the gun burner, or both, I don't know.

Q. Well, do you remember when they started mak-
79 ing the gun burner?

A. I am sorry, I don't know what year that was.

Mr. Haycraft: I would like to mark these three letters for identification; a copy of a letter, a photostatic copy of a letter from Mr. Lockrae for the Minneapolis-Honeywell Regulator Company, to the Cleveland Steel Products Company, attention J. L. O'Brien, dated September 16th, 1936.

Trial Examiner Sheppard: Mark that Exhibit No. 17-A and B, for identification.

(The document referred to was marked Commission's Exhibit No. 17-A and B, for identification.)

Mr. Haycraft: And a letter dated November 5, 1936, a copy of a letter from J. L. O'Brien to the Minneapolis-Honeywell Regulator Company, attention Mr. Lockrae, under date of November 5, 1936.

Trial Examiner Sheppard: Mark that 19-A and B.

(The document referred to was marked Commission's Exhibit No. 19-A and 19-B for identification.)

Mr. Haycraft: A photostatic copy of a letter from Minneapolis-Honeywell Regulator Company, signed by A. H. Lockrae, to J. L. O'Brien, Cleveland Steel Products, under date of October 19, 1936.

Trial Examiner Sheppard: Mark that 18-A and B.

80 (The document referred to was marked Commission's Exhibit No. 18-A and 18-B for identification.)

Mr. Haycraft: A carbon copy of a letter from Minneapolis-Honeywell by A. H. Lockrae to Cleveland Steel

Products, Att.: Mr. J. L. O'Brien, under date of November 19, 1936.

Trial Examiner Sheppard: Mark that Exhibit No. 20 for identification.

(The document referred to was marked Commission's Exhibit No. 20, for identification.)

Mr. Freeman: You can offer them all as far as we are concerned and get them in now.

Trial Examiner Sheppard: By agreement of counsel, the Examiner will accept Exhibits from Exhibit 17-A and B to and including Exhibit No. 20, for the record.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 17-A and 17-B, 18-A, 18-B, 19-A, 19-B and 20, were received in evidence.)

Trial Examiner Sheppard: We will suspend until two o'clock.

(Whereupon, at 12:25, a recess was taken until 2:00 p. m., this day.)

81 Afternoon Session.

2:00 p. m.

Trial Examiner Sheppard: Let the record show a reconvening pursuant to recess for lunch. Proceed, Mr. Haycraft.

ARTHUR H. LOCKRAE, resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Haycraft.

Q. Calling your attention to Commission's Exhibits 17-A and B, I will ask you whether or not that refreshes your recollection as to your negotiations with the Cleveland Steel Products Company, as to their 1936 requirements?

(Handing documents to the witness.)

A. Yes, sir; that is right. I remember that.

Q. I beg pardon?

A. I remember that very well.

Q. What was the Mercoid Control situation mentioned in the second paragraph of that letter?

A. Mr. Haycraft, I think the second paragraph pretty well answers that, because it involved an order which they had placed with Mercoid the previous year.

Q. When was that?

A. I don't know the size of the order, but as I
82 recall, and so stated here, that there was still a balance of approximately five hundred sets to be shipped against that order.

Q. Was there any understanding that Minneapolis-Honeywell could be standardized on Cleveland Steel Products gun type burners as well as the rotary type, beginning with the year 1936?

A. Beginning with the year of 1936?

Q. Yes.

A. No, sir; the understanding, as I recall, in that transaction Cleveland Steel had placed its order with Mercoid, and they were going to use those Mercoid controls as well as ours on that burner.

Q. In other words, they were going to complete the use of the 500 sets, but what about after they got through with the 500 sets, what were they going to do?

A. That was entirely in their hands.

Q. What did they tell you that they were going to do? What did W. J. tell you? By the way, who is W. J.?

A. That is W. J. Smith. As I remember that, we had quoted them on our controls, and they knew the quantities involved in that quotation. If their purchases were sufficient to warrant the next bracket price, then it would be—they would be extended that price, and furthermore, the prices would become retroactive.

83 Q. When was it that you entered into this discussion with Mr. Smith referred to here, with respect to the 1936 contract?

A. Referring to the 1936 contract?

Q. Yes.

A. Well, that letter was dated in September, was it not?

Q. Yes.

A. Well, I don't know, it must have been earlier, it must have been early in that year.

Q. Wasn't it late in 1935?

A. It might have been, it might have been in December 1935.

Q. Did they give you any assurance in December of 1935 that when they had finished the 500 order that they had placed with Mercoid that thereafter your control

would be standard on the gun type as well as the rotary type?

A. Mr. Haycraft, Cleveland Steel Products had always wanted to use and standardize on our control.

Mr. Haycraft: I object to what they wanted to do, and move that it be stricken. I want to find out what they told this witness and what this witness told them.

Trial Examiner Sheppard: It may go out.

The Witness: What was that question?

Mr. Haycraft: Read it, please.

(The question above referred to was read by the Reporter.)

84 I am trying to recall that.

Trial Examiner Sheppard: Would you like to refresh your mind?

Mr. Haycraft: Read that again.

(Question re-read.)

The Witness: Can I answer that this way: Some time previous to 1936, I mean some years previous to that, the Cleveland Steel Products did standardize on and use our controls. They started to use a competitive control.

Mr. Haycraft: Just a minute. Do you mind if I interrupt you there?

The Witness: Not at all.

By Mr. Haycraft:

Q. Was that a rotary type or a gun type?

A. It could have been on both, because our controls were applicable to both.

Q. Not what it could have been. This is important. We want to know exactly. Didn't they start the gun type in 1935?

Mr. Freeman: Are you telling him or asking him?

Mr. Haycraft: I am asking him.

The Witness: I don't know what year they started that.

By Mr. Haycraft:

Q. That is exactly what I want to get at. It is not
85 what they might have done. We want to know what they did.

A. I am sorry. I cannot answer that. I don't know what year that was.

Q. All right.

A. But they were, in some year previous to that, I can-

not recall the exact year, that they had standardized on and were using our control. We had had a discussion with reference to the requirements, and they wanted to buy our controls at a price that we did not feel was right. It was then that they started to use a competitive control.

Q. That was the Mercoid?

A. At that time it was the Mercoid.

Q. And that was in 1935, wasn't it?

A. I cannot recall the year, Mr. Haycraft. Our records would show that, but I just cannot recall whether that was the year or not.

And then, every year after that, when the subject of contract came up at all, of course, this subject arose again, the question of price, and in 1936, in the 1936 contract we gave them a price on the controls that would be retroactive if they reached the quantity in our next price bracket.

Q. And in order for them to reach that quantity, it would be necessary for them to give you their gun type business, to standardize on the gun type as well as
86 their rotary, would they not?

A. I don't know, Mr. Haycraft, because I don't know what that volume was at that particular time.

Q. Read that letter and see if it doesn't refresh your recollection, and if it doesn't, maybe this one will.

(Handing document to witness.)

I show you Commission's Exhibit No. 18 A and B, and see if that does not refresh your recollection.

87 A. This might help a bit. We offered him our retroactive plan. Now, whether he told me that he was going to standardize on it, I don't know, but from what this letter states, such might be the case. Now, in this letter I reminded him of that, certainly, or words to that effect, and also reminded him that if he purchased more of our controls, he could meet that next bracket and get his retroactive credit. That is as I recall that situation, Mr. Haycraft.

Q. Does this refresh your recollection, as to the quantity that you were selling them for the rotary controls and the quantity he was using on the gun type control?

A. That, of course, was debatable. You know, that is rather in controversy right there, isn't it, Mr. Haycraft?

Q. Yes, but I am saying those are the facts you had in mind when you negotiated the contract, were they not?

A. I don't know, at the time we executed that contract, whether he told me the size of the order he placed with Mercoid or not. The only thing, as that letter indicates, my memory is they had about five hundred sets still to take, and they were using our controls that were on both their rotary and on the gun type burner, and on the gun type burner I distinctly recall they had a $5.00 difference in price. If a dealer bought our control, it cost $5.00 more than if he bought Mercoid controls having the gun type burner.

88 Q. Now you state that your salesmen had been reporting that where the Cleveland Steel Products were encouraging your dealers to use competitive controls by that you mean the Mercoid control?

A. That is right.

Q. On the gun type burner?

A. On the gun type burner.

Q. What did you mean here when you say, "We have replied in each instance, advising you were trying to use up your inventory of Mercoid controls, and we have instructed our men in no manner to attempt to disrupt the situation"?

Mr. Freeman: You can look at that letter.

The Witness: Obviously, from that, I recall we had been told that they were going to use up their inventory on Mercoid controls. Now, we tell our men in the field, as near as we can, the status of each one of the manufacturers, what type of controls they are using; if we know, we try to keep them well posted, because they run into their dealers everywhere. We have to do that. Now, then, it is only natural that our salesmen, where they ran into Cleveland Steel burners and found Mercoid controls on them, really want to know how come.

By Mr. Haycraft:

Q. It is their understanding they ought to have Minneapolis Honeywell controls?

A. Not necessarily, I would not say that.

89 Q. Why did they question it?

A. That would be a natural thing for them to do.

Q. Did your dealers know, I mean, did your salesmen know that during the year 1935 that the Cleveland Steel Products had been selling the gun type burner with Mercoid controls on them?

A. A lot of them probably did.

Q. They did not question that, did they?

A. Well, I don't know why they would question it, other than if they ran into a situation that they thought had some considerable value to us, they would report it.

Q. Did you give them to understand, then, in 1936, that if the Cleveland Steel Products Company had used up say five hundred sets of Mercoid, that thereafter gun type, the Cleveland Steel burner would be equipped with Minneapolis-Honeywell controls?

A. I might have done that.

Q. Don't you have any recollection of that?

A. I don't have a recollection of it. I might have done that. It would have been a logical thing, perhaps, to do.

Trial Examiner Sheppard: That would be one hundred per cent, instead of eighty-five per cent?

Mr. Haycraft: Thirty-five.

The Witness: Pardon?

By Mr. Haycraft:

90 Q. You had about thirty-five per cent of the business there, total business, I say.

Mr. Freeman: It wouldn't necessarily make them one hundred per cent.

Trial Examiner Sheppard: No.

Mr. Haycraft: Practically so.

Trial Examiner Sheppard: I mean by one hundred per cent—

Mr. Haycraft: Practically so.

Q. As a result of your understanding with Mr. Smith, the man you discussed this with, apparently, and Mr. O'Brien, whereas you had been getting about one-third of the temperature control business of the Cleveland Steel Products, beginning 1936, after they got rid of this five hundred they had on hand, or they had on order, you were to get all of their temperature control business on both the rotary type and the gun type?

A. I would not say that.

Q. It was to be standardized Minneapolis-Honeywell, rather than Mercoid?

A. I would not say that, Mr. Haycraft, about Cleveland Steel Products, or any other account with whom we do business. They always buy controls from our competitors.

Q. If they are demanded by their customers, isn't that right?

A. Or if they wish to buy them.

Q. If they wish to buy them. If they have stand-
91 ardized, or when would they wish to buy them?

A. They could very well, in the middle of the season, decide they wanted to put out a burner at a low price, and buy a lower priced control from Mercoid, Penn or Perfex. They are all lower priced than ours. That could very well happen.

Q. I am not talking about what can happen. I want to know what did happen. As a matter of fact, do you have the sales figures of the Cleveland Steel Products?

A. For what year?

Q. 1935, '36, '37 and '38?

A. I am sorry. That was some of the information I hoped to get this noon, but we had to phone Minneapolis, and I ended up having to wire them. That will be here in the morning.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. Will you ascertain and be prepared to testify further with respect to your volume of sales during those years, to the Cleveland Steel Products?

A. Yes, sir, we will have that information in the morning.

Mr. Shute: What year?

Mr. Haycraft: '35, '36, '37, '38, '39 and '40.

92 By Mr. Haycraft:

Q. As a matter of fact, you remained as the standard control on Cleveland Steel Products burners, both for gun and rotary type, after 1936, did you not?

A. No, sir, I am sure they used competitive controls in the meantime.

93 Q. Did you have any correspondence with the Automatic Oil Burner Corporation of Chicago, Illinois with respect to standardizing on the Minneapolis-Honeywell temperature controls on their burners during 1936 and 1937?

A. I don't recall that, Mr. Haycraft. I know that we had correspondence with them right along, but whether it was on that particular subject or not, I don't know.

Q. Did you make any search of your files to find that out?

A. We made a general spot search. Of course, we have quite a few accounts and we are still searching, as a matter of fact, but if we found anything on the Automatic Burner it has not come to my attention as yet.

Q. Who handled that work on it?

A. I did quite a bit of work on that myself, and I also had our Chicago man; who also worked on that.

Q. Who was your competitor, who was soliciting that account at the same time that you were?

A. During the years under discussion it was both Mercoid and Perfex and Penn Switch. They were all after it.

Q. All three of them?

A. As far as I know, they were all after that business. As a matter of fact, they are after every account.

Q. And as you indicated a minute ago they were lower than the Minneapolis-Honeywell?

94 A. Yes, sir; they were always lower to my knowledge.

Q. Did you have any question up with Mr. Hirsch with respect to the splitting of the business with Mercoid, with Perfex, or with any other company?

A. I honestly do not recall any such discussion of that nature, Mr. Haycraft.

Q. You haven't any correspondence on that?

A. None has come to my attention yet. We may not have searched that file yet, I am not sure.

Q. Will you make a note to do that?

A. They are still doing it. They are still continuing. This is the second week they are doing it. I have two men on it, and this is the second week I have had two men on it, and I put part of my time on it last week, but it is a tremendous job.

Q. What about the Gould Oil Burner Company at Cambridge, Massachusetts; who handled that account?

A. Mr. Hoyt of our Boston office at that time.

Q. Do you remember who it was that he contacted?

A. Yes, he contacted Joe Gould primarily.

Q. What type of burner were they manufacturing?

A. A gun type burner.

Q. Did you have any competition there?

A. Yes, sir; Mercoid competition.

Q. During what years?

95 A. Well, I know that it was in 1936, and also in 1937, I remember that. It might have been earlier than that, and it also might have been later, but I do remember those two years.

Q. Did they standardize on the Minneapolis-Honeywell?

A. No, sir.

Q. What is the situation there?

A. They used both Mercoid and Minneapolis-Honeywell according to my recollection. I know that was true in 1936 and '37.

Q. How about later years?

A. Well, I don't know, I am not certain about later years, Mr. Haycraft.

Q. Did you make any contacts yourself?

A. No, I never called on that account to my knowledge. I have met Mr. Gould at conventions and things like that, but I have never called on him personally.

Q. Did you have any correspondence either with Mr. Gould or with Hoyt with respect to the sale of your controls to the Gould Oil Burner Company and the standardizing of your controls?

A. I don't recall anything on the standardization of the controls. I know we had correspondence with Gould because I remember going through there and looking for the point you asked me to check; and incidentally I
96 found one letter and perhaps also a report, or two reports, that had some information that you wanted.

Q. You have that?

A. We have those letters here.

(Documents handed to counsel.)

Mr. Haycraft: Will you mark this?

Trial Examiner Sheppard: Commission's Exhibit No. 21.

(The document referred to was marked Commission's Exhibit No. 21, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 21, which purports to be a photostatic copy of a report of your man Hoyt with respect to an interview dated January 5, 1937 with the Gould Oil Burner Company, in which he called on Mr. Art Farnsworth, some sort of a manager.

A. He was connected with the concern, I have just forgotten his capacity.

Q. I will ask you whether or not that is the report which you had in mind in your last answer?

A. Yes, sir.

Mr. Haycraft: I offer that in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: No objection.

Trial Examiner Sheppard: Show the document admitted to the record, Mr. Reporter, as Commission's
97 Exhibit No. 21.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 21 was received in evidence.)

98 Q. A.H.L. instructions refers to yourself, doesn't it?

A. That's right.

Q. And the 95 per cent clause referred to in that report. That report is the clause which had been inserted in the contract with this particular company at the time it was negotiated?

A. At the time it was written.

Q. Which reads as follows:

"Purchaser agrees that at least 95 per cent of its control requirements consisting of thermostat, primary controls and limiting devices will be purchased from the Company."

Reading off of the exhibit.

Mr. Freeman: You are not trying to say by the question it was in that contract submitted to Gould's, are you?

Mr. Haycraft: Yes. This thing indicates it was eliminated. Certainly that is what I am trying to do.

By Mr. Haycraft:

Q. Isn't that right, Mr. Lockrae?

A. From that I would judge so.

Q. In other words, that would be your interpretation?

A. That would be my interpretation.

Q. Do you know whether or not there was an objection on the part of Mr. Gould to sign such a contract with that clause in it?

99 A. The inference is there, that is all I recall.

Q. You don't recall anything further?

A. I don't recall anything further, other than the fact—what was the date of that report, Mr. Haycraft?

Q. January 5, 1937.

A. Yes. The point that he had asked me, and I told him if there was any objection on the part of customers as to that point, to have that clause eliminated.

Q. Do you have any recollection of any conversation with him about it on the telephone?

A. I doubt if there was a 'phone conversation. It might have been discussed in one of our meetings, because that was about the time when we had a meeting previous to that, it was about the first of the year.

Q. You didn't find any letter from him or to him?

A. No.

Q. On that point?

A. I don't recall such a letter.

Q. What is the Reynolds business?

A. That was the Reynolds Metals Company, who were getting into the heating business at that time.

Q. You mean they were building burners?

A. They were not building burners.

Q. Furnaces?

A. They were building furnaces, and incorporated 100 this burner as a part of their furnace.

Q. In other words, with the exception of that account, he was going to use your M-H control exclusively?

A. Apparently from that report, they were going to standardize that control.

Q. Do you know what controls the Reynolds account uses?

A. The Mercoid obviously, in view of the high price difference.

Mr. Haycraft: I am going to ask to strike that.

Trial Examiner Sheppard: That may go out.

Mr. Freeman: If it would stand we wouldn't have to ask him that question later on.

By Mr. Haycraft:

Q. Do you know anything about the Reynolds Company yourself, who was just going into that business? Do you know who owns it?

A. Well, it is the Reynolds Metals Company, who are a nationally known concern. If I am not mistaken, they are the ones that got into the manufacture of aluminum.

Mr. Freeman: How is that material, who owns the Reynolds Company?

Mr. Haycraft: I want to show who they are, that is all.

The Witness: They are not the Reynolds Tobacco Company.

101. Mr. Haycraft: They are not.

The Witness: Not a cough in a carload.

By Mr. Haycraft:

Q. Now, the Wayne Oil Burner Corporation, they are of Fort Wayne?

A. Yes, sir.

Q. And do you know anything about that Company?

A. Yes, I know that account very well.

Q. Did you make any sales to them?

A. Yes, sir.

Q. And back in 1936, did they standardize on the Minneapolis-Honeywell control?

A. I am not sure as to the year, Mr. Haycraft, I cannot tell you.

Q. I am referring now to Commission's Exhibit No. 1, page 10, wherein it stated in our stipulation that in the blank spaces in the contract, some language such as "Season's requirements" or similar phrases used in connection with this contract with this firm, in 1937, for the year 1937?

A. Yes.

Q. For that reason I am asking the question.

A. I do know that they used Mercoid controls, the impression in my memory of the word "Season's requirements" there, I would say that they must have used them there in 1936.

Q. Did they then standardize the Minneapolis-

102 Honeywell the same as Cleveland did?

A. No, sir, they didn't.

Q. What did they do?

A. They gave up the Mercoid controls and started to use Perfex controls.

Q. For how long a period of time?

A. They are still using them, to my knowledge.

Q. And what type of burner were they using?

A. They only made the one type burner.

Q. What is that?

A. The gun type burner.

Q. The gun type burner?

A. That's right.

Q. What proportion of the business did you get in the beginning of 1936 and '37?

A. I cannot answer that exactly, but I would say that we did not get the major portion of their business.

Q. That the Mercoid, it is your belief—

A. Yes, the Mercoid, and then Perfex got the majority of their business.

Q. Did you have any correspondence with the Wayne Oil Burner Corporation? Can you find any?

A. Again I will have to be a little bit vague, because none have come to my attention as yet.

Mr. Freeman: I might say, Mr. Haycraft, those 103 files have been searched, because the Wayne Company was one specific company that you referred to in connection with your season requirements. Just so you know that we have made the search and not as yet found anything.

The Witness: That's right.

Mr. Freeman: It isn't that we haven't come to those files yet.

By Mr. Haycraft:

Q. Now, the Wisconsin Oil Burner Company, do you recall that account?

A. Yes, sir.

Q. And did you contact that account yourself?

A. Occasionally, once a year, something like that.

Q. Who regularly solicited it?

A. Our Milwaukee man.

Q. What is his name?

A. We had two that called on that account at different times. One was Charles Cochran, and another was John Banks. And then, in later years, Harold Pride.

Q. Who was the man who ran that business?

A. There were two men who really owned that concern, John Westmont and Mr. Olson. I don't remember his initials.

Q. What type of burner were they manufacturing?

A. The gun type burner.

104 Q. And did you during that time or about that time attempt to get the Minneapolis-Honeywell controls standardized on that burner?

A. Not at that time. They were using, I believe, the Mercoid controls on that burner, and they continued to use them throughout that year.

Q. That is 1937?

A. During 1937, yes.

Q. Then what happened?
A. I am not certain.
Q. Were you able to get them to standardize in 1938 on the Minneapolis-Honeywell controls?
A. They had standardized, but I am sorry I can't say the year.
Q. Will you get that information?
A. Yes, sir.
Q. Did you find any correspondence on that?
A. We have no correspondence with them on that subject at all.
Q. Malleable Iron Fittings, Branford, Connecticut; did you contact that account yourself?
A. Not very often. I have visited them, but not regularly at all.
Q. Who handled that account for you?
A. That was handled primarily by John Fiegen-
105 baum of our Hartford office, and also our Mr. Chapler.
Q. What is his position? I noticed his name on Exhibit No. 21.
A. Yes, Mr. Chapler was our eastern factory representative.
Q. And who were the men that they contacted at the Malleable Iron Fittings?
A. The principal man is Gillias, G-i-l-l-i-a-s, I believe is the spelling.
Q. In 1937 and '8 were you able to get the Minneapolis-Honeywell equipment standardized on their oil burners?
A. Again I am confused on the year, Mr. Haycraft, because I do know that they used Mercoid Controls as standard for a good many years, and before that they used our controls as standard, but just when that saw-off came there, I don't remember what year.
Q. What type of burner did they make?
A. The gun type burner.
Q. You don't know whether in 1938 and '9 you were standard or Mercoid?
A. I think in the years 1938 and '9 that Mercoid was standard.
Q. Did you find any correspondence with that firm on that subject?
A. I didn't find any correspondence on that point,
106 but I think I can get some information on that if you like to establish that date. I think I can get some information that will establish that date.
Trial Examiner Sheppard: You can do that later.

By Mr. Hayeraft:

Q. The York Oil Burner Company, Incorporated, York, Pennsylvania, what type of burner do they manufacture?

A. Their domestic burner is a gun type burner.

Q. Did you contact that account?

A. I have called on that account, but again not regularly.

Q. Who was your man that handled that account?

A. John Dorsey of the Philadelphia office, and also Mr. Chapper.

Q. Who was the man they contacted?

A. That concern has changed hands in this period of time, and there were two or three individuals who would be involved. I can't recall the date they changed hands, but let's put it this way; when the old regime was there they called on a Mr. Kraber, among others. Under the new regime, I don't recall his full name, only Nordberg.

Q. Did you get the Minneapolis-Honeywell controls standard there?

A. When this new regime came in the Perfex controls were standard.

Q. And that was when?

107 A. That was the date I said I could not establish in my mind.

Q. And what prior to that?

A. Prior to that they used our controls, and I am sure that they used a competitive make, but I don't know whether it was Mercoid or Penn, I am not sure.

Q. To what extent did they use it, do you know?

A. I am sorry, I don't know.

108 Q. Can you get that communication?

A. I will try. I am not sure about that.

Q. Did you find any correspondence at all about that?

A. Nothing that had to do with contracts or with this ninety-five per cent clause.

Q. Standardization?

A. Or standardization.

Q. The Reif-Rex Oil, Buffalo, New York, what type of burner did they use?

A. A gun type.

Q. Did you contact them?

A. Occasionally, but not regularly.

Q. Who called on them?

A. Mr. Kaiser of our Buffalo office, at that time, and also Mr. Chapler.

Q. Who was the man you contacted?

A. There were two brothers, by the name of Reif, Allen and Charles.

Q. What type of—

A. (Interposing) Gun type.

Q. Are Minneapolis-Honeywell controls standard?

A. Again, I will have to search the history to give you the years, but I can give you the progression. First, we were not standard at all. Later we were partially standard, and I think that continued right up until today.

109 Q. What was the competitive control?

A. I believe early it was Mercoid, and later it was Perfex. I may be mistaken about the Mercoid. It might be Perfex all the way through.

Q. Were you able to find any correspondence on that account?

A. There was no correspondence on that account.

Q. How did you get the information, then, as to the situation?

A. You mean just the answer to this last question?

Q. Yes.

A. Yes, just my familiarity with that account.

Q. You might be wrong on it?

A. That is why I said I was in doubt about the Mercoid being standard with us, earlier in the game.

Q. Now, we have quite a long list of accounts in Commission's Exhibit No. 1, where they refer to the ninety-five per cent clause that I read a moment ago, which—

A. Yes, sir.

Q. (Interposing) Were inserted in the contracts that were submitted to the various manufacturers?

A. Yes, sir.

Q. And as I understand it, they were only in existence for a few days?

A. That is true.

110 Q. Less than a month?

A. And never became effective at all.

Q. In other words, you never made any attempt to enforce them?

A. Never.

Q. What is the history of that ninety-five per cent clause? Whose idea was that? Who authorized it, and what happened?

A. Well, I don't know who originated the idea, Mr. Haycraft, but my recollection of the reason for that clause was

this. In 1936 we, like most other manufacturers in the country, were vitally concerned over this new Robinson-Patman law. Now, we were told that we could not extend a contract with a manufacturer in successive years, if he did not live up to the quantity stipulation of the contract.

Now, then we knew that a lot of our accounts, if they would give us ninety-five per cent of their business, could fulfill the quantity obligation of the contract in that year. Now, that is my recollection, and the only one that I have that deals on that ninety-five per cent clause. We were trying to protect ourselves under the interpretation that had been given us of this Robinson-Patman Act.

Q. Who gave you that interpretation?

A. It came from our attorneys.

Q. Well, how did you come to change it, then, and withdraw it, January, 1937?

111 A. We were told that that clause perhaps was not according to Hoyle, and when we heard about that, we naturally investigated, and our attorneys recommended that it be taken out, so we not only took it out of our contracts that had not as yet been signed by the customer, but we also wrote every manufacturer to whom a contract had been sent, and had been executed, eliminating that clause from the contract, and all outstanding contracts we instructed our branches and our salesmen to strike out that clause and notify the account that that clause was not to be effective.

Q. You hadn't consulted your attorney before you put it in?

A. We very obviously had not.

Q. Did you have any other instances, other than the one we have already learned of, where there was objection to the clause, when you were negotiating your contract?

A. Yes, sir. We found a case with the R. S. Products Company, and we have a copy of their letter.

Q. R. S., you say?

A. That is right, R. S. Products Company, at Philadelphia. They are a small manufacturer.

Mr. Freeman: Have you offered that?

Mr. Haycraft: I offer it as the next exhibit number.

Trial Examiner Sheppard: Mark this Exhibit 22 for identification.

112 (The paper referred to was marked Commission's Exhibit 22 for identification.)

Mr. Haycraft: I offer in evidence what purports to be a

photostat of a report of a salesman, Dorsey, dated January 14, 1937, with respect to the price paid on the R. S. contract, Philadelphia.

Trial Examiner Sheppard: Any objection, gentlemen?

Mr. Freeman: No.

Trial Examiner Sheppard: Let it be received, Miss Reporter, as Exhibit No. 22.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 22, was received in evidence.)

Mr. Freeman: There is no objection to any of these papers.

113 Q. Those two companies, so far as you know, are the only ones that raised any objection to the ninety-five per cent clause when that contract was submitted to them with that clause in it?

A. There was one other account which I handled personally, which was the Cleveland Steel Products Company. That clause was in their contract that year, and I personally deleted it before we signed the contract.

Q. Before submitting it to them?

A. Well, it was done while I was there. Well, I don't just remember whether it was at the time the contract was signed, but it was deleted and dated on that date, as I recall it, January 18th.

Mr. Freeman: The deletion date is the same as the date of signing the contract?

The Witness: It was. I know that I was there at the time that the question came up.

By Mr. Haycraft:

Q. You have that contract, do you?

Mr. Gilpatric: Yes, we have it.

Mr. Shute: We have a copy of it.

Mr. Freeman: Don't you have a copy of that?

Mr. Haycraft: No, we don't have.

Trial Examiner Sheppard: Five minutes recess.

(Short recess taken.)

114 Trial Examiner Sheppard: On the record.

Mr. Haycraft: I ask that this paper be marked the next exhibit number for identification.

(The document referred to was marked Commission's Exhibit No. 23-A, 23-B, 23-C and 23-D for identification.)

Mr. Haycraft: A photostatic copy of an agreement between the Minneapolis-Honeywell Regulator Company and

the Cleveland Steel Products Company, a corporation, dated December 2, 1936—

Mr. Freeman: That is submitted; it is dated January 15, 1937.

Mr. Haycraft: All right, submitted as December 2, 1936, instead of January 15, 1937.

Mr. Freeman: No objection to that.

Mr. Haycraft: I will offer this in evidence, then.

Trial Examiner Sheppard: By agreement of counsel, the Examiner accepts it.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 23-A, 23-B, 23-C, and 23-D, was received in evidence.)

By Mr. Haycraft:

Q. Is this Commission's Exhibit 23 the agreement with Cleveland Steel Products Company that you referred to in your last testimony?

115 A. Yes.

Q. I notice the ninety-five per cent clause on page 2 is crossed out and marked "Deleted 1-15-37, A. H. L." That is yourself?

A. Yes, that is mine.

Q. You say that it was made at the time that the contract was executed?

A. It was at the same time, yes. I think the dates will coincide.

Q. Who was it that raised objection to it, Mr. O'Brien?

A. It was Mr. O'Brien or Mr. Smith; I am just not certain who it was, who was there at that particular time. As a matter of fact, I don't recall which gentleman signed that contract, whoever I was discussing it with at the time. I think it was Mr. O'Brien.

Q. Now, are you familiar with the Acme Tool & Gauge Company of Pawtucket, Rhode Island?

A. Yes, sir.

Q. What type of burner do they manufacture?

A. The gun type.

Q. Were your Minneapolis-Honeywell controls standard on that burner in 1937?

A. I believe they were.

Q. Did you find any correspondence with respect to that?

A. There is no correspondence with that account at

116 all that was handled by our Providence office, a man by the name of Lee, Deason Lee, handled that account.

Q. The Alida Manufacturing Company, Brooklyn, New York; what type of oil burner did they make?

A. They made a gun type.

Q. Were the Minneapolis-Honeywell controls standard on that burner?

A. I don't know. I never called on that account, and I don't know.

Q. Can you find out?

A. I can find out. I will try to, at least. I am not sure that they are in business now.

Q. That was handled by your New York office?

A. By our New York office, yes.

Q. The Arcweld Manufacturing Company, Seattle, Washington; what type of burner did they make?

A. Also the gun type burner. Mr. Haycraft, I perhaps might save you some work if I would tell you that all but only a few make the gun type. There are only a few rotary type burners made in the country. If you will give me a list I can give you the names, and all the rest are gun type.

Q. Most of them are gun type?

A. There is Timken, Cleveland Steel Products, Silent Glow, Petroleum Heat & Power Company, Anchor Post Fence Company. I believe that is all—ABC Automatic
117 Burner Corporation.

Q. Those are the rotary type?

A. Yes, all the rest are gun types.

Q. You sell all those accounts?

A. Yes.

Q. Is your control standard on those burners?

A. Read the accounts and I will tell you.

Q. Timken?

A. No, they are not standard.

Q. Cleveland?

A. Yes, sir.

Q. Silent Glow?

A. We only sell a part of Silent Glow's requirements.

Q. Who sells the other part?

A. Perfex.

Q. By part of their requirements do they have, do you mean, certain furnace accounts that take the Perfex and certain accounts that take yours?

A. No, they list both of them.

Q. In that catalog?

A. Yes, both controls are standardized, if you want to put it that way.

Q. They list them both and describe them both in their catalogs?

A. They list them both and offer them both.

118 Q. Do they offer them at the same price?

A. I will have to say I doubt it, but I can't say definitely without checking. I might get that information.

Mr. Shute: What company is that?

The Witness: Silent Glow.

By Mr. Haycraft:

Q. The Petroleum Heat & Power, where is that located?

A. That is at Stamford, Connecticut.

Q. Are you standard on that?

A. Well, they use our controls, and they also use some of Mercoid, and they have used Perfex.

Q. What do they advertise in their catalogs?

A. That I am not certain.

119 Q. Well, that is what is generally accepted as the distinction, standardizing as distinguished from just sale as to order?

A. Many of these manufacturers list two, some three types of controls.

Q. You don't know whether that is true?

A. No. There are burner manufacturers, Mr. Haycraft, who only use the standard. Dealers know if they want the others, they can have them.

Q. The Anchor Post Fence Company?

A. That is it, the Anchor Post Fence Company, standardized on Perfex controls.

Q. Where is that located?

A. Baltimore.

Q. You didn't get in there at all?

A. Well, they offer our controls, and I think there is another place where I think I cannot tell whether they advertise it or list it or not.

Q. I think you have already covered A. B. C.

A. A. B. C.

Q. Then all these others on this listing, they are gun types?

A. They are gun types.

Q. I don't need to ask that question?

A. That's right.

120 Q. Did you answer as to the Arcweld Manufacturing Company?

A. That is a northwest account. I am not familiar with

it personally, and I cannot say yes or no as to that, and I am sure our correspondence would not reflect it. If you want that information I will have to write to our branch out there in order to get it.

Trial Examiner Sheppard: That is at Seattle?

The Witness: That is at Seattle.

Mr. Haycraft: Yes.

By Mr. Haycraft:

Q. The Auburn Burner Corporation?

A. Auburn, Indiana, they use our controls, also Mercoid.

Q. Did they standardize on either one?

A. I cannot tell you how they actually show it in their literature.

Q. Have you had any correspondence with them about it?

A. No.

Q. Who was the man that called on them from your firm?

A. Let me think. George Badger called on them up until 1940 or '41. I am just not sure. I have called on them a few times.

Q. Who negotiated the contract?

A. I believe it was Mr. Badger.

Q. Is he still with you?

121 A. Yes.

Q. What branch does he work out of, Chicago?

A. He does at the present time work out of Chicago.

Q. Bedard-Johnson Company, Minneapolis.

A. They standardize on our controls.

Q. When did they do that, do you know?

A. Well, they are a Minneapolis concern, and I believe from the time they started to do business with us, I cannot tell you what year that was, but I believe they have offered our controls as standard ever since.

Q. In your 1938 contracts you indicate season's requirements there? Have you got a copy of that contract?

Mr. Gilpatric: No.

Mr. Haycraft: You got a memorandum showing what the language was that they used.

Mr. Freeman: It was either season's requirements or estimated requirements.

By Mr. Haycraft:

Q. Do you remember which it was?

Mr. Freeman: I cannot tell you.

The Witness: I believe it was season's requirements.

Mr. Shute: Just season's requirements.

By Mr. Haycraft:

Q. Season's requirements, and yours is the stand-
122 ardized equipment?

A. Yes, sir.

Q. Now, that is true, you say, all during this period of time?

A. It has been standard ever since.

Q. Yes. Now, the Berggren Engineering Company, Brooklyn, New York?

A. As far as I know they standardize on our equipment.

Q. Did you have any correspondence with them?

A. No. They are a small account.

Q. A small account handled from your New York office?

A. Handled from our New York office.

Q. Braden Engineering Company, Providence, Rhode Island.

A. If I remember correctly, they standardize on both Minneapolis and Mercoid.

Q. About what time?

A. Well that has been true, I would say, for practically this entire period up until the last two or three years, and predominantly their sales have been Mercoid.

Q. You say until the last two or three years they have—

A. No, wait a minute. I might be confusing two accounts. Just hold everything. Yes. The name, I believe is Weatherall, I am just not sure about that. I would like to look that up.

Trial Examiner Sheppard: Better check that.

The Witness: Yes, I had better check that, because
123 there are two accounts. I must check that.

By Mr. Haycraft:

Q. Brown Oil Burner Equipment Company, Cambridge, Massachusetts.

A. As far as I know, they were standard on M-H controls.

Q. Was that handled out of the Boston Office?

A. Yes, sir.

Q. And that is true all during that period of time?

A. That's right.

Q. The Buck Engineering, Incorporated, Freehold, New Jersey.

A. That is another small account. I cannot tell you their case history.

Q. Do you know whether or not that was—

A. I don't know if that was handled out of New York. I have never followed that.

Q. You have no correspondence?

A. I have no correspondence.

Q. Burner Parts and Service Company, Lancaster, Pennsylvania.

A. They were predominantly Mercoid. We only sold them a few controls.

Q. That is true all during the time?

A. Yes, sir.

Q. Campbell Machinery, Minneapolis?

124 A. M-H controls, standard.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

125 Mr. Gilpatric: We have that to refresh his recollection.

Mr. Haycraft: I would be glad to have you give him anything you have so we won't have to go over it again.

Mr. Gilpatric: I can give him that.

Mr. Freeman: Just so you understand we have no way of knowing how many oil burners the company manufactures, or how many of the competitors' controls they actually buy and sell, but what we are giving you here is our estimate, that has been made up from the study that is made over a period of time.

Mr. Shute: Which is still incomplete.

Mr. Gilpatric: But it will clear up some of these points.

Mr. Shute: It will help refresh his recollection.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. You can tell us what the situation was in 1941. That will help.

A. And the facts are that same situation will pretty well obtain for some time.

126 Q. What about the burner parts of Lancaster? Is there anything about that in there?

A. I am sorry. We don't even have them listed. I know that they are just a small—

Q. Buck Engineering Company?

A. (Interposing) —concern, and I don't believe they bought anything from us in 1941. That is why they are not listed.

Buck Engineering, fifty per cent Mercoid.

Q. Fifty percent M-H?

A. Yes, sir.

Q. Braden Engineering, Providence, Rhode Island?

A. There were ninety-five per cent Mercoid.

Q. In 1941?

A. Yes, sir.

Q. Auburn?

A. That is questionable. I know they used some Mercoid controls in 1941, but the man who called on that account is Mr. Badger. I did not get in touch with him. I might be able to get you some information on that.

Q. All right. Arcweld, have you anything on Arcweld?

A. I think Arcweld were not in business in '41.

Q. The Alida Manufacturing?

A. And I am afraid the same applies there, because their name is not on the list.

127 Q. Citro Oil Burner Corporation, Fountain Lake, New Jersey?

A. M-H, with standard.

Q. Do you have any recollection of previous to '41?

A. I don't.

Q. Concord Oil Corporation, Brooklyn, New York?

A. M-H with standard.

Q. Have you any information for them previously?

A. I haven't.

Mr. Haycraft: It is understood, Mr. Examiner, the witness' answers now being given relate to 1941, unless I develop otherwise.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. D'Elia Oil Burner Company, Bridgeport, Connecticut?

A. M-H, with standard.

Q. David Duff & Sons, New Bedford, Massachusetts?

A. M-H, with standard.

Q. Eisler Engineering Company, Newark, New Jersey?

A. That account isn't listed. If my memory serves me right, they were out of business in '41, but when they were in business, they were using M-H standard.

Q. Electromatic Oil Burner Company of Malvern, New York?

A. They are in the same category. We do not have them listed, and I don't know what their status was prior to '41.

Q. You haven't any reports on them?

128 A. No, we have no reports on them.

Q. As to any company that I have asked you about, do you have any other reports, that correspond, other than the ones you are referring to, with regard to them, as to the previous year?

A. No, sir.

Q. Enterprize Oil Burner Corporation, San Francisco?

A. M-H, with standard.

Q. Fairfield Oil Heating Company, Greenwich, Connecticut?

A. We have them. Yes, here they are. They used both Mercoid and Perfex as standard.

Q. In '41?

A. '41, and that would obtain, although somewhat earlier they used nothing but Mercoid.

Q. Was M-H ever standard on their—

A. Never, to the exclusion of Mercoid, that I know of.

Q. Didn't they raise any objection to signing your ninety-five per cent clause contract in 1937?

A. Not that I recall. I don't know, Mr. Haycraft. There was no correspondence on that, and I don't know.

129 Incidentally, they later used some Perfex controls. It shows here in 1941 they were also using Perfex.

Q. Fargo Foundry Company, Fargo, North Dakota?

A. They were M-H.

Q. Gar Wood Industries, Inc., Detroit?

A. They were using both Perfex and M-H.

Q. Now, I want to ask you this question. Will you indicate whether Perfex were selling sets or were they limit controls?

A. When I mention a competitor here, Mr. Haycraft, it automatically refers to a set.

Q. Or you would indicate otherwise?

A. Yes.

Q. As a matter of fact, didn't Perfex and Mercoid both

sell a large quantity of limit controls to customers who did not have their thermostats or the primary controls?

A. If they are selling those to the same accounts that we are selling, then it is absolutely news to me.

Q. Anyway, your testimony refers to sets?

A. That is right.

Q. Do you have any independent recollection as to how long Perfex has been selling Gar Wood?

A. I don't know exactly.

Q. Do you have any report on it?

130 A. I have no report on it, but again I think I can find out for you.

Q. General Oil Burner Corporation of Baltimore?

A. Mercoid and M-H.

Q. Now, do you know whether or not they were buying your controls in 1937?

A. I think they were, but I am not positive of that. I think they were.

Q. In other words, the change has taken place since then?

A. Yes, sir, but it is an old account on our books, and I think they were in 1937.

Q. Was your control ever standard on the General Oil Burners?

A. To my knowledge it was not, I think they have always used Mercoid as well.

Q. Do they manufacture burners and sell them to a number of burner manufacturers?

A. I am not sure. I don't know. I have always thought of them, that they just made merchandise, their own burner. I am not certain, it may be possible they may build a furnace of their own, I am not sure.

Q. Do your records indicate that your business had dropped off with the General Oil Burner Corporation?

A. I can answer that question very specifically tomorrow.

131 Mr. Gilpatric: What was that question?

The Witness: The General Oil Burner Corporation of Baltimore, whether our business has dropped off from 1937 on.

By Mr. Haycraft:

Q. The General Oil Heating Corporation.

A. That is the same situation that exists with the General Oil Burner Company. They use Mercoid and M-H.

Q. Do you know in what proportion?

A. It is estimated that the General Oil Burner Company used 20 per cent, Mercoid; and the General Oil Heating, 25 per cent.

Q. Will you find out in both cases when it was that Mercoid got in there?

A. I will try to.

Q. The Capitol Oil Burner Company, Hartford, Connecticut—wait a minute, before we get into that, on the others, would you say that yours was standard on both of those?

A. I think they list both of them.

Q. Does the 20 per cent and the 25 per cent represent the business that they do with Mercoid?

A. Yes, sir.

Q. Do you know whether they are listed in their catalogues?

A. I will have to check up to be sure, but I think
132 they are.

Q. The Capitol Oil Burner Company, Hartford, Connecticut.

A. Well, that is one that is not on this list, so that they are probably out of business.

Q. Do you have any information on that?

A. No, I haven't.

Q. Can you get some?

A. I doubt it very much, because those smaller accounts we haven't had any correspondence with unless we had some trouble with them.

Q. Carlson Brothers Tool and Machine, Boston.

A. They were, you might say, practically out of business for a number of years. They bought twenty-four units in 1941.

Q. Carter-Korth Oil Burner Company, Roselle Park, New Jersey?

A. They used both M-H and Mercoid.

Q. What proportion?

A. It is estimated here 5 per cent Mercoid in 1941. I know that they used more than that in previous years, but just how much I don't know.

Q. Do you have any way of finding out?

A. I think I can get some information on that.

Q. Harrison Sales Company, Seattle, Washington.

A. That is another one of those small accounts
133 that I do know this about, however, that they were dis-

tributors and handled Mercoid controls. I don't find them listed here.

Q. You don't know what happened after 1937?

A. No.

Q. Or what the situation was in 1937?

A. I don't know.

Q. The Hart Oil Burner Corporation, Peoria?

A. M-H, standard.

Q. That is 1937 on down to 1941?

A. Yes, sir.

Q. Harvey-Whipple, Incorporated, Springfield, Mass.?

A. Perfex and M-H.

Q. What proportion?

A. Approximately 40 per cent Perfex.

Q. Do you have any idea how long that was true?

A. I know they had used the Perfex control for the past several years. Just when they started, I don't know.

Q. You don't have any information on that?

A. No, but I think I can get some information on it.

Q. Hayward Manufacturing Company, Boston?

A. M-H was standard in 1941.

Q. And you think that they were in the period previous to that?

A. I am not certain, I would like to check on Hayward.

134 Mr. Gilpatric: Now, let us make it clear, that this is based on information picked up, and you could not get this tomorrow.

The Witness: No, not all of this.

Mr. Freeman: It will be merely hearsay testimony, but we will get it for you if you wish it. If that is the kind of information you want, we will get it for you, but we will want to put in the same kind when it comes to our turn.

Mr. Haycraft: I want the best that I can get, and if that is the best that you can get, I want that.

Mr. Freeman: Obviously, when you are asking how many Mercoid sold to a certain company, the place to get that information is Mercoid itself. They are going to be your witnesses, and they will give you that information. We will do the best we can, and we are glad to do it, but when you talk about the best you can get, you know where to get it. We will do everything we can.

Trial Examiner Sheppard: I think this, gentlemen—I just gathered your point—if you can get the real informa-

tion from the other company, I don't see any point in guessing at it.

Mr. Freeman: That is one point I wanted to raise, and Mr. Gilpatric wanted to raise. The witness says, "I will get the information." We don't have it in our books
135 and records, and we will have to go out and ask Joe Doaks of that given company, do you know the number of controls that were sold by your company to a given company. If that is the information you want, the kind of information you want, we will try and get it for you.

Mr. Haycraft: I didn't want this witness to tell me how many Mercoid were sold.

Mr. Freeman: You are asking him that.

Mr. Haycraft: No, I am asking him when it was—he said that they used Mercoid, and I asked him how long ago it was, and he said he didn't know, he would have to find out or he would try to find out.

Mr. Freeman: Yes, that information we can get, but when it comes to quantities or percentages, we have no way of checking it.

Mr. Haycraft: I didn't ask him to do that, I don't want him to do that.

The Witness: If I remember correctly you did on some of the earlier ones that we were discussing, on these percentages.

Mr. Haycraft: That is all right, but all that I want you to get is when you lost out or your business declined.

Mr. Freeman: Anything that is in our records we will get for you.

136 The Witness: Yes, we will get that.

Mr. Haycraft: I am not asking you to get anything that we can get from Mercoid. The only thing I may do is try to save going around to the various dealers if we can help it.

Mr. Freeman: We will help you do that all we can.

Mr. Haycraft: I feel I am going to have to go to quite a few of them, and on some of them we will take the best information that we can get.

Mr. Freeman: Even before you go to those dealers, maybe we can sit down and stipulate on the record, or stipulate just what the record will show if we checked it, and it may satisfy you and it may satisfy us, and then we will all be happy.

Mr. Haycraft: All right.

By Mr. Haycraft:

Q. The Hi-Point Corporation, Bellefontaine, Ohio?

A. Yes, M-H standard, and they used some Mercoid.

137 Q. Hoben Manufacturing Company, Waltham, Massachusetts.

A. M-H was standard.

Q. Holtum Manufacturing Company, Freeport, Illinois?

A. I am sorry, I don't have them on this list. I know they were small, we never sold them very much, and I believe Mercoid was standard with them.

Q. Unless you know, we had better not have it.

A. I might check that with our Chicago man, but I am pretty sure that was the case, they were using Mercoid.

Q. Homestead Engineering Corporation, Brooklyn, New York?

A. That concern was out of business in 1941. While they were in business I think they standardized on M-H.

Q. Hubbard Oil Burner Company, Minneapolis?

A. They standardized on M-H.

Q. Hupp Oil Burner Company, Brooklyn, New York?

A. They standardize on M-H.

Q. Hyle Oil Burner Company, Baltimore?

A. They were predominantly Perfex, but we also sold them.

Q. Do you have any estimate as to how much?

A. Yes, I think so. I know that account pretty well, that is why I spoke verbatim. We estimated Perfex was getting ninety per cent of the business.

Q. Jacobson Manufacturing Company?

A. They were out of business.

Q. Of Racine, Wisconsin?

138 A. Yes. But when they were in business they used our controls as standard.

Q. Kelly Oil Sales Corporation, Arlington, Massachusetts?

A. They were out of the burner business in 1941. I know that they used our controls, but I am not certain whether they standardized on them or used someone else's.

Q. LaGrace Oil Burner Company, Woonsockett, Rhode Island?

A. I don't know whether—that is one of those small accounts, and I don't even have them listed in '41.

Q. You have no information?

A. I have no information.

Q. Liberty Research Laboratory, Inc., Farmingdale, New York?

A. Well, that is funny, I thought that was here. I want to check that. I think those people changed their name.

Trial Examiner Sheppard: Is that all you have got on that?

The Witness: Pardon?

Trial Examiner Sheppard: That is all you got on that?

The Witness: Yes. I don't have anything on that at all, but I think that concern changed their name. I can determine that.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

139 (Discussion off the record.)

Trial Examiner Sheppard: On the record.

We will take an adjournment until ten o'clock tomorrow morning, Miss Reporter.

(Whereupon, at 4:05 p. m., an adjournment was taken until 10:00 a. m., Friday, August 13, 1943.)

140 Room 1123,
New Post Office Building,
433 West Van Buren Street,
Chicago, Illinois,
Friday, August 13, 1943.

Met, pursuant to notice, at 10:00 a. m. C. W. T.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and B. R. Shute, Esq., 15 Broad Street, New York, N. Y., and Bair & Freeman by Will Freeman, Esq., 135 South LaSalle Street, Chicago, Ill., appeared for the Respondent.

141 Proceedings.

Mr. Haycraft: I am going to ask, Mr. Examiner, to withdraw Mr. Lockrae for a few minutes, because I want Mr. Sweatt to testify to a few matters, and he has to leave.

CHARLES B. SWEATT was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Sheppard: Give the Reporter your name.

The witness: Charles B. Sweatt.

Trial Examiner Sheppard: And your address.

The Witness: Do you want my business address or home address?

Trial Examiner Sheppard: Wherever you get your mail.

The Witness: 2753 Fourth Avenue, South, Minneapolis.

By Mr. Haycraft:

Q. What is your occupation, Mr. Sweatt?

A. I am vice-president of Minneapolis-Honeywell Regulator Company, in charge of all of the sales activities of the company.

Q. How long have you occupied that position?

142 A. Since 1927.

Q. You were one of the founders of the firm?

A. No.

Q. Your father was a founder of the firm?

A. Yes, sir.

Q. As vice-president in charge of sales, what generally speaking are your duties?

A. Well, broadly speaking, I am in general charge of the entire sales organization, and I am responsible for the sales policies and all matters connected with sales.

Q. With respect to the sale of temperature controls for use on oil burners, do you have direct charge of that?

A. No, Mr. Pauling has direct charge.

Q. Mr. Pauling?

A. Mr. Pauling and Mr. Lockrae.

Q. And Mr. Lockrae is under Mr. Pauling?

A. Yes.

Q. What, if anything, do you have to do with the preparation of contracts or agreements that are used in the sale of controls to burner manufacturers?

Mr. Freeman: You mean oil burner manufacturers?

Mr. Haycraft: Oil burner manufacturers.

The Witness: I review those when made up, generally sit in on the discussions involving the various forms and the terms.

143 Trial Examiner Sheppard: How long have you been in this position?

The Witness: Since 1927.

By Mr. Haycraft:

Q. Taking up particularly the agreement that was in effect at the end of 1935, for the year 1936, in evidence here as Commission's Exhibit 11-A to D, did you have anything to do with the preparation of that agreement?

Mr. Freeman: Are you referring to the form or the contents?

Mr. Haycraft: I am referring to the form and the contents.

The Witness: I did, with the general form, but probably not with the specific contents of any individual customer.

By Mr. Haycraft:

Q. Did they ever come to your attention?

A. Well—

Q. This happens to be Exhibit 11. I call your attention to this one. This is the Timken deal.

A. I doubt very much whether the specific contract would have come to my attention. There are several hundred of them made out every year, and I don't go over the detailed contracts.

Q. Do you have any recollection of anything in 144 particular about the Timken contract which was submitted on December 2, 1935 to the Timken Company? Do you have any recollection about that?

A. Nothing except what this particular contract shows

Q. Do you recall that as it was submitted that it was not accepted in that form, or signed?

A. Only insofar as the fact that it is not signed shows.

Q. Do you have any independent recollection about that?

A. No independent recollection, no.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. Do you know, as a matter of fact, whether that contract was consummated?

A. I do not; no, sir.

Q. In your early contracts, that is, along in 1936, with either one of these two forms, you have this language:

"The Company agrees to sell and the Purchaser agrees to purchase, subject to the reservation hereinafter named, during the life of this contract ..... (blank) number of sets of the Company's automatic, temperature controls, each set consisting of one thermostat, one limit con- 145 trol, and one primary control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely

for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90 per cent as many Room Thermostats and 100 per cent (but at the Company's option not more than 125 per cent) as many Limit Controls as Primary Controls."

Now, will you explain the reason for that language, being inserted in the agreement. What was the purpose of having that language put in it?

146 A. Well, there are several reasons. One reason in particular was that we did not desire to sell manufacturers various types of products that would not properly coordinate together, therefore we made it a practice to quote on a complete set of oil burner controls, and under this form of contract the customer purchased the three different units that are necessary in a set of oil burner controls.

There are other reasons, I don't know whether they are particularly material here. One thing, for example, at one time we priced our various types of boiler controls at different prices. That made a rather difficult situation for the oil burner manufacturer, because he had to issue a different price on an oil burner if it went to a hot air furnace, a hotwater boiler or steam boiler. To avoid that confusion in the trade or with the manufacturer, we established a policy of selling all our boiler controls on the same price basis.

That price was figured on an average weighted price, depending upon our past history of operation to each particular type of boiler control that was sold.

In that way we were able to arrive at an average price, so that if we sold all three of them, the three different types, our prices came out equalized.

If, on the other hand, a certain manufacturer should have purchased all of one kind, it might have left us

147 in a hole because that might have been the type that was the more expensive to manufacture. But, if that were evened out or equalized, the general law of averages would bring us out all right.

Q. Now, in this same agreement here that was submitted December 2, 1935, I find this paragraph on the third page of Exhibit 11-C:

"In view of the special prices listed in this agreement, it is understood that the purchaser will standardize on and use the company's products exclusively, except for

field tests or when other makes are specified by dealer." Do you recall having had anything to do with that language being inserted in the agreement?

A. I don't believe I did.

Q. You have no recollection on it?

A. I have no recollection on it other than the fact that it appears there.

Q. That is probably Mr. Pauling or Mr. Lockrae's supervision?

A. It is possible.

Q. They didn't call it to your attention?

A. Not that I recall at this time.

Q. Now, on this Commission's Exhibit No. 12-B, which is the contract which was submitted December 2, 1936,
148 I find this clause:

"The purchaser agrees that at least fifty (50) percent of the quantity of this contract is to be shipped in approximately equal monthly lots prior to July 1, 1937, and will give the Company an order for these controls specifying the required quantity and type of Thermostats, Primary Controls and Limiting Devices. Subsequent orders for shipment in lots of less than 100 units will be invoiced at prices five (5) percent in excess of the net prices specified herein."

Do you recall the insertion of that clause?

A. Doesn't that refer to two different things? Aren't there two different subjects covered there?

Q. It may be. Will you explain it?

A. Yes, sir, I can explain that.

Q. All right.

A. With many of our large purchasers, we ask them to give us what might be called pre-season shipments. In other words, level out our seasonal manufacturing business. As you know, the oil burner business is a highly seasonable one.

The majority of the small manufacturers, being limited financially, purchase as they need them. The larger companies, however, having plenty of capital, they are able to purchase their controls in advance, and this gives a very definite advantage in running our manufacturing
149 plants at full blast during the late winter and early spring months, whereas normally we wouldn't be able to do that.

150 Q. That also, of course, gives the larger purchaser an advantage, if he can get a lower price?

A. That would be open to anyone.

Trial Examiner Sheppard: You mean any one who could take advantage of it?

The Witness: Any one who could take advantage of it.

Mr. Freeman: Of buying the right quantity.

The Witness: It gave us those definite manufacturing advantages.

By Mr. Haycraft:

Q. Was that policy followed any more than that year, do you recall?

A. I believe the same policy was in effect in 19— possibly 1939 and 1940.

Q. Well now, I show you Commission's Exhibit—this has not been marked.

Mr. Haycraft: Mark these the next Exhibit numbers, please.

Trial Examiner Sheppard: Commission's Exhibit No. 24-A and B and Commission's Exhibit 25-A and B.

(The documents referred to were marked Commission's Exhibits Nos. 24-A, 24-B, 25-A and 25-B for identification.)

151 By Mr. Haycraft:

Q. I ask you to identify the two letters, one original letter from Mr. Rockwell, Walter F. Rockwell, vice-president of Timken Automatic Company, dated December 24, 1936, addressed to Harold Sweatt, president of the Minneapolis-Honeywell Company, Commission's Exhibit No. 24-A and B, and carbon copy of your reply to Mr. Rockwell, dated December 29, 1936; and the same as to Exhibit 25-A and B for identification.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: He can identify them, and then I will offer them.

The Witness: Yes.

Mr. Haycraft: I offer them in evidence.

Trial Examiner Sheppard: Any objection to these?

Mr. Gilpatric: No objection.

Mr. Freeman: Why don't you just offer them. We are perfectly willing.

Trial Examiner Sheppard: We would like to make the record show that.

By Mr. Haycraft:

Q. Do you have any independent recollection of the subject matter of this correspondence?

A. I have an independent recollection that the letters refresh, yes.

Q. What is your recollection of the Timken transaction referred to in this correspondence?

152 A. My recollection is that Mr. Rockwell had an idea he had some sort of a credit coming at the end of the year.

Q. A retroactive discount?

A. A retroactive discount, yes, and as my letter very clearly points out, he did not have.

Q. Did you contact Mr. Rockwell at all, in the earlier part of this--

A. No, sir.

Q. How do you know that some such proposition had not been made to him?

A. Had not been made?

Q. Yes.

A. I think if any such proposition had been made I would have known about it and of course, when that letter of Mr. Rockwell's to Mr. H. W. Sweatt came, I consulted with Mr. Pauling, who was directly concerned in it.

Q. He told you he had not made any such proposition?

A. Yes.

Q. Wasn't it customary for you to make retroactive agreements, to make retroactive discounts if certain quantities were reached during the year?

A. That always had been our policy, but Timken, however, were in our lowest price bracket, and therefore they were not able to earn any retroactive credits.

153 Q. How did they come to be in the lowest bracket? Did their purchases place them there?

A. They did.

Q. The volume of sales you made to Timken Company the preceding year was sufficient to put them in the lowest bracket?

A. It was.

Q. Do you have any record of those sales here?

A. No, I haven't.

Q. In 1936 what was the volume required to get them in a lower bracket?

A. I can't remember offhand. I think that is in the stipulation.

Q. or 1937, not 1936. That is the reason I asked the question.

A. I don't recall.

Q. In 1937, according to this exhibit, it was necessary for them to get fifteen thousand units in order to get the highest bracket. I was trying to find out whether that was the same situation in 1936. I do notice this, according to these two agreements, that you made them a lower price in December, 1936, than you did in December, 1935, and also that there was a larger quantity in the contract. Does that refresh your recollection any as to the situation?

A. Well, our whole price structure declined between 1936 and '37.

154 Q. Also was there—

A. (Interposing.) There was a general lowering of prices.

Q. Was there also a change in the quantity that was necessary to obtain the highest bracket price?

A. That I couldn't say without referring to the record.

Trial Examiner Sheppard: You mean that after the Robinson-Patman Act went into effect, certain adjustments were made in both the contracts and your relationship with your customers, is that right?

The Witness: Yes, sir.

155 By Mr. Haycraft:

Q. In the third paragraph of your letter you referred to a plan for increasing the sale of gun type burners by offering it as a private brand to various companies, such as Reynolds, Mueller, and so forth, and at the time of the conversation referred to the Reynolds Company had specified a competitive type of control. What was that competitive type of control, do you know?

A. To the best of my recollection it was a Penn Switch control. The Penn Switch had developed a specialized type of control for continuous ignition gun type burner.

Q. Is it your recollection that the proposition was made to the Timken Company that if they got the Reynolds Company to standardize on M-H that you would give them a dollar a burner up to a maximum of 7,500?

A. If they were able to purchase 7,500 of that special relay referred to, that is correct.

Q. That is not what the letter says. I am asking you now about your recollection of it. The letter says:

"At the time of this conversation the Reynolds Com-

pany had specified a competitive type of control and Mr. Roberts was in hopes that he would be able to get them to standardize on our controls along with the balance of the production. The exact proposition which Mr. Pauling made to Mr. Roberts was that if he was successful in putting
156 this over and you were able to standardize on our controls for this burner, he would grant him a reduction in price on our R116 constant ignition relay of $1.00 per burner up to a maximum of 7,500 burners."

A. There is only one point there that is not clear to me, and it is not clear in that letter; and that is whether that refers in that deal to whether he was successful in selling Reynolds and Mueller and these other people this specialized type of burner. As a matter of fact, we never were successful.

Q. I understand, but I want to see what your proposition was, whether it states—whether this correctly states the proposition at the time, as you understood it.

A. That is what I say, I am not perfectly clear.

Mr. Freeman: I think, Mr. Haycraft, you should read the next sentence, and you will recognize that the proposition included utilizing a special relay.

Mr. Haycraft: Where is that, "from above," do you mean?

Mr. Freeman: (Reading.) "From the above you will note that this was purely a tentative proposition based on a special program, utilizing a special relay."

By Mr. Haycraft:

Q. I will ask you what that special relay was that
157 was to be used in there.

A. Timken used what we termed our R117 relay, which is an intermittent type of relay. The R116 referred to is a continuous ignition relay, or Protectorelay, that eliminates various mechanical parts necessary to obtain the intermittent operation; so it is an entirely different type of relay than Timken used as standard. You will note it was a special relay that we were trying to have them incorporate, and so he had agreed to give them a special price on their standard relay; it was not the case of a special price, or a price that we named there, to be a price for 7,500 on this special type of relay.

Q. You say a special type of relay. It was listed in your contract, wasn't it?

A. I don't believe it was.

Q. R117?

A. R117, yes, but not the R116. That is the relay referred to.

Q. That you say that R116 is not listed in your catalogue?

A. Not in that contract, because Timken never used any of them.

Q. It was new to Timken but it was not new to you?

A. No.

Q. You had been putting them on right along?

A. We had been putting them out right along, yes, sir.

158 Q. So far as "special" was concerned, it was special to Timken, but it was not special to Minneapolis-Honeywell?

A. That is right, special to Timken.

Q. The R116 could be used on a gun type?

A. On the continuous ignition type.

Q. On the continuous ignition type?

A. Yes.

Q. Could it be used as well on the rotary type, or did you sell the R117 for that?

A. The R117 required the rotary type; the rotary type relay, intermittent.

Q. You mean, the rotary type of burner required the R117 rotary type of relay?

A. That is right.

Q. The R117 was the type that Timken was using on their burners?

A. Yes, sir.

Q. The one he had been using on the rotary type burner?

A. Yes, sir.

Q. And he was going ahead with the gun type and using—you wanted him to use the R116?

A. Yes, sir.

Q. Which you sold for the gun type burner?

A. Used for the continuous ignition gun type burner.

Q. It was used for the gun type?

159 A. Yes, that being a special relay which sold at a lower price.

Mr. Haycraft: I believe that is all I have to ask Mr. Sweatt at this time. At some future time I may have something else after we get through with Mr. Lockrae and Mr. Pauling, but that is all I have at the present time.

Trial Examiner Sheppard: I will tell you, this gentleman will no doubt appear on the stand in your case, and if you want to save time now I will let you, at the time that you put him on, go into anything that you want to in connection with this examination, to save his double appearance on the stand.

Mr. Freeman: All right, thank you very much.

(Witness excused.)

Trial Examiner Sheppard: Mr. Reporter, I want the record to show that Mr. Lockrae and Mr. Sweatt have both appeared on the stand without subpoena. All right, now.

Mr. Haycraft: Mr. Lockrae will resume the stand.

Trial Examiner Sheppard: Mr. Reporter, show Mr. Lockrae appeared on the stand again and continues his direct examination.

160 ARTHUR H. LOCKRAE, resumed the stand on behalf of the Commission and testified as follows:

Direct Examination by Mr. Haycraft (Continued).

Q. Before we continue the line of examination that I had been on yesterday evening, Mr. Lockrae, I would like to clear up some matters that I started to develop with Mr. Sweatt on this Timken deal. Do you recall the contract that was submitted to the Timken Company in December, 1935, whether or not it was actually executed?

A. I can't answer that, Mr. Haycraft, I don't remember whether it was or not.

Q. This is the contract, Exhibit 11-B, annd I notice on this contract there was no R-116 listed.

A. That is right.

Q. There is an R117.

A. That is right.

Q. Now, I call your attention to the same thing that I called Mr. Sweatt's attention to, on the first page of this contract: "In view of the special prices listed in this agreement, it is understood that the purchaser will standardize on and use the company's products exclusively, except for field tests or when other makes are specified by dealer."

Do you recall that clause as inserted in that con-
161 tract?

A. Not other than as I see it here.

Q. And you don't have any independent recollection on it?

A. No.

Q. Do you know whether you put it in, or Mr. Pauling put it in? It is typed in, it is not part of the printed contract.

A. No, maybe Mr. Pauling had this contract prepared.

Q. We will see about that when he comes. Now, I call your attention also to the last page of this exhibit, which is 11-D, which appears to be a contract which is to expire December 31, 1937. Would that indicate to you that that was a later contract, rather than the one to which it is attached?

Mr. Freeman: You are just having him to guess, why not wait and straighten it out later.

The Witness: It is certainly not consistent with the rest of it.

By Mr. Haycraft:

Q. I will show you the last page of Commission's Exhibit No. 12, being Exhibit 12-D, and ask you whether that appears to be the last page of the exhibit just preceding? (Handing exhibit to the witness.)

A. That could very well be. The date would indicate that that is true. That could be verified later.

162 Q. That can be verified from your office, can't it, Mr. Lockrae?

A. I think so.

Q. Now, I call your attention to the first page of Exhibit 12-A to D. I notice that there is written in, apparently in pencil on the original, "R116 Protectorelay" with a price of $8.45. Is that the relay that Mr. Sweatt was referring to in his testimony as suitable more for the gun type burner than the rotary type?

A. That is correct, that is, the constant ignition relay.

Q. Can you testify as to the quantities included in these two contracts, whether they would entitle the Timken Company to the highest bracket discount? I noticed in December, 1935 contract it calls for 10,000 or more sets, and in the 1936 contract, December, 1936, 15,000 sets.

A. Well, Mr. Haycraft, I believe that that is in the stipulation.

Q. That is right.

A. That 15,000 sets for the year of 1937.

Q. That is right.

A. That is correct. There is not any doubt about that.
Q. What about 1936?
A. I am not sure about that point.
Q. Will you find out for me on that?
163 A. Yes, sir.
Q. There may be a change in that bracket set up.
164 Now, then, continuing the same line of examination, as I read the name of these different companies I should like to have you indicate in your reply whether or not they were sold by your firm, and, I think you had a memorandum yesterday that would indicate 1941, the particular percentage of business that you did with them.
A. That's right.
Q. And any other information that you may have as to whether or not they had standardized on the Minneapolis-Honeywell control. Gold Star Oil Burner Manufacturing Company, Yonkers, New York.
A. They standardized on both M-H and Perfex.
Q. Do you have any indication—estimate as to the—
A. (Interposing.) It is estimated that Perfex sold approximately 20 per cent of their requirements.
Q. That is in 1941?
A. That is in 1941.
Q. Do you have any independent recollection of how long that has been true, when they came in the picture?
A. I don't know when Perfex came into the picture.
Q. Do you know if you can find that out?
Mr. Gilpatric: Mr. Haycraft, it seems to me you are asking when a competitor came into the picture. The best thing would be to ask the competitor. You subpoenaed us in, you can subpoena the competitor. We have no way
165 of finding out other than picking up the information in the field.
Trial Examiner Sheppard: If this witness doesn't know, we will get the information.
Mr. Haycraft: The main thing that I want to get, Mr. Examiner, that I am trying to get from this witness, is what proportion of the business, if he knows, the M-H Company did with these firms that I mentioned, in the year 1937 and subsequent years. The information that he has there is for 1941, and I am asking him to go back from that and see if he can give the same type of information in previous years.
The Witness: It cannot be done, Mr. Haycraft, except on M-H controls.

Mr. Haycraft: There are the firms, the names I am giving, to which the 95 per cent clause contract was sent in 1937, then they were canceled. Now, I am trying to find out what per cent, or what proportion of their business they were getting at that time, or at that period, for the purpose of examination. If I cannot get it, of course, from this witness—

Mr. Gilpatric: We do not object to asking him, but we are objecting to asking him about finding anything.

Mr. Haycraft: I am asking him if he had anything in his records. I want to take his records or information for whatever it is worth.

By Mr. Haycraft:

166 Q. Do you have anything in your sales records to indicate when the Perfex Company began to sell?

A. To my knowledge, no.

Q. Now, the Goodrich Oil Burner Manufacturing Company, New Haven, Connecticut?

A. In 1941 it is estimated that Mercoid sold them 90 per cent of their requirements, and M-H 10 per cent.

Q. Do you know how long that has been?

A. I do not.

Q. The Greenwood Engineering Company, Glenarm, Maryland?

A. We estimated in 1941 that we, the M-H sold them our controls as standard equipment. I have no record of of any competitor.

Q. Lynn Products Company, Inc., Lynn, Massachusetts?

A. It is estimated in 1941 that Perfex sold them 10 per cent of their requirements, and we sold them 90 per cent. I happen to know that that did not obtain in previous years. Perfex was getting considerably more of their business in previous years.

Q. You don't know what the situation was in 1937?

A. I do not, Mr. Haycraft.

Q. Malleable Iron Fittings Co., Branford, Connecticut. I think we had that. Skip it.

A. Yes.

Q. Master Oil Burner Company, Seattle, Washington?

167 A. Our records show that we—that they standardized on M-H controls in 1941. I know they did not do that in previous years, that they were using competitive controls, but just what type, I don't know.

Q. You haven't any correspondence?

A. No.

Q. Messer Company, Newark, New Jersey?

A. They standardized on M-H controls in '41.

Q. Do you know how long they had?

A. I believe they used a majority of our controls in previous years. I have no record of competition.

Q. Micro-Westco, Inc., Bettendorf, Iowa?

168 A. They standardized on our controls in 1941. Now, in years previous, I know that they used a considerable quantity of Penn controls.

Q. Do you have any correspondence on that subject?

A. I don't.

Q. Mowhawk Oil Burner Manufacturing Company, New York?

A. I don't know. I do not have such a name listed in 1941.

Q. All right. Do you have any recollection of—

A. (Interposing.) I have a recollection, Mr. Haycraft, that that name was changed.

Q. Do you know what it is, or what it was changed to?

A. No, that is what I was trying to think.

Q. Can you look that up?

A. Yes, I will try to find that.

Q. Montag Stove & Furnace Works, Portland, Oregon?

A. It is estimated that Penn sold them 10 to 15 per cent of their requirements, and we sold them the balance.

Q. Do you know anything about the previous years?

A. I think that Penn sold them the previous year, but as to the split, I can't say.

Q. Muehlbach, Minneapolis?

A. I think they were out of business in 1941, Mr. Haycraft. I don't have anything on this. They were a smaller concern, and I would have to check the record on that. I have no recollection of it.

169 Q. National Devices Company, Bellmore, New York?

A. I do not have their name on the list here, and I think they are in the same category as Muehlbach.

Q. Will you check that also?

A. Yes, sir.

Q. Neis & Brechtl, West Allis, Wisconsin?

A. I am sorry. I don't have that name here.

Q. Oil Equipment Laboratories, Elizabeth, New Jersey?

A. This record indicates that was M-H with standard equipment.

Q. Old Colony Machine Works, Fall River, Massachusetts.

A. This record indicates M-H with standard equipment.

Q. Osher and Reiss, Inc., Brooklyn, New York.

A. I am sorry. I don't have that name, either.

Mr. Freeman: On page 2 of your list.

The Witness: I am sorry. Yes, here it is. It is estimated that Mercoid sold 15 per cent, and M-H the balance.

Q. Have you any information as to how long that was?

A. No, sir.

Q. Packard Oil Burner Manufacturing Company, Bridgeport, Connecticut?

A. That name is not on the list.

Q. Do you have any independent recollection of the firm?

A. Just by name only.

Q. Pan-American Engineering Corporation, Berkeley, California?

.170 A. It is estimated Mercoid sold them 10 per cent, M-H 90 per cent.

Q. Have you any indication of how long that was true?

A. No, sir.

Q. Penn Petroleum Products Company, Providence, Rhode Island?

A. M-H was standard equipment for 1941, but I don't know the situation in prior years.

Q. Petroleum Heat & Power Company, Stamford, Connecticut?

A. M-H was standard equipment in 1941, but I believe that they did offer Mercoid, and I have a faint recollection of Perfex.

Q. Have you anything on it there, or any correspondence or reports on that?

A. No, it just sticks in my mind in conversation regarding them, that they bought some Perfex controls, and I know in previous years they did use some Mercoid?

Q. Progressive Machine, Minneapolis?

A. M-H with standard in 1941.

Q. How about previous years?

A. And as well in previous years.

Q. Quiet Heet Manufacturing Corporation, Newark, New Jersey?

A. They used both Mercoid and Penn in 1941. It is estimated that they used 12 per cent Mercoid, and I
171 have no estimate on the other.

Q. What estimate have you got on your own?

A. Well, it would be the difference, and that is rather intangible.

Q. Do you know what the situation was in prior years?

A. And I know that they have purchased Mercoid controls for some years.

Q. Did you have any correspondence or reports on that firm with respect to that?

A. We have letters regarding Quiet Heet, mostly engineering data, and specifications, and that sort of thing, but most of their correspondence was handled right out of our New York office, that is the details attendant to their business.

Q. Didn't you have any correspondence with your New York office with respect to the standardization of the equipment with that firm?

A. No, other than this year when this report was made up. These figures I have given you are the New York office estimates.

Q. Did they report any attempt to standardize on Minneapolis-Honeywell controls, or what their success has been in previous years?

A. I can't say.

Q. Did you look through your correspondence files?

A. Yes.

172 Q. To find anything on that.

A. There was nothing bearing on that. The correspondence mentioned they have used Mercoid controls, and I knew that anyway.

Q. You had considerable correspondence with Quiet-Heet and also your New York office, and other customers of yours, with respect to the price at which Quiet Heet was selling their finished product?

A. That is true.

Q. Which we will go into at another time.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. Reliable Oil Burner Corporation, Madison, Wisconsin?

A. I am afraid they are out of business, too, because I don't have the name on the list, and my recollection is not reliable there, either, because they are a very small concern, and I never called on them.

Q. You don't remember. Roscoe Manufacturing Company, Seattle?

A. It was estimated in 1941 Penn sold them 5 per cent, and M-H sold them the balance.

Q. Do you know about previous years?

A. I can't be certain, but I do believe that they
173 used Penn controls in previous years, as well as ours.

Q. Does that indicate to you they probably standardized on yours 95 per cent?

A. Well, it would indicate to me that they probably used both. Now, whether they showed both in their price sheets or literature, I don't know.

Q. Silent-Flash Oil Burner Corporation, Brooklyn, New York?

A. That name is not on our record for 1941.

Q. Do you have any recollection of the same?

A. I haven't.

Q. Do you have any correspondence on it, or reports?

A. Not that I know of.

Q. S-K Company, Camden, New Jersey?

A. They standardized on M-H in 1941, and I believe they also did in previous years.

Q. Simplex Oil Heating Corporation, New York?

A. It is estimated Mercoid sold them 5 per cent, M-H the balance.

Q. Standard Products, Clinton, Massachusetts?

A. We were not doing business with them in 1941, and our previous history is hazy in my mind. I don't recall their history.

Q. You haven't any correspondence or reports?

A. No.

174 Q. Sunray Oil Corporation, Rockaway Park, New York?

A. I am sorry, I don't have that on here. Yes, Sunray. We do have it. They were standardized on M-H.

Q. Todd Combustion Equipment, Inc., New York City?

Mr. Freeman: Isn't that—

The Witness: (Interposing) That is an industrial burner.

Mr. Haycraft: It is?

The Witness: Yes, sir. They do not manufacture domestic burners.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. They do not have any domestic burners?

A. No.

Q. Volcano Burner Corporation?

A. Volcano?

Q. New York City.

A. They use Mercoid, Penn, Perfex, and M-H. It was estimated 25 per cent Mercoid. No estimate was obtained on the Penn or Perfex.

175 Q. Harry C. Weiskittel, Baltimore, Maryland.

A. They standardized on M-H in 1941. They are a small concern, and we sold them practically nothing in that year.

Q. Westchester Home Equipment Company, Mount Vernon, New York.

A. They standardized on M-H in 1941.

Q. Now, still referring to Commission's Exhibit 1, page 15, we have a list of some firms here that had seasonal requirements inserted in the blank number of sets. Some of those we have already gone over, and some we have not, and we will take those up now. The Bock Corporation, Madison, Wisconsin?

A. They made mostly hot water heaters, and that is another type of burner. I am afraid that is another name that would not apply here.

Q. It is not a pressure or a rotary burner?

A. No, sir.

Q. Diesel Burners, Inc., of Moosup, Connecticut?

A. They standardize on M-H.

Q. Do you have any reports on them?

A. No reports on competition at all.

Q. Electrol, Clifton, New Jersey?

A. They standardize on Perfex.

Q. When?

A. Well, it has been for some years. They also
176 used Penn in past years. They never used very much
of our equipment. It was estimated in 1941 that they used 25 per cent of our equipment and 75 per cent of Perfex.

Mr. Freeman: That also is one of the companies which makes its own primary controls, which has already been testified to.

Mr. Haycraft: I would like to have the witness tell us that.

The Witness: That is true, they have a special control that they mount along side of the blast tube.

By Mr. Haycraft:

Q. Have you made any attempt to get them to standardize on M-H?

A. Well, we haven't been very successful, as these figures show.

Q. Have you made any attempt to?

A. Certainly, we make an attempt with every customer to standardize on our controls.

Q. Do you have any reports or correspondence on that?

A. We know that there are men calling on them constantly. They are one of the manufacturers on our list, and I know those boys are trying to do a job.

Q. Do you have any reports on them or correspondence with respect to the subject matter I have asked you about?

A. No, sir. Again, that is another account that is
177 handled out of New York, and our New York man
calls on them.

Q. The Heil Company of Milwaukee?

A. They have standardized on Perfex for the past several years. In 1941 it was estimated that Perfex got 90 per cent of the business and M-H got 10 per cent.

Q. What was the situation in 1937?

A. I am hazy on that, Mr. Haycraft, because I don't know what year they started to use Perfex. They did use some Penn in prior years.

Q. Hi-Point, Bellefontaine, Ohio. That sounds familiar.

A. I thought we had that.

Q. I think we did.

Mr. Shute: Yes, you did.

Mr. Haycraft: Withdraw that.

By Mr. Haycraft:

Q. Scott-Newcomb, Incorporated, St. Louis.

A. They standardized on M-H in 1941, and M-H has been standard for the past two years. Just how many, I can't say.

Q. The Williams Oil-O-Matic Heating Corporation?

A. They use Mercoid, Penn and M-H; and it was estimated that M-H got 25 per cent of the business in 1941.

Q. What about previous years?

A. In previous years it would be less than 25 per cent for M-H, and the competition percentage would go up
178 proportionately.

Q. Do you have any correspondence on the attempt to standardize on M-H with that firm?

A. We try to sell them all the controls that we possibly could get them to buy, but we were not very successful.

Q. Do you have with you a record of sales to Williams Oil-O-Matic in those years from 1936 on?

A. That is data that we talked to Minneapolis about yesterday.

Q. How are they getting along?

A. I know that they are working on it. We got in a little bit of data this morning. A few of those Century files came down, part of them, but we haven't had a chance to go through them. Here is a figure on Williams for 1941, Mr. Haycraft, if that will help you.

Mr. Gilpatric: Mr. Haycraft, we seem to have some Williams files here.

Mr. Haycraft: May we take a few minutes recess?

Trial Examiner Sheppard: Yes, take a ten minute recess.

(A short recess was taken.)

179 Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. Referring to Williams Oil-O-Matic Company, which is to be identified here—these papers are photostatic copies of reports taken from your files?

A. Yes, sir.

Mr. Haycraft: Mark them the next exhibit number, will you please?

(The documents referred to were marked Commission's Exhibits 26 and 27 for identification.)

Mr. Haycraft: I offer in evidence Commission's Exhibits Nos. 26 and 27.

Mr. Gilpatric: No objection.

Trial Examiner Sheppard: They will be accepted in evidence.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 26 and 27, were received in evidence.)

By Mr. Haycraft:

Q. Now, referring to Commission's Exhibit No. 26, is J. C. Todd one of your salesmen?

A. Yes, sir.

Q. Who is Cornely, one of the customers—I mean one of your dealers?

180 A. Cornely was a dealer or distributor.

Q. And this Commission's Exhibit No. 27, was that—who published that? I mean, who got that out?

A. Charles Cochran, who was one of our salesmen in Chicago.

Q. And that was sent out to some of your other salesmen?

A. That was sent out to some of our other salesmen, as well as to myself.

Q. Now, do you recall what bracket the Williams Oil-O-Matic Heating Corporation was placed in in February, 1938, at the time of this 1938 contract?

A. That was a bracket 5 contract.

Q. That was your bracket 5?

A. I am quite sure that it was.

Trial Examiner Sheppard: Can you stipulate?

Mr. Freeman: The stipulation shows.

By Mr. Haycraft:

Q. What did you take into consideration in giving them the bracket 5?

A. The previous year we had been extremely conscious of this Robinson-Patman Law, and it was our interpretation that if we sold a customer in the price bracket and he did not earn that bracket, we could not give him the same price the succeeding year.

Now, in 1937, we gave Williams a price that was somewhat representative of the quantities that they bought from us in the previous year, and when that price was given
181 them, it was so high that they established a $7.50 dif-

ferential between competitive controls and M-H controls. In other words, their dealers had to pay Williams $7.50 per burner more if they got the M-H controls.

In 1938 we went into Williams Oil-O-Matic, and we quoted them our lowest price, which was still considerably higher than competition, so high, in fact, that they had to establish a price difference of $2.50 when the dealer purchased the burner equipped with M-H controls.

Q. So that your 1938 quotation in the No. 5 bracket to Williams Oil-O-Matic did not have any relation to the quantity they bought during the previous year?

A. No, sir. We had to recognize the competitive situation that existed there, and we did not come close to meet it.

Q. Is that the only year you did that with Williams Oil-O-Matic?

A. No, sir, we have done it with succeeding years.

Q. That is in 1939, 1940 and 1941?

A. Yes, sir.

Q. That was the first year that you did it?

A. To my knowledge, that is so.

Q. Now, is that true with any other of your accounts?

A. Yes, sir. I think there are other accounts where we quoted a price that was lower than their actual purchases from us entitled the customer.

182 Q. Of your bracket?

A. Correct. And yet, in no instance that I know of did we ever come close to meeting the competitive price that existed with that particular account.

Trial Examiner Sheppard: Will you give us a list of your customers that you did that?

The Witness: I will have to work that up, your Honor.

Trial Examiner Sheppard: Would you like to have it?

Mr. Haycraft: Yes, that is very important.

Trial Examiner Sheppard: I think we have to have that. Make a note of it and get that.

183 By Mr. Haycraft:

Q. You were questioned about the Malleable Iron and Fittings Company.

A. Yes, sir.

Q. And I have here some correspondence between your office and the New York Office with respect to that account. Will you glance through it and identify it, and I will have it marked for identification, with permission to substitute photostatic copies for the original.

A. Yes, sir.

Q. Look at all of them in that sequence, and I will identify them later.

(Handing documents to the witness.)

A. Yes.

Mr. Haycraft: Will you mark these Commission's Exhibits Nos. 28, 29, 30, 31, 32-A, B, C, 33-A, B, C, for identification?

(The documents referred to were marked Commission's Exhibits Nos. 28, 29, 30, 31, 32-A, 32-B, 32-C, 33-A, 33-B, and 33-C, for identification.)

Trial Examiner Sheppard: Miss Reporter, we overlooked admitting into evidence Commission's Exhibits 24-A and B and 25-A and B. We will do so at this time. There was no objection.

(The documents referred to heretofore marked for identification COMMISSION'S EXHIBITS 24-A and 24-B and 25-A and 25-B, were received in evidence.)

184 Mr. Haycraft: I now offer in evidence, Mr. Examiner, as Commission's Exhibit No. 30, a copy of a report—

Trial Examiner Sheppard: You had better start with 28.

Mr. Haycraft: 28 is a copy of a report, or rather a letter of instructions from J. W. Pauling, Home Office, to H. E. Chapler, July 8th, 1938. Exhibit 29 is an original report of H. E. Chapler of September 29, 1938, on the Malleable Iron and Fittings Company.

Exhibit No. 30 is a copy of a report of C. E. Swanson, Minneapolis, to J. J. Feigenbaum, Hartford, Connecticut, dated November 24, 1939, and Commission's Exhibit No. 31 is a copy of a report, or rather a copy of instructions from Swanson to Feigenbaum. The date is not shown, but it was received at the office on November 7th, 1939.

Exhibit No. 32-A, is a copy of a report from W. J. Brown of the New York Office, to Mr. Lockrae, with regard to the Malleable Iron and Fittings Company, dated March 25th, 1939.

Exhibits 32-B and C are copies of an announcement by the Malleable Iron and Fittings Company, with respect to Mercoid Controls.

Exhibit No. 33-A is a copy of a letter from A. H.
185 Lockrae, Minneapolis, to J. J. Feigenbaum, Hartford, Connecticut, dated January 16th, 1940. Exhibit 33-B

is a pencil notation memorandum attached thereto, and 33-C is the original report from Feigenbaum to Lockrae, or the Minneapolis office, dated January 13th, 1940.

Trial Examiner Sheppard: All right. These exhibits may go in, subject to the objection.

Mr. Gilpatric: I would like to object to one of them, your Honor.

Trial Examiner Sheppard: All right.

Mr. Gilpatric: Exhibit No. 32-B and C. It is a copy of a report sent out by the Malleable Iron and Fittings Company, apparently, to its trade. It seems to us to have no bearing at all on the issues in this proceeding. We object on the ground it is immaterial and irrelevant.

Mr. Haycraft: I think if counsel had seen the report he would not have said that.

Mr. Gilpatric: I have seen it.

Mr. Haycraft: Because the bulletin, Mr. Examiner, is referred to in this report to which it is attached, and it refers to the Mercoid control being substituted for the Minneapolis-Honeywell.

Trial Examiner Sheppard: Objection overruled at this time. If it develops later that it is of no value, we 186 will consider the motion to strike.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 28, 29, 30, 31, 32-A, 32-B, 32-C, 33-A, 33-B, and 33-C, were received in evidence.)

By Mr. Haycraft:

Q. I will ask you first whether or not you know, in 1938, whether the Malleable Iron and Fittings Company, were placed in the bracket No. 3, or 2, in your contract?

A. In that correspondence I would judge that they started the year in our second bracket, and later earned a retroactive credit.

Q. At least they intended to earn it?

A. They did earn it.

Q. What, in this correspondence, would indicate that they did actually earn it? Will you indicate that?

A. I was simply going by the pencil figures of Mr. Swanson.

Q. I would like to have you determine, if you can, whether or not they were placed in bracket 3, as a result of representations made and indicated in that correspondence?

187 A. In Mr. Swanson's letter to Mr. Feigenbaum, he indicated this customer had purchased sufficient instruments to earn a retroactive credit.

Q. About 800—

A. And I believe, and this I will have to check for you, Mr. Haycraft, that they did earn a retroactive credit that year.

Q. I am interested in finding out whether you gave them one?

A. That is what I will have to determine. I believe that we gave them a credit that year.

Trial Examiner Sheppard: All right, check on that.

By Mr. Haycraft:

Q. Who is Mr. Swanson?

A. Mr. Swanson was my assistant in Minneapolis; now in Australia.

Q. Who is Mr. Lapidus, mentioned in Commission's Exhibit No. 29?

A. He is president of the Quiet Heet Oil Burner Company, Newark, New Jersey.

Q. Now, in 1939 that same matter came up again, did it not, as to whether they should be in bracket 2 or bracket 3?

Mr. Freeman: It would be much better if he had that correspondence.

188 The Witness: I can't say without looking at that, Mr. Haycraft.

(Documents handed to the witness.)

The Witness: I will have to check on that.

Mr. Haycraft: Get the information on that for 1939, also.

The Witness: Yes, sir, 1938 and 1939.

Mr. Freeman: What you want to know is whether they actually earned a retroactive credit, and whether they got it.

The Witness: And when.

Mr. Haycraft: And when, for the two or three years—the two years, 1938 and 1939, under consideration here.

Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Haycraft: I ask that these papers be marked, please.

(The documents referred to were marked Commission's Exhibits 34, 35-A, 35-B, 35-C, and 36, for identification.)

By Mr. Haycraft:

Q. I now show you an Exhibit for identification, 189 marked Commission's Exhibit No. 34, which is a copy of an Inter-Office Communication from A. H. Lockrae to H. E. Chapler, dated March 1, 1941, with respect to Anchor Post Fence Company.

I also show you Exhibit No. 35-A, which is a copy of a report from Mr. Lockrae to Mr. Chapler, dated March 7, 1941, with respect to the same subject matter; and a note on the bottom thereof to John Pauling; and also Exhibit 35-B and C, a copy of a mail-o-gram, air-mail-o-gram, from the New York Office, Chapler, to the Home Office, Lockrae, dated March 4, 1941, with respect to Anchor Post Fence; also Commission's Exhibit No. 36 for identification, a report from Chapler, New York office, to Lockrae, Home Office, dated March 12, 1941, with respect to the same company, and ask you to identify that as correspondence taken from your files and passing between the individuals named.

(Handing documents to the witness.)

Mr. Freeman: We will concede that is such correspondence. We gave it to you.

Mr. Haycraft: All right.

The Witness: I identify it.

Mr. Haycraft: I offer it in evidence.

Trial Examiner Sheppard: All right, Exhibits 34, 35 and 36 are accepted.

190 (The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 34, 35-A, 35-B, 35-C and 36, were received in evidence.)

Trial Examiner Sheppard: Do you want to make copies of those, too?

Mr. Freeman: Yes, we do.

By Mr. Haycraft:

Q. On this Exhibit No. 34, who is John, mentioned in the first paragraph?

A. John Pauling.

Q. Who is Brannon mentioned in the second paragraph?

A. Brannon is with the Anchor Post Fence Company. I don't know his title. I know he is an official.

Q. In the last paragraph reference is made to the policy

of splitting their business. With whom were they splitting their business at that time?

A. With Perfex, and they had also split it in previous years with Perfex. Perfex was getting a majority of the business.

Q. The John mentioned in the third paragraph of Exhibit No. 35 is also Mr. Pauling?

A. Yes, sir.

Q. Who is Kingsman and Hanson mentioned in the note at the bottom of the page?

A. Kingsman and Hanson referred to were with Perfex.

191 Q. What was their positions?

A. Kingsman was vice-president and Hanson—I have forgotten his title, but they were both officials of Perfex.

Q. Sales manager?

A. I don't know, sir.

Q. The John Dorsey, was your man, mentioned in the second paragraph of 35-B?

A. Yes, from Philadelphia.

Q. And Brannon and Donahue mentioned there they were—

A. (Interposing.) Anchor Post.

Q. Anchor Post men.

A. Yes.

Q. I will ask you who Joe Hauf is, Joe Hauf mentioned in the second paragraph. He is mentioned twice.

A. He is an engineer with the Ray Oil Burner Corporation.

Q. Is that another one of your customers?

A. Yes, sir.

Q. In Baltimore?

A. Yes, sir.

Q. Who is Ted Smoot mentioned in the last paragraph of the page?

A. He is an engineer with Anchor Post Fence, or was at that time.

Q. And then Hobbs mentioned there in that paragraph, which relates to the Morton Oil Burner Company. Is

192 that another one of your customers in Malden, Massachusetts?

A. I think that Hobbs in this letter is connected with the Malden Company, the Morton Company, at Malden,

Massachusetts, and who were and are dealers or distributors of Anchor Post Fence.

Q. And who is Charley White?

A. He is our man in Boston at that time.

Q. Now, can you tell us now in which bracket the Anchor Post Fence was placed in in 1941? I notice that you presented a bracket No. 4 contract, but it does not appear from the correspondence that that was executed.

A. They were placed in bracket 4-A in 1941.

Q. 4-A?

A. Yes.

Q. What is the A?

A. That is one of the bracket numbers in 1941. That is in your stipulation.

Trial Examiner Sheppard: Is that stipulated?

Mr. Gilpatric: Yes.

Mr. Haycraft: Yes, I see it now.

By Mr. Haycraft:

Q. Now, is this one of the firms which has not earned their bracket in the preceding year, and the price was made because of the competitive price?

A. That is right; and in 1941 it was estimated that 193 Perfex still got at least 85 per cent of their business.

Q. And what bracket had this firm been in before, in previous years?

A. I will have to check that up to be certain. I think it was bracket 4, but I am not certain.

Mr. Haycraft: Mr. Examiner, that is all I have until I get some of the information requested yesterday, unless you have some of that.

Mr. Gilpatric: We have some of it.

Mr. Haycraft: Some of it has come in. We had better probably take a recess until after lunch to see what they have here; or do you have that ready now?

Mr. Gilpatric: Some of it we have.

Trial Examiner Sheppard: You may want to look it over.

Mr. Gilpatric: Some of it is just questions, according to my notes here. It is all right with us to take a recess now.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. On page 47 of the transcript I asked you certain questions with respect to White Rogers—pages 46 and 47, and asked who competed with you in the sale of the devices
194 to the White-Rogers Company, and you said you would look that up, you would like to look that up, look up the record on that. What did you find, or have you been able to look up the record?

A. I did not get any further information on that. Would you mind repeating that again, Mr. Haycraft?

Q. You were questioned with respect to manufacturers attempting to sell thermostats and limit controls to oil burner manufacturers to whom you were selling, and you mentioned the White-Rogers selling fan controls and other devices, and that several other manufacturers sold thermostats. I asked about those that were competing with you in the sale of control devices to oil burner manufacturers, what other ones besides the ones you had already designated, there were during that period, and you said you would look that up.

A. I believe I have included Penn, Perfex and Mercoid, did I not, and I think White-Rogers and General Controls, and Detroit Lubricator Company.

Q. The General Controls did not sell, didn't you say?

A. They were making thermostats—

Q. I understand, but that is not my question. My question was very carefully worded. My question was, what manufacturers were attempting to sell controls to the same people as you were selling controls to.
195 Mr. Freeman: He said, "attempted to sell".

Mr. Haycraft: Attempted to sell, yes.

The Witness: General Controls did attempt to sell.

By Mr. Haycraft:

Q. We have on the record here that they did not.

A. I am sorry, because I know definitely—

Q. (Interposing.) Page 45.

A. I know definitely they sold to the Ray Electric—

Q. (Interposing.) That is the General Electric, I will take that back. I stand corrected. General Controls you say then, did attempt to sell?

A. Yes, sir.

Q. What did they attempt to sell?

A. It was thermostats, limit controls and oil valves.

Q. What accounts, do you know, did they attempt to sell to?

A. I know definitely that they attempted to sell some of their products to the Ray Oil Burner Company.

Q. Go ahead.

A. Detroit Lubricator Company, and then I mentioned Delco Appliances.

Q. Delco Appliances came in that other classification. Do you know of any instance where Delco Appliances attempted to sell to Oil Burner Manufacturers?

A. I do not.

196 Q. All right.

A. I mentioned General Electric.

Q. You say they did not sell?

A. I since have been talking to Mr. Chapler last night, and found out that they did, and I think I can get you some data to show that they did attempt to sell.

Q. You do know that?

A. I have made a note of that and I will check up on that. Then the Electrol which was mentioned here this morning, which had their own Primary control.

Q. Did they attempt to sell that to one of your customers?

A. I am not sure, I am not sure. Then the Sampsell Electric Company.

Q. Where are they located?

A. In Spring Valley, Illinois, and I do know that they sold Sears, Roebuck, whom our competitors considered an oil burner manufacturer.

Mr. Haycraft: I move to strike that answer as not responsive to my question.

Trial Examiner Sheppard: It may go out, the latter part of it.

Mr. Freeman: Just so the record is straight as to what is going on, Sampsell still sells thermostats and limit controls for oil burner use.

Mr. Haycraft: That was not the question, Mr.
197 Freeman.

Mr. Freeman: What was the question?

Mr. Haycraft: I am conducting this examination in a certain way, and the witness is constantly answering something else, and volunteering information, and I don't think it is proper. When you come to your side of the case you can develop it to suit yourself, but I don't think the witness should do that constantly.

The Witness: The Spencer Thermostat Company of Attleboro, Massachusetts.

By Mr. Haycraft:

Q. What do they sell and to what oil burner manufacturers?

A. Well, they sell thermostats and limit controls; and I know they have tried, that they have offered them to manufacturers; what manufacturers they sold to, I can't answer that.

Q. What manufacturers did they offer them to?

A. I know for one, the Cleveland Steel Products Company.

Q. All right.

A. The Newark Boiler Regulator Company, Newark, New Jersey. I know that they sold limit controls and low water cut-offs to oil burner manufacturers. I have some other names, Mr. Haycraft, covering low water cut-offs, or is that what you want?

Q. If they are recognized as a limit control or
198 primary control or a thermostat, and they were offered to oil burner manufacturers, who were your customers, that same class of trade, yes.

A. That would be Bender-Warrick Company of Detroit, Michigan.

Q. Will you explain what a low water cut-off is?

A. A low water cut-off is a device that is placed on a steam boiler to prevent the boiler from going dry.

Q. Is that used in domestic installations?

A. Oh, yes. And the Donlon-Miller Company in Chicago, Illinois, make the same type of control.

Q. Something like a limit control?

A. It is a limit control.

Q. It is what you call a limit control?

A. Yes, except it stops the boiler, if the water in the boiler gets too low, it cuts it off. That is where it gets its name, low water cut-off.

Q. Then it is used in domestic installations?

A. It is commonly used in domestic installations, yes.

Q. It is commonly used in domestic installations with installations where the Minneapolis-Honeywell Primary control or thermostat is used?

A. That is right, or any make.

Q. Or any make?

A. Yes.

199 There is another name here, Julian E. Frieze. Now, I cannot say they ever sold limit controls to the oil burner trade, I don't know. They cataloged them and they were called on. They are in Baltimore, Maryland. That is F-r-i-e-z-e.

Q. Now, page 64 in the transcript, you said you would like to look at the matter of pre-season commitments.

A. Yes, sir.

Q. Have you done that?

A. Yes, sir.

Q. Incidentally, I notice in Commission's Exhibit No. 1—

A. (Interposing.) That is shown there.

Q. There is a notation at the bottom of the page, "A special concession in price was offered to four customers under condition that they place order for ten thousand sets prior to September 1, 1938."

That refers to the same subject, does it not?

A. In 1938 we offered four of our customers a proposition whereby they would order 10,000 controls prior to September 1st of that year. Three of those customers approved the plan, one of them did not, and as a result the entire plan was thrown out, and all four of those customers were given the same prices that were included in the plan.

In other words, it never became effective.

Q. I don't understand your answer on that. If you 200 gave them the prices included in the plan, they received the prices without the commitment?

A. We eliminated, in other words, the September 1st commitment. They didn't have to go ahead with the original at all.

Q. But they all went into group bracket 6?

A. They were right in group bracket 6, yes, sir.

Q. They got a special concession of price without the—

A. (Interposing.) They became our standard 6 bracket price.

Q. Were they the only ones that came within that standard?

A. They were the only ones that could meet that qualification at the time when that plan was set up. But when that plan fell through, the prices were extended to them and became the standard to our customers in the sixth bracket.

Q. That was 1938?

A. That was for 1938, for that year.

Trial Examiner Sheppard: Does the record show the names of those customers? Exhibit No. 1?

Mr. Haycraft: There was some mention of it.

The Witness: I would think so. I can name them.

By Mr. Haycraft:

Q. I guess you had better name them.

A. Delco Appliance Corporation, Gilbert & Barker Manufacturing Company, Holland Furnace Company, and Timken Silent Automatic Corporation.

201 Trial Examiner Sheppard: Which one of those didn't accept?

The Witness: I am sorry, I cannot tell you that. I could probably look it up, but from memory I just don't know.

Trial Examiner Sheppard: Well, three did accept and the other did not?

The Witness: Then the whole thing was opt.

By Mr. Haycraft:

Q. I was just going to ask you about that Timken account. I was just wondering whether or not that was one of the instances where you gave the extreme discount without them having earned it for the previous year, on account of the competitive situation.

A. It could very well have been, Mr. Haycraft, because Timken has always enjoyed our best price.

Q. In order to earn it, in 1938 he would have to purchase 15,000 sets or units?

A. I believe that is sets, sir.

Q. And that would be, on 15,000 sets, he would have to have at least 15,000 primary controls, wouldn't he?

A. Yes, sir.

Q. Refreshing your recollection on that—

Have you got something you can give me on that?

Mr. Shute: What?

202 Mr. Haycraft: Have you got something you can give me to refresh his recollection on that? If you haven't, I have.

Mr. Freeman: Well, use what you have got.

By Mr. Haycraft:

Q. Can you tell us whether or not your sales to Timken in 1938 amounted to 15,000 sets?

A. From these figures, they did not.

Q. Now, in 1939 you required—your highest bracket was

Bracket 5, and you required 10,000 sets, is that right? Is that your recollection?

A. If it is in the stipulation.

Q. It is in the stipulation.

A. Yes.

Q. Did they qualify in 1939?

A. They did not buy 10,000 sets.

Q. The same for 1940 and '41.

Do you have '40 there?

(Document handed to counsel.)

By Mr. Haycraft:

Q. Well, then, would you say the giving of the lowest bracket price to the Timken concern was to meet the competitive condition that existed there?

A. Yes, sir.

Mr. Haycraft: Let's go off the record.

203 Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. On page 77 of the transcript you said you were going to look up correspondence with the Century Engineering Company. Have you been able to do that?

A. Part of it came down this morning. It was not here in its entirety, and we did not have time to look through it.

Mr. Haycraft: Off the record again, please.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. You were to look into some correspondence, also, with the Automatic Oil Burner Corporation of Chicago. Have you been able to find any reports or correspondence on that account?

A. No.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

We will go until two o'clock.

(Whereupon, at 12:30 p. m., a recess was taken until 2:00 p. m., this day.)

204 Afternoon Session.

2:00 p. m.

Trial Examiner Sheppard: On the record.

ARTHUR H. LOCKRAE, resumed the stand and testified further as follows:

Direct Examination by Mr. Haycraft (Continued).

Q. Referring to the class of trade that you sold M-H temperature controls, I will ask whether or not you sell to furnace manufacturers or others who do not manufacture burners, giving them prices which you give to the burner manufacturers?

A. Our prices are set up, Mr. Haycraft, on each model, and that model carries its price in our various price brackets.

Now, that instrument is priced the same according to quantity to any manufacturer we might sell, whether a furnace manufacturer, a gas burner manufacturer, or what not.

Q. So then you do recognize that burner account, giving them the same discount as furnace manufacturers who may have burners manufactured for them?

A. That's right.

Q. In that connection, were the Osher & Reiss, the Pan-American Engineering Company, and Montag, were
205 they manufacturers of furnaces, or were they burner manufacturers?

A. Montag manufactured a burner and also a furnace. Pan-American, to my knowledge, made no furnace. They just manufactured a burner. I am not definitely sure but I think Osher & Reiss were in the latter category.

Q. Did you make any sales to Lennets Manufacturing Company?

A. Yes.

Q. Did they manufacture burners?

A. At that time they did not.

Q. Fox Furnace?

A. Yes, in years past we have made sales to Fox Furnaces.

Q. Did they have burners manufactured for them?

A. That's right.

Q. International Heating Company?
A. International—is the address there, Mr. Haycraft?
Q. Utica.
A. They are burner manufacturers, I believe, and they may or may not have been purchasing oil burners, or they may have been manufacturing. I am not sure.
Q. How about Westinghouse, Mr. Lockrae?
A. Westinghouse, I don't believe we ever sold them direct. They bought a burner with a control, and they use it with their furnace.
Q. Did they buy some controls direct?
A. They may have bought some controls direct from
206 us, but whether they were the oil burner controls we are talking about, I am not certain.
Q. In this deal which you had with the Cleveland Steel Products, wasn't there some arrangement there about allowing Cleveland Steel Products to be credited with the volume of business sent direct to some of their customers?
A. I think that was outlined in that letter that we were discussing yesterday.
Q. There was some such arrangement of that kind contemplated?
A. Yes, sir.
Q. Was that customarily your policy where a burner manufacturer sells his burner to a furnace manufacturer without controls, and the furnace manufacturer buys direct from Westinghouse, from the Minneapolis-Honeywell, that the burner manufacturer would be allowed to include as a part of his volume, the controls that were sold direct to the furnace manufacturer?
A. Yes, sir, that is true.
Q. Now, the sales of temperature controls to wholesalers or jobbers, what is your policy with respect to selling them as to discount?
A. Speaking of 1941, we had two prices to wholesalers. If a wholesaler would contract with us to buy $750.00 worth of equipment in a year, and to carry a stock of our controls,
which I believe was the equivalent of $200.00 in value,
207 they would get a discount of 25 and 25 per cent from our list prices.
Now, there are many wholesalers through the country that do not attempt to stock controls. They get an order and they place it with us, and we would ship them the order, and to that class of wholesaler we give a discount of 25 and 15 per cent discount.

Trial Examiner Sheppard: You would ship them direct?
The Witness: If they asked us to do it.

By Mr. Haycraft:

Q. Was that Class A the discount with reference to heating control units as distinguished from other products?

208 A. Well, they generally applied to what we term heating control thermostats, limit controls, water cutoffs and the like.

Q. Approximately how many jobbers did you sell to on that basis, each class?

A. Well, I would say that we probably have five hundred or more of those contracts, where we extend 25, and then 25 per cent discount, or in that neighborhood.

Q. About how many of the other?

A. Well, the other class, Mr. Haycraft, there is no contract on that. They are a recognized jobber, and they send us an order and automatically get 25 and 15 per cent discount.

Q. No contract basis?

A. No, sir.

Q. You use the same basic list price in going to jobbers as you do to the furnace manufacturers?

A. No, sir, Mr. Haycraft. Our list prices have no bearing on the price we extend a manufacturer. They apply where we are selling a wholesaler or where we are selling a dealer.

Q. There is no relationship between them?

A. No relationship. We just can't figure a discount on any of our prices.

Q. You sell dealers direct?

209 A. Upon occasion, yes, although that part of our business is very small. Ordinarily they will buy through their jobber.

Q. Approximately how many dealers' accounts would you say you have?

A. Well, Mr. Haycraft, the last time I saw any statistics there were recorded about 30,000 or more dealers throughout the country; and I know the percentage we have on our books would be extremely small, in comparison to that, but I have no idea as to the number. Our sales to them were extremely small and picayunish.

Q. Do you have a contract with the Chalmers Oil Burner Company?

A. They have been a customer of ours for a good many years, Mr. Haycraft.

Q. Do you know whether you sell them on contract or not?

A. I am pretty sure we had a contract with them in '41, and also the preceding years.

Q. They are a small concern?

A. Very small.

Q. Do you have a contract with the Aldrich Company, Peoria, Illinois?

A. Yes, sir.

Q. What type of control do you sell them? What type burner?

210 A. It is a gun type burner.

Q. Gun type?

A. Yes.

Q. You mentioned the Gilbert & Barker Manufacturing Company.

A. Yes, sir.

Q. What type burner do they manufacture?

A. Gun type burner.

Q. They are a pretty large concern?

A. Yes, sir.

Q. What is their trade name?

A. Gil-Barco.

Q. Is the Minneapolis-Honeywell standard on their burners?

A. They have standardized on Penn, and also on Minneapolis-Honeywell for several years.

Q. On both?

A. Both.

Q. Do you have a contract with the Harding Manufacturing Oil Burner Company, Chicago?

A. We did have, but they were out of business in 1941, if you remember. Harding built lathes, and the war effort took their entire capacity, and they just took their burner.

Q. I neglected to ask you about the Aldrich Company, did they standardize on Minneapolis-Honeywell?

A. No, sir, both Minneapolis-Honeywell and Mer-
211 coid, and I think they have also used some Perfex.

Q. What bracket are they in?

A. They are in our bracket 5, 1941.

Q. That is your highest bracket?

A. Lowest priced bracket, yes, sir.

Q Do their purchases justify such a classification?

A. My recollection is that they do, although I have got those records, Mr. Haycraft. They came in, and I can verify that very easily for you, if you wish me to.

Q. All right.

A. This record of 1941 shows that they purchased 31,735 units, and this abridged record for that year, which they sent down to me, is not split up as to what type controls were involved.

Q. You could not tell?

A. As far as the split up is concerned.

212 Trial Examiner Sheppard: In sets?

The Witness: That is right.

By Mr. Haycraft:

Q. The key would be the primary control, wouldn't it?

A. Yes, sir.

Q. In other words, if you bought 10,000 primary controls, that would be within the requirements?

A. Yes.

Q. How about the American Radiator Company, do you sell them separate from the Fox Furnace Company?

A. No, the American Radiator Company have not used any of our boiler controls for the last two or three years. That is the Fox Furnace Company.

Q. Back in 1939 they did, didn't they?

A. Yes, as I said yesterday, I believe there was one year when we sold them our oil burner controls.

Q. They were in bracket 5?

A. Yes, sir.

Q. Do your records show what percentage of the business of Century was M-H and what was something else?

A. I think I estimated that this morning.

Q. Will you check that?

(Examining documents.)

A. It is estimated that Penn Switch got 75 per cent of their business, and M-H got 25 per cent.

213 Q. When was that, in 1941?

A. 1941.

Q. What about previous years?

A. Well, I would say the ratio would hold pretty well for some years previous, but for just how many, Mr. Haycraft, I couldn't say, because I know Penn and we have been selling them for several years.

Q. Do you think it would be unreasonable or in line with your recollection that 95 per cent of Century's orders, Century's business was M-H controls?

A. In 1940?

Q. In 1940.

A. No, I don't think any such thing would be correct.

Q. Do you think that Mr. Lapner, if he testified to that, that he would be mistaken?

A. I think so, because I don't know how many burners they built, but I do know that Penn Switch was standard on all of the burners which they sold the Crane Company; and I know that represented a substantial part of their volume; at least I think it did, and we got none of that business in 1940.

Q. Well, that would probably account for it. The figure I had in mind had reference to the dealer business as distinguished from Crane. Would that reconcile it, do you think?

A. Well, I don't know. It is pretty hard to estimate the thing.

214 Q. He did not say how much business was Crane and how much was dealer. In other words, you would not know how the business was divided?

A. I couldn't say, in 1940. I would be very grateful if it were that way.

Q. Referring to the Micro-Westco Company, what is your estimate of your business with that firm in 1941?

A. In 1941?

Q. Yes.

Mr. Freeman: Hasn't that already been answered?

The Witness: In 1941 they standardized on the M-H controls.

By Mr. Haycraft:

Q. Was that true in previous years?

A. No, sir.

Q. What was the situation in 1938, 1939 and '40?

A. Well, I know that Penn Switch sold them a considerable quantity of controls prior to 1941, but I don't recollect just what specific years that involved.

Q. Do your records show what brackets they were in in 1939, 1940 and 1941?

A. I think—I have the 1941 record, and they were in our fifth bracket in 1941.

Q. Did they earn that in sales?

A. They did not.

215 Q. How about 1940; do you have any record of that? Do you know whether they earned fifth bracket in 1940?

A. I don't know what bracket they were in in 1940.

Q. They were in bracket 4, to refresh your recollection.

A. And what was the quantity stipulation in 1940 in bracket 4?

Q. 10,000—do you mean for 4?

A. 4, yes.

Q. 5,000.

A. Well, they did not earn it in 1940.

Q. How about 1939? That is the same thing, 5,000.

A. They did not earn it that year.

Q. Can you testify why they were placed in a higher bracket in those years, in 1940 and 1941?

A. It was purely a competitive situation.

Q. Who was the competitor?

A. Penn Switch Company.

Q. Do you have any correspondence or records on that company?

A. I doubt if there would be. I called on those people myself, Mr. Haycraft, and inspected their contracts, and so forth.

Q. Do you recall anything about that company building burners for furnace manufacturers?

A. They manufactured oil burners in 1941, and
216 some years earlier, there to, there was a number of furnace manufacturers to whom they sold furnaces. I don't know the names of them.

Q. Was that business taken into consideration in determining the bracket?

A. It might very well have been.

Q. What is your recollection on that?

A. I would say that it would have been taken into consideration.

Q. Do you have a recollection as to whether it was or not?

A. I don't.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Haycraft: I haven't anything further to ask the witness until the reports are forthcoming.

The Witness: We have them individually here, Mr. Haycraft, and we were discussing it at noon, and we thought it would be just as well if we prepared this list and got it on one schedule.

Mr. Haycraft: It would probably be easier to follow.

Mr. Gilpatric: Make it as one exhibit.

Trial Examiner Sheppard: It would be better to
217 prepare it that way, yes.

Mr. Haycraft: When can we have it, by Monday, or would you rather put it over until Friday?

The Witness: We can easily have it then.

Trial Examiner Sheppard: Better make it Friday, because you have these other witnesses Monday.

Mr. Freeman: Off the record, please.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

218 Trial Examiner Sheppard: On the record.

What is your desire, Mr. Haycraft, shall I excuse this witness until next Friday?

Mr. Haycraft: I think so.

Trial Examiner Sheppard: You want to take him up after we come back from the Milwaukee hearings?

Mr. Haycraft: Yes.

Trial Examiner Sheppard: All right. Mr. Lockrae, I will excuse you until ten o'clock on Friday, a week from today.

(Witness excused.)

Trial Examiner Sheppard: Is there anything else we can do now, gentlemen, or do you want to continue until Monday?

Mr. Haycraft: I have made an agreement with counsel for respondent that I would call the Mercoid witnesses Monday morning.

Trial Examiner Sheppard: Monday morning?

Mr. Haycraft: That would be the next step, now.

Mr. Gilpatric: Can you tell us which one you will call first, Mr. Haycraft?

Mr. Haycraft: Mr. Owens.

Trial Examiner Sheppard: We will adjourn, now, and reconvene Monday morning at 10:00 o'clock A. M., August 16th.

219 (Whereupon, at 2:45 p. m., August 13, 1943, the hearing in the above-entitled matter was adjourned.)

220

Room 1123,
New Post Office Building,
433 West Van Buren Street,
Chicago, Illinois,
Monday, August 16, 1943.

Met, pursuant to adjournment at 10:00 a. m. C. W. T.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and B. R. Shute, Esq., 15 Broad Street, New York, N. Y., and Bair & Freeman, by Will Freeman, Esq., 135 South La Salle Street, Chicago, Ill., appeared for the Respondent.

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Proceedings.

Trial Examiner Sheppard: Mr. Reporter, you may show a reconvening of this hearing pursuant to the adjournment taken last Friday.

Gentlemen, while I think about it, I will give you the designated points in Detroit and Cleveland. On August 23, Room 713 in the Federal Building, Detroit, and on August 26th in the Federal Building, Room 410, Cleveland, Ohio.

JAMES WILLIAM OWENS was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Sheppard: Give your name and address.

The Witness: James William Owens.

Trial Examiner Sheppard: And your address?

The Witness: 4448 North Mozart Street, Chicago.

Trial Examiner Sheppard: All right, gentlemen. You may proceed, Mr. Haycraft.

By the way, while I think of it, there were certain exhibits to be photostated, 28 to 36. Have you had those photostated?

222 Mr. Freeman: Yes.

Trial Examiner Sheppard: Have they been returned to the Reporter?

Mr. Freeman: Not yet. While you are at it, do you have the Room Number in the Federal Building at Milwaukee?

Trial Examiner Sheppard: August 18th, ten o'clock, Court Room, Post Office Building.

Mr. Haycraft: That is all we have. You will have to inquire from the Postmaster.

By Mr. Haycraft:

Q. Mr. Owens, what is your occupation?

A. Executive Vice-President of the Mercoid Corporation.

Q. How long have you occupied that position?

A. Since 1920.

Q. Since 1920?

A. Yes.

Q. What did you do before that?

A. I was for thirteen years with Manning, Maxwell and Moore.

Q. What business were they in?

A. I was in the division of that Company making heating specialties.

Q. While you have been vice-president of the Mercoid Company, what have been your duties?

A. I have been in charge of sales.

223 Q. What products does the Mercoid Company sell?

A. Automatic heating controls.

Q. To whom do they sell those products?

A. To companies manufacturing automatic equipment, such as oil burner manufacturers, stoker manufacturers, refrigeration, and industrial accounts.

Q. Has the Mercoid Company operated under that name all the time that you have been vice-president, or did it have another name?

A. Originally it was the Federal Gauge Company; and the Federal Gauge Company is still the holding Company

and the Mercoid Company is the operating Company. That was changed in 1928, I believe.

Q. How long have you been making automatic controls for oil burner manufacturers, suitable for use on oil burners?

Mr. Freeman: Of the domestic type.

Mr. Haycraft: Of the domestic type.

The Witness: Since 1922.

By Mr. Haycraft:

Q. Will you describe the type of temperature controls that you manufacture for use on oil burners of the domestic type?

A. Well, the primary control today is, or could be stack operated, a stack operated device, or a light operated device. The one that is most commonly used is the stack
224 control, mounted in the stack, for shutting down the burner in the event of flame failure; and it operates in conjunction with the room thermostat, which automatically stops and starts the burner through a change in the room temperature.

We also employ a limit control, which is installed on the boiler to prevent over pressure, starting and stopping with changes in pressure or temperature, depending upon the type of heating system. With warm air it is the change in the warm air temperature.

Q. At the present time you manufacture three different types of controls; that is, primary controls, the thermostat and the limit control?

A. We do.

Q. How long have you manufactured the three of them?

225 A. Well, we made our first primary controls back around 1924 and '25.

Q. And did you sell—

A. But the thermostat and limit controls we made since about 1923.

Q. Thermostats and limit controls since—nineteen when?

A '23.

Trial Examiner Sheppard: Does he sell them in sets?

By Mr. Haycraft:

Q. Well, when you make your sale of these controls, how are they sold? Are they sold in separate units, or do you sell them in sets, or both ways?

A. Well, I would say that the majority of the controls are purchased in sets.

Trial Examiner Sheppard: Well, that is from the purchasers' angle. Do you sell yours in sets?

The Witness: The oil burner manufacturer, we do.

Trial Examiner Sheppard: You do sell them in sets to the person who buys them from you?

The Witness: As a rule, yes. As a rule they buy the thermostats, primary controls and assortment of boiler controls. They are not packaged 1, 2, 3, but they buy 100 primary controls, are very apt to buy 100 thermostats,
226 and maybe 40-40-20, all three different types of limit controls.

Trial Examiner Sheppard: I see. That is what I wanted.

By Mr. Haycraft:

Q. Have there been instances where you have sold the thermostat and the primary control and not a limit control to the oil burner manufacturer?

A. Quite often.

Q. What would be the occasion for that?

A. Some of the burner manufacturers only furnish two controls with the burner, allowing the dealer to buy their own limit control.

Q. When you started to sell automatic temperature controls to oil burner manufacturers, who were your principal competitors?

A. Dating back to the earliest date?

Q. Yes.

A. Well, at that time Absolute Contactor was about the only other company actually offering oil burner controls to the oil burner trade.

Q. Well, what was the name of the firm?

A. Absolute Contactor Company. They were located at Beloit, Wisconsin.

Q. As time went on, what developments took place
227 in the industry in that regard?

A. Well, there was the Honeywell Heating Specialties Company had been making a control that was designed for coal burning, the same as Minneapolis, and along in 1927 Minneapolis and Honeywell got together, and from then on it was the Minneapolis-Honeywell Company, and they decided about that time that the oil burner field

looked pretty good, and they went into the oil burner control business.

Q. About 1927 or 1928?

A. Yes. They didn't amount to anything in that field until Honeywell came into the picture.

Q. That was about what year?

A. 1927. In the meantime, Penn Electric Switch Company started.

Q. Where are they located?

A. They were at that time at Des Moines, Iowa. They are now at Goshen, Indiana.

Q. About what year did they enter the field?

A. Well, it was about the same time, I believe, as Minneapolis-Honeywell got into the oil burner picture, that Penn came in.

Q. Then, as time went on, did other competitors appear?

A. Later on Absolute was taken over by Time-O-Stat Controls Company, and they later on were absorbed by Minneapolis-Honeywell. I think that happened along 228 about 1933.

Q. When did the Perfex Company come into the picture?

A. Perfex came in along about 1935 or '36.

Q. Now, did the Perfex Company manufacture the full set of controls at the beginning?

A. Yes, I believe they did.

Trial Examiner Sheppard: Where are they located?

The Witness: Milwaukee, Wisconsin.

By Mr. Haycraft:

Q. What method do you use in making your sale of automatic temperature controls for use on oil burners?

A. I am afraid I don't quite understand.

Q. Do you have any salesmen calling on the manufacturers, or wholesalers or dealers?

A. Oh yes, both, direct mail and through contact through sales representatives.

Q. Back before the war, back before 1941, say the period from 1936 on to 1941, approximately how many salesmen did you have calling on the trade?

A. 1937, we had three or four men in Boston, seven or eight more in New York, four in Philadelphia, one in Baltimore, one in Cleveland, one in Indianapolis, one in St. Louis, and five or six out of Chicago, and one in Kansas City.

229 Q. What were these men doing? What were their duties?

A. They were directly contacting the trade, selling Mercoid automatic controls.

Q. When you say contacting the trade, will you tell us what you mean by the trade?

A. They were calling upon oil burner manufacturers, oil burner dealers, as well as stoker dealer and industrial accounts, as well as jobbers and distributors of Mercoid controls.

Q. During that period of time did you make any calls yourself on the trade?

A. Yes, I was constantly on the road, probably putting in six months of the year traveling.

230 Q. Did you call on the same trade, the same class of trade, or did you just pick out special accounts?

A. I probably called on more or less special accounts.

Q. During this period of time, and by this period of time I mean from the time that you began making oil burner controls, automatic temperature controls for oil burner manufacturers; did you have any contact or sell any of your controls to the Automatic Burner Corporation of Chicago?

A. Yes, they happened to be one of our earliest accounts, one of the first oil burner accounts; and while we lost their business back around 1927 and 1928, we did keep on contacting them and kept after their business in different ways.

We were doing a lot of missionary work with some of the people to whom they were selling oil burners, and a few times succeeded in getting these companies to specify our controls.

Q. To that extent have you been able to sell to the Automatic Oil Burner Corporation since 1927 or '28?

A. Not every time.

Q. What was the reason for not being able to make sales under those circumstances?

A. Well, I couldn't say exactly; I only know what Mr. Hirsch told me at one time.

Q. And who is Mr. Hirsch?

231 A. He is President of the Automatic Oil Burner Corporation.

Q. What was the reason given?

A. Well, he advanced the reason at this particular time, that if he were to buy Mercoid controls it was going to cost

money; and he explained that in this way; that he had an arrangement with Minneapolis-Honeywell that if he did not reach a certain quota he would not get a credit; and not receiving that credit the Mercoid Controls probably cost him about $2.00 more a set; so he refused to furnish these controls of ours at this particular time to this account.

Q. How did your price compare with the Minneapolis-Honeywell price, or do you know?

A. I believe at the time that we offered the controls to Mr. Hirsch that there was a slight difference in our favor.

Q. What is the trade number for the various controls you described. Your primary control; how do you describe those?

A. The constant ignition today is referred to as Type JM. It was formerly known as KM. The intermittent ignition, formerly KM, is today known as JMI.

Q. When you say "known today," how long has it been known as JMI?

A. Well, for the last two to three years.

232 Q. How long have you been making a constant ignition control? Has that been all the time?

A. I would say since 1925.

Q. How long have you been making the intermittent ignition?

A. Intermittent, about 1927 or—about 1927.

Q. Do you know the trade number or description of the comparable products sold by Minneapolis-Honeywell to those two?

A. I consider the R116 as comparable to type KM. The R117 might be compared with the JMI, except they incorporate a re-cycling feature, which our control did not incorporate.

Q. How do you designate it?

A. Type H Sensatherm.

Q. What different designations do you have for your limit controls?

A. Well, DA31 is a pressure control, and the M41 and M51. Those are the warm air limit controls. Then we have various types of hot water controls, such as DA36, DA37, DA337, 115W, 35; and then we have low water cut outs also for pressure jobs. Those have various designations, for the low water cut outs.

Q. Now, do you know what the Minneapolis-Honeywell designation is for comparable controls?

A. I don't know their number; no, sir. I know
233 they call the hot water control Aquastat; and then they have the Pressuretrol. The warm air control, I don't recall that.

Q. But they have controls which are comparable?

A. Yes.

Q. Do you recall whether or not you have made any sales to the Cleveland Steel Products Corporation, Cleveland, Ohio?

A. Will you repeat that question?

(The question above referred to was read by the Reporter.)

The Witness: We have.

By Mr. Haycraft:

Q. When did you first make sales of automatic temperature controls to that manufacturer?

A. I believe our first sales were in 1935.

Q. Do you remember the type of control that you sold at that time?

A. The KM, type H Sensatherm and type KM primary control.

Q. There were no limit controls sold at that time?

A. There might have been. I have some notes here on that.

Trial Examiner Sheppard: You may refresh your mind from your notes if you want. Don't testify from the paper, but refresh your recollection and then testify.

Mr. Haycraft: We are talking about 1935.

234 The Witness: 1934 was the first year we sold.

By Mr. Haycraft:

Q. 1934?

A. Yes, some KM type and the H Sensatherm type, but I can't see any limit controls.

Q. How many did you sell in 1934?

A. 175 and 34 and 25—175 sets; 25 sets early in 1935 on an order that we had received for 1,000 sets, and that order was cancelled by the end of the year, because they had not—that had not been completed, and the order was cancelled. That was sold to them on the option of taking the balance at the end of the year or cancelling the order, and they cancelled the order.

Q. Do you know what type burner those were used on?

A. Gun type.

Q. Gun type. What did you do in 1935?

A. In 1935, when the balance of the 1934 order was cancelled, that was replaced on March 15th by an order covering 500 sets of controls. They completed that order and ordered another 150 sets besides, making 650 sets for 1935.

Q. When you say sets, what do you mean?

A. Type H Sensatherm and KM primary controls.

Q. There were no limit controls in there?

A. No.

Q. What happened in 1936?

235 A. Well, that year they bought 125, 175—275 type KM primary controls and 100 limit controls, and 315 type H Sensatherms.

Q. In 1937?

A. In 1937 they bought an even thousand sets.

Q. Of what?

A. Type KM Pyratherms and type H Sensatherms.

Q. In 1938?

A. Nothing. They bought 300 limit controls.

Q. 1939?

A. In 1939 they bought for Westinghouse 250 type KM and 250 H Sensatherms, and that was all.

Q. Did you make any contact with this account yourself?

A. Yes, I was in constant touch with Cleveland Steel.

Q. And who was the man that you contacted in that firm?

A. I generally conducted business with J. L. O'Brien.

Q. What was his position?

A. Well, he occupied several different positions there. He not only acted as buyer of controls, but also, I understand, supervised the factory.

236 Q. Was there anyone else you contacted there?

A. Each time I would visit there W. J. Smith was in. I would contact W. J. Smith.

Trial Examiner Sheppard: What was his position?

The Witness: I think he was vice president of the company.

By Mr. Haycraft:

Q. Some higher official, anyway, than O'Brien?

A. Yes.

Q. I noticed that your sales in 1936 were less than '35. Do you have any explanation of that?

A. No, except their business might have fallen off that year.

Q. Did you have any discussion with Mr. Smith and Mr. O'Brien as to your 1936 purchases, or your 1936 sales.

A. I don't recall at this time.

Q. Do you have any explanation of the lack of sales in 1938 and '39?

A. Well, I believe the main reason for the lack of sales in 1938 was the switching over to another make of control.

Q. Another make of control, with the gun type burner, you mean?

A. Yes.

Q. Do you know what other make control they switched to at that time?

237 A. Well, they told me at the time they were contemplating taking on the Perfex, and having their nameplate put on the controls, and I understand they did buy one hundred or two hundred sets of Perfex, but that was all. What they actually did, they switched over to Minneapolis-Honeywell one hundred per cent.

Q. Did you make any sales to Gould Oil Burner Corporation in Cambridge, Massachusetts?

A. I have a memorandum I took on that. What year was that?

Q. Back in '35 or '36, along in there.

A. No, we had not been selling them anything then. The first record I have of any sales is in 1937.

Q. What did you sell them in 1937?

A. Well, a total of 43 sets, consisting of Type KMI intermittent ignition control, Type 8 Sensatherm, and a limit control, and those were picked up out of our Boston stock. We have a branch in Boston, and then in that year they placed an order for 1,000 sets of controls, but they only ordered out 150 sets on that 1,000, and there was some financial difficulties that took place there, so that that order, as far as I could find, was never completed. Later on in the year, they bought 30 more sets of the same control, and on the same basis they had been buying before they bought the 1,000 sets.

238 Q. Do you know anything about the quantity of burners that firm puts out?

A. No, I knew very little about them. They are an Eastern outfit, and were handled by the New York office; in fact, I never called on them, myself.

Q. Referring back to this Cleveland Steel Products Corporation again, I neglected to ask you, did they manufacture the rotary type of burner, as well as gun type, during the time you were selling them?

A. Yes, they made both burners.

Q. Did you sell any temperature controls for the rotary type during that period of time?

A. Temperature controls?

Q. Yes, for the rotary type burner?

A. What do you mean by temperature control?

Q. What we have been talking about.

A. Well,—

Q. Automatic temperature controls?

A. We have never sold them any primary control or room thermostats for the rotary type.

Q. You sold them limit controls for the rotary type?

A. Well, they could have used our limit controls, the ones they did buy in say 1938; they bought 300 limit controls from us. They could have been used with either gun or rotary burners in conjunction with either our equip-
239 ment or competitive equipment.

Q. What type of burner did the Gould Oil Burner Corporation sell, manufacture and sell?

A. I judge from the sales, that it was a gun type burner.

Q. Have you had any experience in selling to the Malleable Iron Fittings Company, Branford, Connecticut?

A. I called on the company, and I know we have sold them.

Q. Do you remember when it was that you made calls and when you made sales?

A. I think the first time I called over there was in 1937.

Q. What type of burner do they manufacture?

A. I believe they make the gun type burner.

Q. What were you trying to sell them in 1937?

A. Primary controls, room thermostats, boiler controls.

Q. Were you able to make any sales in 1937?

A. No, I don't believe we did.

Q. Do you remember any reason why you were unable to?

A. I believe they had, at that time, an exclusive contract with Minneapolis-Honeywell.

Q. You say you believe. What led you to believe that?

A. Well, that is my recollection.

Q. Where did you get the information?

A. Well, at the time I called there, it is my recollection that they told us that.

Q. Did you make sales in 1938?

A. I believe that we started selling them along about
240 1939. I might be wrong about that. We might have sold them earlier than that, but I know at the outset, when we first called on them, they did have an arrangement with Minneapolis, and then they got into some kind of a misunderstanding, and we started to sell them, what date I could not say. I haven't any memorandum on it at all. I did not check that.

Q. You did sell them in 1939, and 1940?

A. I know we sold them back a few years ago. We started to sell them, and it was following a misunderstanding they had with Minneapolis-Honeywell, and I knew from what had happened that they had been an exclusive Minneapolis-Honeywell account.

Q. Have you had any experience in selling the Wayne Oil Burner, Fort Wayne, Indiana?

A. We have sold them on and off, over a period of years.

Q. What type burner do they manufacture?

A. Gun type.

Q. Do you remember whether you sold them any in 1937?

A. I believe we did sell some controls to them in 1937.

Q. You do not recall how many?

A. No, I don't know offhand how many controls we sold.

Q. Did you continue selling them all through since 1937, or have you been changing?

A. No, I believe about three or four years ago that
241 they started buying Perfex with their name on the nameplate.

Q. Did you ever sell any controls to Wisconsin Oil Burner Company, of Madison?

A. We have sold a few. They are a comparatively small company.

Q. Have you any recollection or record of about how many you sold them back in 1937 or '38?

A. I know we never sold them very many. If they bought fifty sets from us, that would be enough to cover their purchases of several years.

Q. Do you recall making any sales to the York Oil Burner Company, York, Pennsylvania?

A. Yes, we have.

Q. That type burner do they make?
A. Gun type.
Q. Have your sales to them been substantial?
A. They are fairly large. They made a fairly large number of burners, but our percentage, the percentage of Mercoid controls used, was small.
Q. Do you recall in 1937 approximately how many controls you sold?
A. No, I couldn't recall. While we might have done $3,000 worth of business with them, I do know the total requirements that Mercoid received was very small.
Q. Are you familiar with the Reif-Rex Oil, Buffalo,
242 New York?
A. Reif-Rex Oil, yes.
Q. Did you ever make any sales of temperature controls to them?
A. No.
Q. What type burner do they manufacture?
A. I believe they make a gun type.
Q. Do you have any reason for not making sales there?
A. Just one of those accounts we couldn't break into.
Q. Do you know who did make their temperature controls?
A. Well, I was under the impression Minneapolis-Honeywell enjoyed their business.
Q. Are you familiar with the Carter-Korth Oil Burner Co., Roselle Park, New Jersey?
A. Yes, sir.
Q. Did you ever make any sales of oil burners, temperature controls to that firm?
A. Yes, sir.
Q. In what quantity?
A. I believe we enjoyed a good percentage of that company's business.
Q. What type of burner do they manufacture?
A. Gun type.
Q. Do you remember when you started selling them?
A. Back quite a few years. I think as far back as 1933.
243 Q. And you enjoyed business all the length of time since then?
A. Well, there was some changes in there. They just wound up as the Korth Oil Burner Company. Jack Korth, head of the Carter-Korth Oil Burner Company died, and

Arnold Eckhart took it over as the Korth Oil Burner Company.

Q. Have you continued to sell them since 1933 or 1934?

A. Yes.

Q. Hi-Point Corporation, Bellefontaine, Ohio, have you made sales to that firm?

A. We have sold them controls up until 1941. We get a few sets each year from them.

Q. What type burner do they manufacture?

A. Gun type.

Q. How do you account for your selling a few sets each year? Is it a small outfit, or did you enjoy any portion of their business?

A. Well, they were a small outfit, but what we received I do not believe would represent more than 25 per cent, not more than 25 per cent of their total business.

Q. Are you familiar with the Gar Wood Industries, Detroit, Michigan?

A. I am.

Q. Did you make any sales to that firm?

A. We did not.

244 Q. What?

A. We did not.

Q. Have you contacted the account yourself?

A. I have.

Q. During what period of time? Over what period of time?

A. Well, in the last eight or ten years, perhaps longer than that.

Q. What type burner do they manufacture?

A. They made a gun burner.

Q. Are you familiar with the General Oil Burner Company, Baltimore, Maryland?

A. I am.

Q. Have you made sales to that firm?

A. Yes, we have. We have sold General Oil Burner at Baltimore.

Q. What type burner do they manufacture?

A. A gun burner.

Q. Do you have all their business?

A. I believe so. It is my recollection that we enjoy a good percentage of their business.

Q. Are you familiar with General Oil Heating Corporation, West New York, New York?

A. I am.

Q. And what has been your experience in selling that account?

245 A. As far as I know, we get the majority of their control business.

Q. Has that been true of the last few years?

A. It has been for quite a few years.

Q. What type burner do they manufacture?

A. A gun type.

Q. Are you familiar with the Goodrich Oil Burner Manufacturing Corporation, New Haven, Connecticut?

A. To some extent, yes.

246 Q. Do you recall whether you made any sales to that firm in 1937?

A. I believe we enjoyed their business that year.

Q. Was it that year or the following year?

A. Well it was around 1937 or 1938. It seems to me that we had the business for a couple of years in a row.

Q. What type of burner did they make?

A. Gun type.

Q. Are you familiar with the Fairfield Oil Heating Company of Greenwich, Connecticut?

A. I am.

Q. Have you had any experience in selling to that firm?

A. We have sold them, I couldn't say what year, or to what extent, but I do know that we sold them some controls.

Q. What type of burners do they manufacture?

A. Gun type.

Q. Are you familiar with the firm of Petroleum Heat and Power Company, at Stamford, Connecticut?

A. I am.

Q. Did you sell them any temperature controls?

A. We sold them temperature controls, oh, for a period of—wait a minute, I have a note here on that.

(Examining papers.) —In 1937 and '38 we did sell them what we call temperature controls, but they were used on large pre-heaters for large industrial burners; and

247 we sold them quite a nice sizeable quantity of those controls.

Q. Did you sell them any controls for domestic oil burners?

A. No, not outside of a few limit controls and low water cut-outs and relays. What those were used on, I couldn't say.

Q. Do you know who were selling them temperature controls for their domestic burners?

A. I was under the impression that they were buying from Minneapolis-Honeywell.

Q. Are you familiar with the firm of Electrol Incorporated, Clifton, New Jersey?

A. Yes, sir.

Q. Have you had any experience in selling temperature controls to that company?

A. No; they about that time, in 1937—they were making their own primary control. We sold them mercury tubes and gave them a free license on the circuit, on the circuit control, on the patent which we had; and they in turn bought all the mercury tubes from us, and also a number of pressure gauges. Our sales amounted—

Q. Did you sell them sets of temperature controls?

A. No, we haven't sold them any sets.

Q. Or any Sensatherms or Pyratherms?

A. No, sir.

248 Q. What type of oil burner do they manufacture?

A. Gun type.

Q. I neglected to ask that question with regard to the Petroleum Heat and Power Company. What type do they manufacture?

A. They have the gun and the rotary type, a horizontal burner.

Q. Are you familiar with the Hi-Point Corporation, Bellefontaine, Ohio.

Mr. Freeman: You asked that once.

By Mr. Haycraft:

Q. Are you familiar with the Quiet Heet Manufacturing Corporation, Newark, New Jersey?

A. Yes, sir.

Q. Back in 1937 and '36 did you sell them any temperature controls?

A. Well, I know we enjoyed their business at the outset, and they finally got to be a good sized manufacturer; and about that time one of our competitors stepped in and took the business over.

Q. What do you mean?

A. About the time they got selling a decent number of burners. I think that was around 1936 or '37.

Q. How long had you been selling them before that?

A. Oh, a couple of years.

249 Q. Do you remember who the competitor was that sold them at that time?

A. Minneapolis-Honeywell.

Q. How long did you sell them before that?

A. Oh, a couple of years.

Q. Do you remember who the competitor was that sold them at that time?

A. Minneapolis-Honeywell.

Q. Are you familiar with the Volcano Burner Corporation of New York City?

A. No, I am not.

Q. Do you know whether you made any sales to them or not, or do you know anything about them?

A. I don't recall just what we might have sold Volcano. It is familiar to me, but I don't recall what we sold, if anything.

Q. Are you familiar with the Simplex Corporation of New York City, New York?

A. Yes, sir.

Q. What experience have you had in attempting to sell temperature controls to that corporation?

A. I don't think we really sold them anything. Maybe we sold them an odd control here and there. As far as I know, they have never given us any of their business.

Mr. Hayeraft: That is all, Mr. Examiner.

250 Trial Examiner Sheppard: Cross-examine.

Mr. Gilpatric: May we have a few minutes recess, please?

Trial Examiner Sheppard: Yes, we will take a five minute recess.

(A short recess was taken.)

Trial Examiner Sheppard: On the record. All right, proceed with the cross-examination.

Cross-Examiation by Mr. Gilpatric.

Q. Mr. Owens, you mentioned your Company enjoying a small percentage of the control business of the Automatic Oil Burner. Do you know the other manufacturers controls that were sold to that oil burner company?

A. No, I would just have to guess.

Q. Isn't it a fact that the Perfex sold controls to that Company?

A. In what year?

Q. 1937 and 1938, in that period of time, and since that time?

A. No, I don't believe that Perfex sold them back at that time. They might have sold them at a little later time than 1938; but I don't believe in 1937 or '38 Perfex enjoyed any of their business.

Q. You testified on direct that Minneapolis-Honey-
251 well stepped into the Quiet Heet business in 1937 and 1938. It is a fact that you continued to sell them controls since that time, is it not?

A. Nothing to brag about.

Q. But you have sold them controls?

A. We sold them some controls. Back along about 1939 I believe Mr. La Pedus came into my office; and I think the only reason he bought those controls was to put a little pressure on Minneapolis-Honeywell as to price.

Mr. Gilpatric: I object to the last part of the statement as not responsive, and ask that it be stricken.

Trial Examiner Sheppard: It may go out.

By Mr. Gilpatric:

Q. Did you sell any in 1940 to Quiet Heet?

A. No, we did not.

Q. Or 1941?

A. We sold them one year; it might have been 1939 or it could have been 1940; but he never completed that one order that he gave us; and that is the reason that I interposed that other remark. I wanted to clear up that point, that he gave us this one order and he didn't finish the order. He may have taken some of it the same year, and some the following year.

Q. Do you have any memorandum there to refresh your recollection?

252 A. I don't have to have any memorandum on it. The order was completed mostly in 1939. That is, the order was shipped, what part of it that was shipped, was shipped in 1939 and 1940; but not in its entirety. In 1941 we enjoyed some of their business, and about one-third as much in 1942.

Q. So that it is a fact that during those latter two or three years you did ship controls to Quiet Heet Company?

A. I would say about 7 per cent—6 or 7 per cent of their total requirements.

Mr. Gilpatrick: That is all.

Trial Examiner Sheppard: Any redirect?

Mr. Haycraft: No.

Trial Examiner Sheppard: Thank you, Mr. Owens. You may be excused.

(Witness excused.)

Mr. Haycraft: May we have another recess? I have another witness coming in. May we have a ten minute recess, please?

Trial Examiner Sheppard: Yes, take a recess for ten minutes, awaiting another witness.

(A short recess was taken.)

253 Trial Examiner Sheppard: All right, gentlemen, we will come to order.

Mr. Haycraft: I will ask Mr. McCabe to take the stand.

Trial Examiner Sheppard: Give us your name, Mr. McCabe.

Mr. McCabe: Ira Emmett McCabe.

Trial Examiner Sheppard: Your address, Mr. McCabe?

Mr. McCabe: 5806 Newark Avenue, Chicago.

Trial Examiner Sheppard: Rise to your feet, hold up your right hand, and I will take your oath.

IRA EMMETT McCABE, was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Sheppard: Speak up loud, so the gentlemen over there can hear you, and also Mr. Haycraft and myself.

All right, go ahead.

By Mr. Haycraft:

Q. What is your occupation, Mr. McCabe?

A. Inventor and engineer.

Q. Do you have any official position with the Mer-
254 coid Corporation?

A. Chief Engineer of the Mercoid Corporation, also chairman of the board of directors.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. Have you had anything to do with the development of the products manufactured by the Mercoid Corporation?

255 A. All the products, the majority of the products come under my department and are developed in my department.

Mr. Haycraft: Mr. Examiner, I have here some catalogues of the Mercoid Corporation that I would like to put in evidence. There are two or three of them which are the only copies the company has.

Mr. Freeman: We will accept photostats.

Mr. Haycraft: I thought we might take them down to Washington and photostat them and return the original to the Company.

Trial Examiner Sheppard: Will that be satisfactory to you gentlemen?

Mr. Freeman: Yes, just so that the originals will be available if we want to look at them.

Trial Examiner Sheppard: Mr. Reporter, mark these catalogues beginning with 37.

(The documents referred to were marked Commission's Exhibits Nos. 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49 and 50, for identification.)

Trial Examiner Sheppard: Under agreement of counsel, Mr. Reporter, those exhibits will be received for the record, 37 to 50 inclusive.

(The documents referred to heretofore marked for identification COMMISSION'S EXHIBITS NOS. 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49 and 50, were received in evidence.)

256 By Mr. Haycraft:

Q. Do these catalogues contain a description of all of the products sold by the Mercoid Corporation during that period of time from 1934 until 1943?

A. It would not contain all, it would contain most of them.

Q. It would contain most of them?

A. We have some products which we do not have in there.

Q. Would you say that they contain most of the products sold to oil burner manufacturers during those years?

A. Yes.

Q. And do they contain the prices at which controls were to be sold?

A. Yes. The prices shown here are list prices.

Q. To what class of trade do they apply?

A. Well, that would be to the consumer.

Q. To the consumer?

A. I imagine so. I am not on the selling end of the business, I couldn't say for sure. I do know that these are list prices, and there are discounts to various classes of trade.

Trial Examiner Sheppard: Do you furnish these catalogues to jobbers?

The Witness: Yes.

257 By Mr. Haycraft:

Q. Do you furnish them to your salesmen in calling on the trade?

A. Yes.

Q. Will you indicate or testify as to the primary control, the thermostat and limit control that was most popularly sold to the oil burner manufacturers for use on oil burners; what type of primary control, limit control and thermostat?

A. Well, we have several types in there. How far back do these catalogues go?

Q. Let us take 1936, and indicate by page reference and description the different controls that were sold to oil burner manufacturers during that year?

Mr. Freeman: Give us the catalogue number and the exhibit number, so that we will have some sort of a record from here on.

258 A. Catalogue "C," I believe this is C-40, Commission's Exhibit 40. This is our 1936 catalogue, No. 100A, on Page 13, is KMI, the KMI Pyrotherms.

Q. Well, it is your primary control?

A. Yes, that was the primary control, at that particular time.

Q. All right.

A. In 1936.

Q. Will you also, then, describe in the same way, your thermostat and the limit control?

A. Yes. Of course, there are a variety of limit controls. The thermostat is shown on Page 3.

Mr. Freeman: Page 3?

The Witness: And 4. Does that answer your question?

Mr. Haycraft: Yes.

By Mr. Haycraft:

Q. Then the limit control?

A. The limit controls were shown on Pages 6—and pressure controls and vacuum controls and high pressure controls; Page 7 is warm air limit and fan controls, also lever air controls, and Page 8, hot water controls of both immersion and clamp-on types. Page 9 is also additional models of hot water controls, and on Pages 10 and 11 were combination low water and pressure controls, and low water
259 controls only.

Q. In that catalogue do you have, you say, a fan control?

A. Yes.

Q. I think it is on Page 7?

A. Page 7.

Q. What was the purpose or function of that fan control?

A. That was used to limit the temperature for the furnace, where it was operating as an oil burner, as you asked me, to prevent overheating of the furnace, by reversing it, so that instead of it being normally closed, in low temperature, it was normally open, and we use it as a fan control.

Q. During that year did you sell what is known as a combination fan and limit control?

A. Not in 1936.

Q. What is the first year you sold the combination fan and limit control?

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: It is first shown in our 1938 catalogue.

Trial Examiner Sheppard: What is the exhibit number?

The Witness: No. C-45.

260 By Mr. Haycraft:

Q. And your catalogue number is—

A. 100F. It may have been introduced earlier than that. That is the first catalogue it is in.

Mr. Haycraft: Mark this Commission's Exhibit 51, for identification.

(The paper referred to was marked Commission's Exhibit 51, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 51, for identification, which is a bulletin, sales advertisement of some kind, entitled "Mercoid Combination Fan and Limit Control for Warm Air Furnaces," and ask you if that describes the combination control and if so, when it was published or put on the market, if you can tell?

A. That is the control, and here it says 32,000, June, 1937, on this bulletin.

Mr. Freeman: Just a little louder, please.

The Witness: There is a notation on the last page, down in the left hand corner, that designates—it says that 32M-6-37. It also says, copyright, 1937, the Mercoid Corporation.

Mr. Haycraft: We offer this in evidence.

Trial Examiner Sheppard: Any objection, gentlemen?

261 Mr. Freeman: We might look at it. Is that one of your M80 circulars?

The Witness: Yes.

Mr. Freeman: Where does it come from, Mr. Haycraft? Is it one Mr. Royal picked up, or somebody?

Mr. Haycraft: Yes.

Mr. Freeman: Mr. Haycraft, who is this Mr. Moore, whose name appears upon the circular? Just so we get that straight, Langdon Moore?

Mr. Haycraft: I can't tell. That part is not in. He did not know anything about it.

Mr. Freeman: Do you want to introduce it with it on or off?

Mr. Haycraft: With it off.

Mr. Freeman: No objection.

Trial Examiner Sheppard: Let Exhibit 51 be accepted in the record.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 51, was received in evidence.)

By Mr. Haycraft:

Q. How do you describe this Mercoid combination fan and limit control in the business, what terminology do you give to it?

A. Mercoid type, M80, combination fan and limit control.

262 Q. Did it replace any other device used for the same purpose?

A. I might take the statement of the catalogue, which states that the Type M80 Mercoid warm air control is a duplex instrument, combining within one case, all the well known, field proven features of the Type M51 limit control, and the Type M53 fan control.

Q. Those are the controls you had been selling previous to that time?

A. Yes.

Q. Now, did you continue to sell these controls through 1938 and 1939?

Mr. Freeman: What controls are you referring to, by "these" controls?

Mr. Haycraft: I will say this control, Mercoid combination fan limit control, Type M80?

The Witness: Yes.

By Mr. Haycraft:

Q. I notice the price which you first brought out was $15 to the consumer. Do you know what price they were quoting to the manufacturer? Do you know what price you sold the combination fan control at, when you first brought it out?

A. I would have to look it up. I am not familiar.

263 Q. I am talking about the oil burner manufacturer, not the consumer. Do you remember the price you sold them at?

A. I would have to look up the prices, for I don't carry those in my head, but I can find out for you.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: $6.75 to $7.50.

By Mr. Haycraft:

Q. Did there come a time when you were notified or apprised of the fact that this M80 combination fan and limit control was alleged to be an infringement of a patent known as the Freeman patent, owned by the Minneapolis-Honeywell Regulator Company?

A. Yes.

Mr. Freeman: We will concede that it was, and that will save time.

Mr. Haycraft: If you please, Mr. Examiner, I am conducting this examination.

By Mr. Haycraft:

Q. When did you first learn that, and under what circumstances?

A. I think the latter part of 1939 or early in 1940
264 they discussed with us the possibility of a license under that patent.

Q. With whom did you discuss it?

A. There were various ones. I remember there was Mr. Harold Sweat, I believe, Mr. Huff, up in Minneapolis, I think.

Q. Any one else from your firm?

A. Well, at one time I believe there were others; I believe there was Mr. Owens at one time, and another time Mr. Courteol.

Q. Where did this discussion take place that you have referred to?

A. I think it was over at the Blackstone Hotel one time, and another time I think it was discussed at one of the NEMA meetings down east.

Q. By NEMA you mean National Electric Manufacturers Association?

A. The National Electric Manufacturers Association.

Q. When was that?

A. I don't remember exactly the date. I thought I had a paper here to determine that.

Trial Examiner Sheppard: It was sometime after the first one, wasn't it?

The Witness: Yes, it was.

By Mr. Haycraft:

Q. What was the proposition that was put up to
265 you by the Minneapolis-Honeywell officials?

A. Well, they told us that we could accept a license under this patent, and we were to pay them a royalty, I think of 25 cents an instrument; and they were to fix the sales price of the instrument; and they submitted an agreement to us, which we finally rejected on account of our inability to reach an agreement on account of the price fixing arrangement in it. That contract was handed to us sometime prior to April 10th, because I have a record that was submitted to us—

Mr. Gilpatric: What year?

The Witness: Of 1940. We received an opinion from our attorneys on the 18th of April.

Trial Examiner Sheppard: 1940?

The Witness: 1940.

Trial Examiner Sheppard: And then you rejected this?

The Witness: We rejected it on our objections.

By Mr. Haycraft:

Q. Then was there a suit? Did you get notice of a suit? Did you get notice of a suit being instituted later than that?

A. Yes, at a later date they advised us that they were going to file suit; but inasmuch as we had had previous difficulties with infringement suits, where they filed suits against our customers, and then they would be dropped,
266 we moved to file a suit by a declaratory judgment on the agreement.

Q. And that resulted in a suit which is now pending in the Courts?

A. Yes, sir.

Q. In the United States Supreme Court?

A. Yes, sir.

Mr. Haycraft: I will have these marked for identification.

Trial Examiner Sheppard: Mark them beginning with Exhibit 52.

(The documents referred to were marked Commission's Exhibits Nos. 52 and 53, for identification.)

Mr. Haycraft: I have had marked for identification the transcripts of record, Volume 1 and Volume 2, entitled Mercoid Corporation *vs.* Minneapolis-Honeywell Regulator Company;—the Mercoid Corporation, Plaintiff-Appellee *vs.* Minneapolis-Honeywell Regulator Company, Defendant-Appellant No. 8019 and the Mercoid Corporation, Plaintiff-Appellant *vs.* Minneapolis-Honeywell Regulator Company, Defendant-Appellee, No. 8020, Appeals to the District Court of the United States for the Northern District of Illinois; transcript filed May 23, 1942.

Now, there are some items in this record that I would
267 like to refer to. As a matter of fact, I wish to offer them in evidence, with permission to have them withdrawn for the time being and put in later, because I understand the Respondent has a copy of this exhibit which it can use. This set is being used by the witness' attorneys at the present time in that litigation, and they do not want to part with them.

Mr. Freeman: Why don't we agree now that you can put in photostatic copies of any of the pages that you want. We certainly want to object to 2,000 pages of record going in for the purpose of proving something which may appear on three or four pages. I think it is an imposition, if the Respondent has to appeal this case, to have to print 2,000 pages.

Mr. Haycraft: You would not have to do that. It would go in as a physical exhibit.

Mr. Freeman: Why not put in the three or four pages as a photostat copy, as an ordinary exhibit?

Trial Examiner Sheppard: You gentlemen may get together and agree on exactly what you want.

Mr. Freeman: We have no objection to any part of it going in but—

Mr. Haycraft: (Interposing.) This will never be printed in the record. It is always a physical exhibit, and will be handled as such.

Mr. Freeman: With that understanding, that it will 268 be a physical exhibit, all right.

Mr. Haycraft: Very well. I want to refer to only a few pages at this time, but there may be other pages we may have to refer to in our brief, and also the Respondent may want to refer to other pages. Of course, this will depend on what the future development of the case is in the Courts. I am merely putting this in as a foundation.

Let me put it this way; certainly, in the event that the Court, the Supreme Court should decide in favor of the Respondent, then the Commission will have to look at the record to see whether they want to dismiss this case based upon the opinion of the Supreme Court. In order for them to do that, we will have to have all of the record.

Mr. Freeman: That is your problem, not ours.

Mr. Haycraft: That is the reason I am presenting it at this time. If that can be stipulated, I would like to have these received in evidence as our exhibits.

Mr. Freeman: Yes.

Mr. Haycraft: With that understanding.

Trial Examiner Sheppard: All right. With that understanding, gentlemen, I am going to accept Exhibits 52 and 53 for the record, for whatever use either side wants to make of them.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 52 and 53, were received in evidence.)

269 By Mr. Haycraft:

Q. Mr. McCabe, at the conferences that you had with officials of the Minneapolis-Honeywell Corporation, were there any representatives of any other manufacturers of temperature controls present?

A. There were, I believe—I kind of forget who they were, I don't have those records. I thought I brought them, but I don't see them here.

Trial Examiner Sheppard: Just tell from your memory.

The Witness: I remember at one of the meetings there people from the Detroit Lubricator.

By Mr. Haycraft:

Q. Do you remember who they were?

A. I think Mr. Swan and Mr. Hodges. And there were people from White-Rogers.

Q. Where are they located?

A. At St. Louis.

Mr. Freeman: Now, is he giving us the names of people or the names of companies? White-Rogers happens to be the name of a firm.

Mr. Haycraft: He said that there were people from that firm.

The Witness: I think it was Mr Rogers, if I am not mistaken. And there were two or three meetings, but I
270 don't remember just at which ones they were. At some of the meetings I believe some people from Penn were there, and Perfex.

By Mr. Haycraft:

Q. Who was there from the Perfex Company?

271 A. I think Mr. Luthe was one of them.

Q. At the meetings where these representatives of companies were present, what was the discussion about?

A. The discussion was regarding the licensing under this, and I remember one of the companies reported that their attorneys said the price-fixing clause was not acceptable, and they couldn't take the license.

Q. Which firm was that?

A. Detroit Lubricator.

Q. Did they ever take a license, to your knowledge?

A. I wouldn't know.

Q. At the time these discussions were taking place, in 1940, do you recall the prices at which you were selling the

M80 combination fan and limit control to the oil burner manufacturers?

A. I could find out for you from the records.

Q. I show you Commission's Exhibit 53, which is the transcript of the record just admitted in evidence.

Mr. Freeman: What page?

Mr. Haycraft: Page 783, which is the second page of the contract, dated January 27, 1940.

The Witness: Type M80 or 80B, combination fan and limit control, the list price was $11, and the net price was $4.75.

By Mr. Haycraft:

272 Q. That net price was the price to the manufacturer, is that right?

A. Yes.

Q. Do you recall the price that the officials of the Minneapolis-Honeywell were fixing as the price to the manufacturer under the license agreement at that time?

A. May I have that, and I can look and give you the exact price; on Page 913.

Q. The same exhibit?

A. Exhibit 53. It states: "Net minimum price for combination furnace control shall be $5.25."

Q. $5.25?

A. Yes.

Q. Was anything said to you by the officials of the Minneapolis-Honeywell Regulator Company with respect to that price, and the price you were quoting your control?

A. When Mr. Swan stated there—

Q. My question was whether anyone from the Minneapolis-Honeywell said anything to you about the price you were getting for your fan, in the combination fan control?

A. They wanted to get our price up.

Q. Up to what?

A. The same as in the price list I have just quoted from.

Q. Did they give any reason for doing that?

A. Well, they were concerned in prices generally.

273 Q. How long had you been selling that fan for $4.75, do you remember?

A. Probably not very long. The price was down every year, the cost was going down because of increased manufacturing. We had absorbed the tool charges, and the volume having increased, the prices were reduced.

Q. Did you tell that to either Mr. Huff or Mr. Sweatt, during the course of those discussions?

A. At the initial time we were more concerned whether we could operate under the license, and that was our preliminary reaction, was to get an opinion from our attorneys as to the validity of the license.

Q. Was there anything said to you by any of the officials of Minneapolis-Honeywell with respect to what they hoped to accomplish by the granting of this license?

A. As I remember, they hoped by licensing under the patent it would be possible to stabilize the prices of instruments.

Q. Did they make any proposition to you about increasing your price, even though you did not take out a license?

A. Well, at a later date, when I met Mr. Huff.

Trial Examiner Sheppard: What position with the respondent had Mr. Huff?

Mr. Freeman: He is vice president.

Mr. Gilpatric: And treasurer.

Mr. Freeman: That memo Mr. McCabe is referring
274 to, will be available to us, will it not, those papers he is referring to?

Mr. Haycraft: I don't know.

The Witness: These are my own notes I had after I talked to him, and I don't know. They are private papers.

Mr. Freeman: We want to see them if he is referring to them.

The Witness: I am just merely refreshing my memory as to what Mr. Huff—

Mr. Freeman: We still want to see them.

Trial Examiner Sheppard: All right.

The Witness: When we received an opinion from Mr. Wilkinson regarding that, he considered the price-fixing improper; he suggested we might pay the royalties and leave the price-fixing out; and that was not satisfactory to the Minneapolis-Honeywell Regulator Company, and we therefore rejected the license, and later the suit was filed, and at a later date I discussed the possibility of settling the suit with Mr. Huff, and they offered to eliminate any license. Such royalties as you want, we will forego that, but he did not eliminate the price feature, so the suit is continued.

By Mr. Haycraft:

Q. Do you remember when it was you had this last discussion with Mr. Huff, approximately?

275 A. That was in October of that year, 1940.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Freeman.

Q. Was that opinion you received from Mr. Wilkinson in writing?

A. Yes.

Q. Do you have a copy of it?

A. I have.

Q. May we see it?

Mr. Haycraft: I have no objection, if the witness has no objection, Mr. Examiner. It is up to the witness. It is a privileged communication, of course. It is up to him.

Mr. Freeman: He has waived any privilege when he tells us what is in it.

Trial Examiner Sheppard: You tell what the opinion was, if you want to.

The Witness: I can give conclusions and read them to him, if he wants. I don't know what Mr. Wilkinson would say. I am merely using reference to facts relating to these questions.

Mr. Haycraft: Do you want to read it into the record?

276 Mr. Freeman: You mean the letter?

Mr. Haycraft: No, the opinion.

Mr. Freeman: I want to know what he bases those conclusions on. I do not want to just take whatever Mr. McCabe relegates from the letter, what he thinks is pertinent. He has made the statement here, and he has testified with respect to what he was advised by Mr. Wilkinson as to what was legal and what was illegal, and so forth. I think we are entitled to know. Otherwise, we move all the testimony of this witness with respect to anything he received, or testified with respect to price fixing, and so forth, as he was advised by Mr. Wilkinson, be stricken.

Trial Examiner Sheppard: That was an opinion from your counsel to you?

The Witness: Yes.

Trial Examiner Sheppard: You consider that a confidential document, do you, or do you want to tell these gentlemen? I will let you do either one, whatever you want to do. If you want to tell them, O. K. If not—

The Witness: I would rather ask Mr. Wilkinson's permission. It is a communication to us. If he has any objection,—merely as a matter of courtesy.

Mr. Freeman: We could adjourn, and he can get that during the noon hour.

277 The Witness: Yes.

Trial Examiner Sheppard: You could call him up, and come back.

The Witness: I will take it over.

Trial Examiner Sheppard: All right.

Mr. Haycraft: It is almost 12:30.

Mr. Freeman: I would just as soon go on.

Trial Examiner Sheppard: We will take until two o'clock, and you be on the stand, and you can testify about that.

(Whereupon, at 12:30 p. m., a recess was taken until 2 o'clock p. m. this day.)

278 Afternoon Session.

2:00 p. m.

Trial Examiner Sheppard: All right, gentlemen, proceed.

IRA EMMETT McCABE resumed the stand and testified as follows:

Trial Examiner Sheppard: Now, Mr. McCabe, did you check up on that figure that you wanted to check up on this morning, the price of the combination fan? You wanted the manufacturer's price, wasn't that it, this morning, Mr. Haycraft?

Mr. Haycraft: Yes.

Trial Examiner Sheppard: Did you find that?

Mr. Haycraft: I don't think he did anything about it.

The Witness: I did not have a chance to do anything.

Trial Examiner Sheppard: Do this, Mr. McCabe. Mr. Owens over there gave you that price, and I am perfectly willing to accept that. If you check up and find any difference, write a letter to Mr. Haycraft, and we will put it in the record.

The other matter was about the communication. Do you wish to tell us about that?

279 The Witness: Yes, if he wants to look at it, all right.
Mr. Freeman: May I look at it?
(Document handed to counsel.)

Cross-Examination (Continued) by Mr. Freeman.

Q. Mr. McCabe, I think you testified that you are an inventor of a number of products now sold by the Mercoid Corporation; is that correct?
A. Most of them.
Q. And those are patented products, are they not?
A. Many of them.
Q. And some of those products made and sold by Mercoid include primary controls?
A. Yes.
Q. And some of them include thermostats?
A. Yes, sir.
Q. And some limit controls?
A. Yes, sir.
Q. And I take it that the primary controls of your development are patented in your name; is that correct?
A. Some of them are. Well, there might be some by others there, I can verify that; but the majority of them are in my name, or have been assigned to me.
Q. The Mercoid Primary controls are made under
280 patents owned by your Company?
A. Owned by me.
Q. Owned by you, Mr. McCabe?
A. Yes, sir.
Q. And I take it likewise that the thermostats made and sold by your company are made under patents either under patents owned by you, or patents taken out by somebody else and owned by you, is that correct?
A. I think there are one or two—I think that Mr. Egelston of the American Radiator has a patent; but the others are mostly mine.
Q. But the Sensatherm type, that is made under your patent?
A. Yes.
Q. And I take it that the products made and sold by Mercoid known as limit controls are likewise patented, and you are the patentee or owner of the patents?
A. Yes, sir.
Q. And I take it that you have been making primary

controls since about 1923 or 1924. When I say "you" I mean the Mercoid Corporation.

A. The Mercoid Corporation. It would be the Federal Gauge previous to that.

Q. That was a primary control as early as 1923?

A. Well, we made some of the drip switch type even
281 earlier than that, I would say about 1920.

Q. How far back does your experience in the making and sale of domestic oil burner controls go back to?

A. I came with the Company in 1921.

Q. Had you taken out any patents yourself prior to that time, that is, prior to 1921 with respect to domestic oil burner controls?

A. No.

Q. Your experience with respect to domestic oil burner controls started in 1921?

A. Yes, sir.

Q. And it has been continuous ever since?

A. Yes.

Q. And you have continued to take out patents during the last twenty-two years with respect to primary controls, limit controls and thermostats, is that correct?

A. Yes.

282 Q. About how many patents do you own or control directed to primary controls?

A. Well, I would have to look and find out.

Trial Examiner Sheppard: You can estimate it for us, if you want to.

The Witness: All right.

Trial Examiner Sheppard: I do not think Mr. Freeman wants anything specific.

The Witness: I have taken out one hundred and some patents, but I don't know. I would have to make a list and find out, because I don't keep track of them that way.

By Mr. Freeman:

Q. Would you say ten or twelve were directed to primary controls, or more than that?

A. Probably more.

Q. Closer to twenty? What is your best guess, Mr. McCabe?

Mr. Haycraft: I object to guessing. I have no objection—

By Mr. Freeman:

Q. Give us your estimate?

A. Here is the list of my patents, in the back of my catalogue. If you want to find that out, you could do it by looking over those, and ascertain what is important to you.

Q. What is your best estimate, that is all I am in-
283 terested in now.

A. I would just as soon not estimate, because I haven't given any thought that way. I know there are a number of limit controls.

Trial Examiner Sheppard: I do not want to spend too much time. Would you say eighteen or twenty?

The Witness: It might be.

Trial Examiner Sheppard: O. K.

By Mr. Freeman:

Q. How about thermostats?

A. Well, there were several of those.

Q. How about limit controls?

A. It would be the same.

Q. Around eighteen or twenty?

A. No. I say, there are several. They are listed in the catalogue, but you find out, as I suggested.

Mr. Freeman: Have you answered my last question?

Mr. Haycraft: He answered it.

By Mr. Freeman:

Q. What was your number with respect to limit controls, for domestic oil burners?

A. Well, there are several of them. I wouldn't off hand be able to give you,—the trouble,—that is, there may be improvement in patents on, for instance, a Mercoid switch,
and may reach into limit controls, and there may be
284 a patent on limit controls, and different styles, and all that. We can find out, if it is important to you, but you can find out from the patents themselves. They would speak better than I can.

Q. You referred to your 1936 catalogue with respect to KMI. That was a primary control, was it?

A. That was.

Q. Of the intermittent ignition type?

A. Yes.

Q. And how long has your company been making a primary control of the intermittent ignition type?

A. That would depend on what you mean. We made, for the American Oil Burner, as early as 1922, an intermittent ignition control, which operated from the pressure of the oil, in combination with the drip switch unit.

Q. That was a primary control arrangement, though, was it not?

A. Yes.

Q. So that you had been making a primary control where the ignition would go on only when the demand for heat was present, since about 1922, correct?

A. Yes.

Q. And how long has your company been making and selling a primary control for domestic oil burners of the continuous ignition type?

285 A. That would be about the same.

Q. So that your company had on the market, for sale, primary controls of both the intermittent ignition type and constant ignition type, since 1922?

Mr. Haycraft: I object to that. That is not what the witness said.

Trial Examiner Sheppard: Well, Mr. McCabe, is that correct?

The Witness: We made what was known as drip switches originally, where there was a cup which received the oil, and opened the circuit from the oil burner, then shut it off and the fire went out, as early as 1922. Other types came along like that.

By Mr. Freeman:

Q. That was a primary control?

A. Well, we called it a drip switch.

Q. And it was of the intermittent ignition type?

A. Not that.

Q. Was that constant?

A. That could be for either one. The safety device could be used on any burner where they could accumulate the oil, that particular type, as early as 1922.

Q. When did your company, Mercoid Corporation, start making a primary oil burner control?

A. We started making oil burner controls in 1922,

286 but when you speak of primary, I think your definition is not as we used it.

Q. When did your company start making primary controls, using your own definition?

A. We started making oil burner shut-off devices in 1922.

Q. And these oil burner shut-off devices were used with a limit control and with a thermostat, correct?

A. Quite frequently they were.

Q. And the oil burner shut-off device was distinct from the thermostat and distinct from the limit control, is that correct?

A. Yes, they were usually hooked in a series.

Q. That is, the three controls were hooked in series?

A. Yes.

Q. When those three controls both were used upon the same installation, then you got proper operation of the oil burner from a safety standpoint, is that correct?

A. If they were—

Q. (Interposing.) Properly connected together?

A. Properly connected and properly installed.

Q. And I take it you get that same safe operation today, if you use your DA31 limit control and the Honsatherm, Type H, and KMI, or your more recent type primary control, is that right?

A. Yes, provided again they are properly installed and—

287 Q. Assuming that the controls are properly installed as recommended by your company, then you would get safe oil burner operation today, with the three controls made and installed by Mercoid Corporation?

A. Yes.

Q. And on that same assumption that back in 1922 the three controls were properly connected together, in accordance with the recommendation and instruction from the Mercoid Corporation, you would then get proper oil burner control, is that correct?

A. Yes.

Q. That has been true from 1922 on through the years, up to and including the present time, is that correct?

A. Yes.

Q. Your company came out with its combination M80 combination fan and limit control in 1937, did it not?

A. Yes.

Q. And when did you first hear of the Freeman patent?

288 A. Probably many years before, I knew of the Freeman patent.

Q. As a matter of fact, you knew it was referred to in a letter to your company by H. W. Sweatt in 1932, do you not?

A. Well—

Q. (Interposing.) You can refer to these transcripts of the record which you have here.

Mr. Haycraft: What page.

Mr. Freeman: I don't know.

The Witness: I would not know just when I saw that letter. I know I have seen this letter, but I don't know when I saw it first.

By Mr. Freeman:

Q. You do find in the letter of November 28th, 1932 a reference to the Freeman Patent 1813732, do you not?

A. Yes, sir.

Q. And that is addressed to the Mercoid Company?

A. It is addressed to the attention of Mr. Van Ness.

Q. But it is addressed to the Mercoid Corporation?

A. Yes, sir.

Q. Were you an officer or director or in any way interested in the Mercoid Corporation in November, 1932?

Trial Examiner Sheppard: You were there then, were you not, Mr. McCabe?

289 The Witness: I was there, but he said, was I a director or officer.

By Mr. Freeman:

Q. Or in any way connected with the Company at that time?

A. I was associated with them under my contract.

Q. By the way, speaking of contracts, that was a royalty contract which you had with the Mercoid Corporation?

A. Yes, sir.

Q. And they paid you a royalty on all of the items made and sold by the Mercoid Corporation?

A. Yes, sir.

Q. They were paid to you, weren't they?

A. Yes, sir.

Q. Did you likewise receive a royalty on the combination fan and limit control, M80 sold by the Mercoid Corporation?

A. Yes, sir.

Q. When I speak of the M-80 I am referring to the device illustrated on Commission's Exhibit No. 51.

Mr. Haycraft: Also mentioned in 52 and 53.

Trial Examiner Sheppard: All right, Mr. Freeman, go ahead.

By Mr. Freeman:

Q. Now, I understand you to say that you had a meeting with Mr. Huff sometime in the fall of 1941, or rather, 1940. Is that correct?

290 A. Yes.

Q. And you also spoke about some meetings at the Blackstone Hotel where an agreement was submitted to you; is that correct?

A. Yes. There were two or three meetings there that I remember of, but I don't remember which one.

Q. I am referring to the one—

A. (Interposing.) It was prior to April, I know that.

Q. Prior to April 10th of 19—

A. (Interposing.) 1940.

Q. And at the meeting prior to April 10th, 1940 I understood you to say that there were some people present from the Detroit Lubricator Corporation; is that correct?

A. At one of those meetings.

Q. I am now asking you with respect to the meeting where Minneapolis-Honeywell presented to you or to your corporation a proposed license agreement under the Freeman patent.

A. I am not sure which of the meetings this license agreement was. One meeting it was talked about, and at another meeting they gave us a copy, and later meetings there were other discussions. I am not sure as to the time.

Q. Have you any memos or any record by which you can distinguish which meeting you were presented with a proposed agreement, where other people were present? And by "other people" I am referring to the people

291 from other companies like the Detroit Lubricator, or Perfex or White-Rogers?

A. The only thing would be they were NEMA meetings, and at a couple of those meetings, the NEMA meetings they called us back and talked to us, and the agreement was there.

Q. You mentioned White-Rogers, and thought Mr. Rogers of that firm was present when the agreement was presetned. Do you know whether W. L. Huff asked Mr. Rogers of the White-Rogers Company to take a license under the patent, the Freeman patent, at that time?

A. I don't know when he asked him, just when it was. I know that Mr. Rogers was at one of the meetings discussing prices; and they were also discussed with Mr. Swan of the Detroit Lubricator, who said, as I remember it—he was with the American Radiator, and he said that patent counsel said that they could not accept it on account of the price fixing clause.

Q. Do you recall any conversation carried on by Mr. Huff or any other officer of the Minneapolis-Honeywell and Mr. J. K. Luthe of the Perfex, at the same time? I am talking now about the time that the agreement was presented to your Company or to you?

A. I would not say at just what meeting it was. I know it was discussed at two or three meetings. I don't know just exactly when they attended it, the exact date. I don't carry that in my mind, but I remember Mr. Luthe, discussing it at two or three of those meetings when they were
292 all there; but I didn't make up any notes.

Q. This morning you testified to a meeting at the Blackstone Hotel.

A. Yes, sir.

Q. And another NEMA meeting down east.

A. Yes.

Q. Do you recall at which of those two meetings the various people you have referred to this morning were present?

A. Well, some were present at both. Some were absent as to some meetings, and others were present. It would be rather difficult for me to say now. I could get the NEMA files, and it would probably disclose some of those things to you there.

Q. Do you know when that NEMA meeting was held?

A. What?

Q. Do you know when that NEMA meeting was held?

A. It was in the spring of—

Q. (Interposing.) That was 1940?

A. 1940 sometime.

Q. Do you recall who was present at the time Mr. Huff spoke to you with respect to the Freeman patent, or your Company, about taking out a license?

A. I did not make notes as to the date, and as to who all was present at every one of the meetings. I remember
293 distinctly Mr. Swan being there, and Mr. Hodges, and Mr. Huff, I believe, and I think Mr. Henning or Mr. Luthe—

Q. (Interposing.) —Mr. Henning was with the Penn Company, is that correct?

A. Yes.

Q. And Mr. Rogers is with the White-Rogers Company of St. Louis?

A. Yes, sir.

Q. And Mr. Hodges is with the Detroit Lubricator Company?

A. Yes, sir. I know the meeting at which Mr. Swan was; I remember that he said that he could not accept the license, that he was willing to personally as far as he was concerned, he was willing to go along, but he was not able to because of what counsel was objecting to in the license as offered.

Q. Was that the time that the Minneapolis-Honeywell offered a license to your Company?

A. I don't know whether it was just at that time that they offered it, that they offered us a license, but they offered us a license somewhere in there. I don't know just when it was. I know they discussed it first, and later they gave us copies of that license.

Q. Were you not offered a license in 1939 and a changed form in 1940?

A. I could not say just when it was, somewhere around 1939, or the early part of 1940 they offered a license;
294 and later furnished an agreement after Mr. Wilkinson's report, I believe.

Q. You know that was in 1940?

A. In April, April 10th, we had a report submitted by Mr. Wilkinson, because we had discussed it—I had discussed the method of licensing with Mr. Moore, this method of taking patents and licensing them for the different switches that we sold; and he said that we could not do it; and I reported at one of these meetings to the people, and they did not like what Mr. Moore said; and I said, "How about having Mr. Wilkinson decide it."

They said they would accept his opinion, which we procured, and that is the information you have there.

Q. You said that to whom?

A. At one of these meetings I brought out that counsel also stated that it was not legal to fix rates on unpatented articles with a system of patent. I did not say the Freeman patent. I used one of my own as an example to my own attorney to get his reaction to it. After hearing what

Mr. Swan had stated, I thought it would be a little better if he passed on another patent first, as if I was going to get the patent and license it.

Upon his report I mentioned it at one of those meetings, that Mr. Moore said we could not do that; so then we called in Mr. Wilkinson, who handled this oral case for us,
295 and who had done work for us before, and they said they would be acceptable to them; and we got his opinion, and that is the opinion which you have there.

Q. To whom was that to be acceptable; that is, Mr. Wilkinson's opinion, that you are talking about?

A. They just pooh-poohed Mr. Moore's reaction, and told me that—he told me that that was in restraint of trade, and they said that is not so; you get a good firm, and they will tell you different. I said, "How about Mr. Wilkinson?"

Q. Who told you that?

A. The boys that were there.

Q. Will you name them?

A. Probably Mr. Harold Sweatt of the Minneapolis-Honeywell.

Q. Do you know when it was that they told you to do that?

A. Prior to this—about the time that we went there. That was in April.

Q. Of 1940?

A. 1940.

Q. And you did get the opinion from Mr. Wilkinson that he thought that Freeman made an invention and that his claims consequently were valid, did you?

A. That is the opinion, because that is what he stated. That opinion there gives what he stated.

Q. You did get an opinion from Mr. Wilkinson that
296 the claims in the Freeman patent were valid and that Freeman made an invention.

Mr. Haycraft: I object to that. If you want to put any of that in, I have no objection.

Mr. Freeman: I would like to offer the whole document.

Mr. Haycraft: All right, there is no objection to that.

Mr. Freeman: I offer in evidence the opinion of Wilkinson, Huxley, Byron and Knight, by George L. Wilkinson, dated April 18, 1940, as Respondent's Exhibit No. 1; and may we substitute photostat copies?

Trial Examiner Sheppard: You may have photostat

copies made, and that exhibit will be accepted for the record.

(The document referred to was marked RESPONDENT'S EXHIBIT NO. 1 and received in evidence.)

The Witness: He stated—

Mr. Haycraft: Now, don't volunteer anything.

Mr. Freeman: Why don't you let him finish his answer and tell us what he wanted to tell us.

By Mr. Freeman:

Q. Go ahead and tell us what you wanted to tell us before you were interrupted by counsel for the Commission.

Mr. Haycraft: I object to that.

297 Trial Examiner Sheppard: I think that is covered in the certificate, isn't it?

Mr. Freeman: I don't know what he wants to say. Let him say what he wants to say, and if it is not responsive, it may be stricken.

Mr. Haycraft: That is an improper question, Mr. Examiner, and I object to it.

Trial Examiner Sheppard: Read the question.

Mr. Freeman: There is no question pending.

Mr. Haycraft: Yes. He asked him if they had an opinion, and what it was.

The Witness: I had not answered that.

Mr. Haycraft: I know you hadn't, because that is improper and I objected to it.

Trial Examiner Sheppard: Read the question.

(The question above referred to was read by the Reporter.)

Mr. Haycraft: I object to that question. I say that the opinion speaks for itself.

Mr. Freeman: And we have just offered it.

Mr. Haycraft: Then the question was not answered.

Trial Examiner Sheppard: I am going to let the opinion go in as Respondent's Exhibit No. 1 and you can get anything that each other of you want out of it. As to anything else, the objection is sustained.

298 Mr. Freeman: You will get that back.

Mr. Gilpatric: Can't we photostat the original, Mr. Examiner?

Trial Examiner Sheppard: Yes, I think that would be better.

Mr. Freeman: That is a new one. They claim privilege, and Mr. Haycraft had a copy of it all the time.

Mr. Haycraft: I did not.

The Witness: He did not.

Mr. Haycraft: What do you want to make that statement for? We have been playing ball here very well. What do you mean by that sort of thing?

The Witness: I got that copy from Mr. Wilkinson this noon, and Mr. Owens and Mr. Black will testify to it. He gave it to me, and he said, "If you need an extra copy, here it is." I am sorry.

Mr. Haycraft: Didn't you see him hand it to me?

Mr. Gilpatric: No.

Mr. Freeman: I saw you hand it back. Off the record.

Trial Examiner Sheppard: Off the record.

(Conference off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Freeman:

Q. You first sold the M80 at a price from $6.75 to
299 $7.50. Can you tell me what brought about that difference of 75 cents? Was that a quantity discount, or was that a price structure you had at one time, and you lowered it? All I want to know is, what are the facts?

A. I don't know. You would have to find out from the records. It might be a different temperature scale. There are different list prices, according to the circuits and all. I would not be familiar enough with that. The prices speak for themselves.

Q. Isn't it a fact that you had a different price where you sold a mounting bracket, by which the combination M80 could be mounted on a furnace, and when you did not furnish—

A. It might be. Mr. Owens could tell you more about that.

Q. You know, as a matter of fact, there was a different price when the mounting bracket went with the combination M80, and when it did not go with the M80?

A. Also there is a different price when it had a different temperature scale.

Q. Now, you referred to that Minneapolis-Honeywell price of $5.25 this morning. Do you know whether that included a mounting bracket or not?

Trial Examiner Sheppard: Don't you remember about it, Mr. McCabe?

The Witness: No.

300 Trial Examiner Sheppard: Ask Mr. Owens.

Mr. Haycraft: It is Respondent's—

The Witness: What was the question?

Trial Examiner Sheppard: Read the question.

(The question above referred to was read by the Reporter.)

The Witness: According to this, it does not state whether it does or not. I presume it would include one. It does not include summer switch, because the net minimum price and combination—

Mr. Freeman: I was not asking about a summer switch, and I move that be stricken as not responsive.

Trial Examiner Sheppard: That may go out.

By Mr. Freeman:

Q. Then, as a matter of fact, you do not know whether that $5.25 price which you referred to this morning included a mounting bracket, whether the price included a mounting bracket or not?

Trial Examiner Sheppard: Do you remember about that, Mr. McCabe? Have you anything that would refresh your mind?

The Witness: I imagine it wouldn't make any difference, whether it was with or without, because it says, "Price for combination control shall be." If you took off a lot of stuff, it would still be a combination control.

301 Mr. Freeman: I move the answer be stricken, and ask the reporter to read my question, and ask the witness to answer my question.

(The question above referred to was read by the Reporter.)

By Mr. Freeman:

Q. Do you know?

Trial Examiner Sheppard: The response can be stricken if it was not in response to the question.

The Witness: The statement here is the net minimum price for a combination furnace control shall be $5.25.

Now, whether it included a mounting bracket or ten brackets, it says a net minimum price shall be $5.25.

Trial Examiner Sheppard: All right.

Mr. Freeman: I move that be stricken. All I want to know is whether this witness knows or does not know.

Mr. Haycraft: I object to that.

The Witness: That is what I am trying to tell you. It states —

By Mr. Freeman:

Q. If you don't know, say so.

A. It states the net price for a combination furnace control shall be $5.25. It does not matter whether one or ten brackets, or anything else. It says "Net price for a combination furnace control shall be $5.25."

302 Q. Mr. McCabe, I think we can save a lot of time if you will tell me whether you personally know or do not know. That is all I want to know.

Trial Examiner Sheppard: Just answer that yes or no.

The Witness: Would you read the original question again?

(The question above referred to was read by the Reporter.)

The Witness: Which is that $5.25 price that I referred to this morning? Can you give me the question where that was involved? You are asking a question. I want to know what I am answering.

By Mr. Freeman:

Q. You referred to Page 913 of the record this morning, and referred to $5.25 as the price. Do you recall so doing?

A. I wish you would read those notes back.

Trial Examiner Sheppard: Read the notes, if you have them.

(The record as above referred to was read by the Reporter.)

The Witness: I would say, whether it included a mounting flange or not, as long as the price was a minimum price, "shall be $5.25," if you took a flange off, it wouldn't let you sell it at less than $5.25.

303 By Mr. Freeman:

Q. I understood you this morning to make a comparison between your price of $4.75 and the Minneapolis-Honeywell price of $5.25, and what I would like to know now is whether or not when you made that comparison, you took into consideration that the Minneapolis-Honeywell price list was predicated upon a mounting flange, whether you knew?

A. I don't know what the Minneapolis price was predicated on. I just know it says here, under this price schedule, "The net price for a net minimum—a net mini-

mum price for a combination furnace control shall be $5.25."

Q. You can answer the question yes or no. Then, you do not know whether or not the price included a mounting flange or not?

A. It might.

Q. I do wish you would answer the question, as long as you tried to make a comparison this morning between Mercoid M80 prices at $4.75, and the price contained in the Minneapolis-Honeywell schedule?

A. I want to explain to you, if the minimum price for it was such, it would not matter what was included. You might have no case on it.

Mr. Freeman: I move to strike.

Mr. Haycraft: I would like to have counsel indicate whether he is now talking about $4.75, or $6.75, or
304 $7.50. He changed the question. The question is not the same as propounded the first time. There is nothing in the record to show $4.75, that that price had any mounting flange. The comparison is not correct.

Mr. Freeman: You made one comparison.

Mr. Haycraft: I move to strike all his testimony on the question with respect to this mounting flange, when the comparison was between $4.75 and $5.25, and he is bringing in $6.75 and $7.50.

Trial Examiner Sheppard: My principle is for the witness here to testify on the price as he sees fit.

The Witness: He is asking me about price.

By Mr. Freeman:

Q. I am asking whether you know or not. That is all I am asking, not what is contained in the document. I am asking whether you know.

A. I know if it was a combination furnace control, at a certain net minimum price,—it says it should be $5.25. It does not say what kind of combination, what appurtenances or accessories go with it. It says minimum.

Q. I take it you do notknow whether a mounting flange went with the price schedule contained on Page 913?

A. It might go, because as long as you did not go below that minimum, you could still sell it according to this basis.

305 Trial Examiner Sheppard: Then it may not be either, but the case would be the same in either case?

The Witness: Yes.

By Mr. Freeman:

Q. I am asking whether you know then, as a fact, that the price was the same in either case?

A. All I know is what this states.

Q. Tell us what you personally know, not what you are now reading.

Mr. Haycraft: I object to that, Mr. Examiner. No foundation has been laid for that. The witness, in his direct testimony, referred to that same document. He hasn't any knowledge outside of that.

Trial Examiner Sheppard: If you have anything to add, refer to that.

The Witness: I haven't anything to add to what I have already told you.

Trial Examiner Sheppard: Nothing further.

By Mr. Freeman:

Q. What was your price for the combination fan and limit control in 1939?

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

306 The Witness: Page 775 of this record, I find it.

Mr. Haycraft: Exhibit 53.

The Witness: Exhibit 53, I find a net price of $5.35.

By Mr. Freeman:

Q. That is to the Herco Company?

A. Yes.

Q. What did you find as the 1940 price to the Herco Company?

A. Page 783, I find a price of $4.75.

Q. I understood you to say this morning that the prices, starting with about 1937 up to 1939 came tumbling down, as production increased, was that correct?

A. Well, as the tool charge goes off.

Q. This downward trend in price, was that characteristic of all the products made by your company, or just the combination M80?

A. No, we usually come out with a new model control, and the first production costs are higher for that, and it is reflected in the selling price. As improvement is made possibly in the manufacturing, or changes, we usually bring it down as a follow through.

Q. I understood you to say you had meetings in the fall of 1940 with Mr. Huff of the Minneapolis-Honeywell?

A. Yes.

307 Q. And I think you said something about him telling you that he wanted you to go along, some words to that effect, is that correct, without a license agreement?

Trial Examiner Sheppard: Do you remember that?

The Witness: I am just trying to get my memory back. It is hard for me.

Trial Examiner Sheppard: Will you read those notes, if you have them?

(The record above referred to was read by the reporter.)

Trial Examiner Sheppard: Is that what you mean?

The Witness: Is that what you mean, Mr. Freeman?

By Mr. Freeman:

Q. You testified as to that this morning, did you not?

A. Yes, they said they would forego royalties, but they did not forego the price, if that would satisfy us. Such royalties as you are worrying about, you need not worry about those. They offered to forego them. That was not the—if you will read Mr. Wilkinson's letter here, in which he stated that "the license tendered you by the Minneapolis-Honeywell violates the Anti-trust Laws, but a license probably could be drafted which would be lawful, provided it contains no price restriction as to merely a part of the patented invention, i. e., the combination furnace control."

Q. That letter was written in April of 1940?

308 A. Yes.

Q. And your conversation with Mr. Huff was in October of 1940?

A. Of course, there was another conversation after this letter, but I don't remember the dates and all. I did not know we were going to be involved.

Q. And your declaratory judgment suit against Minneapolis-Honeywell was filed in the United States District Court here in Chicago on June 29, 1940?

A. Yes. After we had a letter from Mr. Huff, telling us that—I will read you the letter of June 21st in which Mr. Huff wrote me as follows:

Dear Ira:

The question of your company taking a license under the Freeman patent has been dragging along, as you know, over a period of several months. In view of your failure to reach a decision on the matter, we have no choice but to enter suit, and this we expect to do on July 1st. I am sure that you can appreciate our position in the situation and that every opportunity has been given to you to accept the license under this patent, and that the necessity for our filing suit is the result of the necessity to be fair to our other licensees and to ourselves in this present price situation.

Very truly yours,
Minneapolis-Honeywell Regulator Co."

309 "Willard.
"W. L. Huff, Vice-Pres. & Treasurer."

Q. What page of the record are you reading?
A. Page 923. In answer to that, we wrote, on June 28th:
"Your letter of June 21, 1940 addressed to The Mercoid Corporation, Attention, Mr. Ira E. McCabe, has been referred to me for acknowledgment and reply.
"The reason why this matter has dragged along is that Mercoid has been loath to take a license under the Freeman Patent No. 1,813,732, because as Mercoid interprets this license, Mercoid would pay a royalty upon every patented Mercoid fan or limit control sold by it whether or not adapted by the purchaser in an installation such as described in the Freeman Furnace Control Patent. Also, under this license Mercoid would agree to control the sale price of such Mercoid instruments, and this we have been advised is not in accordance with the law.
"Furthermore, from our knowledge of the prior patents, and such prior public uses, Mercoid denies the validity of said Freeman Patent, and further Mercoid does not sell nor install a complete apparatus for a furnace control as disclosed and claimed in the said Freeman Patent. Mercoid denies that the sale of its patented fan or limit control which may be claimed in the said Freeman Patent, in any way infringes or contributes to the infringement of
310 the said Freeman Patent No. 1,813,732.

"Yours very truly,
"The Mercoid Corporation,
"Hugh Courteol,
President."

311 Trial Examiner Sheppard: All right, go ahead.

By Mr. Freeman:

Q. As a matter of fact, Mr. McCabe, you know that the Minneapolis-Honeywell offered your Company a license during 1939 under the Freeman patent while your price was still $5.35, is that not so?

A. I can point you to our letter of January 24, 1940, on page 863, which says:

"Dear Mr. Courteol:

"Please tell me whether or not you or Mr. McCabe have had an opportunity to give consideration to the matter under the Freeman patent along the lines which I discussed with you in Chicago last."

That was dated January 24, 1940.

Q. Will you tell us now that you had no other discussion with respect to Mr. Huff, with respect to taking a license under the Freeman patent prior to that time, that is, prior to January 24, 1940?

A. I don't recollect a 1939 license agreement at all being offered us.

Q. You knew that in March, 1939, Minneapolis-Honeywell's price, that is, its manufacturer's price on its combination furnace control was $5.25, did you not?

A. I don't know whether it was or not.

312 Q. Will you refer to page 907 of the record, which you have there, and there you find an agreement between Minneapolis-Honeywell and Cook Electric, dated March 31, 1939, do you not?

A. There is —.

Q. Do you find there an agreement dated March 31, 1939 with Cook Electric, involving the Freeman patent?

Mr. Haycraft: What page is that?

Mr. Freeman: 907.

The Witness: What about it?

By Mr. Freeman:

Q. Do you there find an agreement with the Cook Electric dated March 31, 1939?

A. Yes, sir.

Q. And you find on page 913 the manufacturer's price, that the manufacturer's price for the combination furnace control shall be $5.25, do you not? That exhibit A is part of the price schedule with the Cook agreement, is it not?

A. That may be, but how do I know?

Mr. Freeman: Mr. Reporter, will you read the question?

(The question above referred to was read by the Reporter.)

The Witness: Yes.

313 By Mr. Freeman:

Q. Your primary control sold in 1937 as shown in the catalogues which were presented this morning by counsel for the Commission, gave satisfactory service when properly installed, is that correct?

A. Yes.

Q. And likewise your primary controls when properly installed on a domestic oil burner in 1936 gave satisfactory service?

A. Yes.

Q. As a matter of fact, your company has been one of the leading manufacturers of controls for the past fifteen or twenty years, is that not so?

A. Well, we hope so.

Q. You have always made a good product?

A. We tried to.

Q. An engineered product?

A. Yes.

Q. And that goes back to about the time that you started in the oil burner control business, in 1923 or 1924, up to date?

A. Yes, sir.

Q. You have been rather proud of the items manufactured and sold under the name of the Mercoid Corporation; those products which you have engineered for the last

314 twenty years; is that not so?

A. Yes, sir.

Q. You have had a lot of satisfied customers during the period of the last twenty years for domestic oil burner controls; isn't that so?

A. I think so.

Q. And you have had a lot of customers who kept on buying the Mercoid controls for the period of the last twenty years; is that not so?

A. Yes, sir.

Mr. Freeman: That is all.

Mr. Haycraft: Just one question.

Redirect Examination by Mr. Haycraft.

Q. When did you first manufacture and sell an intermittent primary control of the KMI type?

A. KMI; I will have to look back.

Trial Examiner Sheppard: I think he said 1923.

The Witness: Not the KMI.

Mr. Haycraft: No, not the KMI.

The Witness: I think it was 1936 or did we have the other model. I am not sure. I can't remember all of those things.

Trial Examiner Sheppard: If that is another matter that you want to ask Mr. Black, that is all right.

Mr. Freeman: Yes, we have no objection to that.

315 The Witness: We have one particular control now, but I don't remember the exact date that that control came out.

Trial Examiner Sheppard: Was that 1933?

The Witness: I imagine he is referring—they asked me when we made the intermittent ignition primary control, and I stated that we had built for the American Oil Burner an intermittent ignition control in 1922. I based that on the fact that we were still at the 12 South Jefferson address, and we moved in January, 1923; and we made a number of them at that time; and that was an intermittent ignition device which operated from the oil pressure. It was operated from the unit with a grip switch, but it was called an ignition shut off control.

By Mr. Haycraft:

Q. How is that distinguished from the present type of intermittent primary control?

A. Later we began to use temperature instead of an accumulation of oil.

Q. When did you start to make the ignition switch to operate on temperature?

A. The intermittent ignition based on temperature would be along in 1927 or 1928, along in there.

Q. When was it that the Minneapolis-Honeywell put intermittent temperature control on the market, the 316 primary control, do you remember?

A. It would be—we first came out with a temperature operated safety device in 1925; and there was Minneapolis Heat Regulator, and there was then the Honeywell

Heating Specialties, was a different company. They were not all one company then, in fact, there were three companies; the Minneapolis and the Honeywell Companies; the Minneapolis Heat Regulator Company, I believe it was, and the Honeywell Heating Specialties, and the Absolute Contact Corporation. Later they became—All of those interests are now part of the Minneapolis-Honeywell.

Q. Were you the first one on the market with an automatic temperature control of the intermittent ignition type?

A. No, I would not know who was the first one. There was one of our customers, the Williams Oil-O-Matic who was building a stack control in those early days; and I think the Hart people adopted it after that, and then there were—what is that fellow's name I am trying to think of, one of the early people—

Q. (Interposing.) Were they selling it to the trade?

A. No, more so the people built them as part of their burners, and sold them as their own. There was Honeywell, Minneapolis and Absolute, and myself, who were building them.

317 In 1924 the Underwriters set up a regulation calling for the safety control of a different type to eliminate the difficulties we were having with the trip switches at that time, and everybody broke their neck to build some form of stack control. I was myself working back in 1923 on a light operated device, and also a temperature operated device, but they were mostly of an experimental nature at that time. We were operating them and watching them on oil burners of some of our friends. The manufacture started in about 1925 with us, or late in 1924; the first safety temperature control as a standard item.

Q. Was that an intermittent ignition?

A. No, the burners at that time had their own intermittent device on them that we supplied them, and then we generally added different devices over a period of years.

Q. Who was the pioneer among the intermittent temperature controls?

A. A fellow down there—do you know what his name is?

Mr. Freeman: Sherman?

The Witness: Sherman, I think they were the pioneers.

By Mr. Haycraft:

Q. When was that?

A. That was about 1916, I believe.

Q. I am talking about commercially, I am not talking

about inventions. I am talking about when they first
318 put them on the market, when they first sold them to oil burner manufacturers; when the temperature control manufacturers first sold them to oil burner manufacturers.

A. Probably along about the same time, along in 1924 there were four manufacturers then; Absolute Contact, Minneapolis Heat Regulator, and Honeywell Specialties, and then the Federal Gauge Company, which was the predecessor of the Mercoid Corporation.

Q. What is the difference between the KM primary control and the KMI?

A. There is an extra switch in there which is actuated by the stack temperature to open the ignition switch, but it is locked out. The stack temperature does not close that until the unit—until the fire goes out, or something breaks the circuit.

Q. Which one is that?

A. The KMI.

Q. Is that known as the intermittent?

A. Yes, sir; that is known as the intermittent type.

Q. How long have you been making the KMI type for oil burners?

A. I think it was around 1935 or 1936, somewhere in there. We had some models ahead of that, high voltage types, which used the same arrangement.

Q. What about the low voltage?

319 A. There was one ahead of the KMI which used low voltage.

Q. What year did that come out?

A. I can find that out.

Q. In 1932?

A. I am trying to place it. We have several models, and it is hard for me to remember that. The SMI I think was in 1930.

Q. The question is on the low voltage now.

A. Just a moment. You are asking me a lot of questions which are hard to remember in a hurry. We have had so many models it is hard to remember. I can readily find out from the records, but it is hard for me to remember the exact date.

Trial Examiner Sheppard: Well, it is hard to remember that far back, yes.

By Mr. Haycraft:

Q. What do you have in 1934?

A. We had the KMI there, and we had another model ahead of that. You asked me about the low voltage?

Q. That is right.

A. That is even earlier. I am trying to get the exact date. I know in 1930 we had the SMI, and we had difficulty with the relays sticking, and I worked out the transformer relays; and in—that was in the fall in 1931 that we were
320 making them.

Q. It was about 1931, is that right?

A. There was a model ahead of the KMI being sold then with the heating elements in the high voltage, and that heating element broke the circuit. The relay was used with it in combination. That was in 1931. I am quite sure that the first model was put out about 1931.

Q. Did you have the re-cycling device in the KMI that you had in 1934 and 1935, along in there?

A. Well, we had—

Mr. Freeman: I didn't understand him to say that there was a device which had a re-cycling in 1934 and 1935.

Mr. Haycraft: That is what I am asking him.

Mr. Freeman: Will you read Mr. Haycraft's question?

(The question above referred to was read by the Reporter.)

Mr. Freeman: Your question assumes that they did.

Mr. Haycraft: The question assumes nothing. I am asking him the question.

The Witness: The KMI was re-cycling for current failure, but not for flame failure. The was the KMR. That is shown here in the catalogue in 1934 for that device.

By Mr. Haycraft:

Q. Was that a re-cycling device?

321 A. That was a re-cycling device.

Q. Referring now to this combination fan and limit control, M-80, was there any mounting flange in that $4.75 price? Is there a difference whether it was mounted or unmounted, in that 1940 catalogue? Is that price listed in that exhibit which you referred to this morning?

(Handing document to the witness.)

Trial Examiner Sheppard: Read the question.

(The question above referred to was read by the Reporter.)

The Witness: That is not in there. On page 783 it states the price of $4.75. It says the M80 or M80-B combination fan and limit control is furnished standard with built in summer switch.

By Mr. Haycraft:

Q. Is there any charge for mounting the flange or anything of that kind?

A. It does not show it here.

Q. Do you know whether there was or not?

A. I will have to ask Mr. Black.

Mr. Black: That included the flange, Universal.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Anything further, Mr. Freeman?

Mr. Freeman: Yes.

322 *Recross Examination by Mr. Freeman.*

Q. Just so that we get the record straight, when did Mercoid first put on the market a temperature responsive primary control?

A. The first was in December of 1924, I am sure, and we sold it to the Williams Oil-O-Matic in 1925, I believe it was.

Q. That was temperature responsive?

A. Yes.

Q. As distinguished from the drop bucket switch type?

A. Yes.

Q. When did your company first come on the market and manufacture for resale purposes a temperature operated primary control with intermittent ignition?

A. You mean with the intermittent ignition operated by the stack temperature? You see, we made the pressure intermittent ignition, and we also made a magnetic operated unit in—it was when we were down at the other plant.

Trial Examiner Sheppard: Can you give him any information on that, Mr. Black?

Mr. Black: SDE.

The Witness: SDE was pressure, and then there was an electrically operated ignition using a separate stack mounting, and also we used the flame type.

323 Mr. Black: That was not a temperature type of ignition.

The Witness: No, that was a magnetic type. What time did we have that?

Mr. Black: That was around 1931, the SMI.

The Witness: Well, we had one before that.

Mr. Haycraft: I think the question should be read to the witness again. The question was for resale.

The Witness: That is what I am talking about, for resale, Mr. Haycraft, but I don't remember the year.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Freeman:

Q. You testified that you began the sale of the temperature responsive primary controls to the Williams Oil-O-Matic Company in 1925?

324 A. 1924.

Q. And you continued to sell temperature responsive primary controls since that time to date, is that correct?

A. That is right, but you asked about temperature—

Q. I am now asking when you included in that temperature operated primary control, a control of the ignition, by which it became intermittent?

A. Yes.

Trial Examiner Sheppard: Can anybody help Mr. McCabe out?

Mr. Owens: I answered that question for Mr. Freeman this morning.

Mr. Freeman: Why don't you tell him now? We are asking Mr. McCabe.

Mr. Haycraft: It is all right.

Mr. Owens: 1927, we brought out the SMI high voltage intermittent stack control. I could be wrong within a year. I estimate 1927.

The Witness: There was another model we sold a few of. He asked me a question, and I am looking back.

Trial Examiner Sheppard: Will you accept that as your answer?

The Witness: I am not sure that is right, to be honest. I can verify myself from records if I had records here which go back. It might be earlier.

325 By Mr. Freeman:

Q. I am not trying to get any exact dates, but we can say about 1930 or shortly before, your company has

made a temperature responsive primary control, with intermittent ignition, isn't that correct?

A. Well, we made them before then, because we moved to the present plant in 1930, and we had a line of those controls in the other plant, and I am trying to place the years, trying to go back over twenty-two years and say this happened a certain date, it is hard. We had a couple hundred to take off.

Q. Your company, prior to 1930, made temperature responsive controls of the intermittent ignition type?

A. That is right.

Q. And since 1930 it has continued to sell temperature responsive primary controls, of the intermittent ignition type?

A. Yes.

Q. And I understand your company began making a low voltage control, so that the thermostat would be in a low voltage circuit, as distinguished from a high voltage circuit?

A. Yes.

Q. When did your company begin doing that, approximately?

A. I think sometime in 1931. The exact date, I 326 wouldn't know.

Q. Since 1931, your company has offered for sale a thermostat which was to be included in a low voltage circuit, with a primary control, temperature operated, of the intermittent ignition type, in the high voltage circuit, is that correct?

A. Yes.

Q. And since about 1931, your company has made and sold a limit control that likewise would be in the high voltage circuit?

Mr. Haycraft: Limit control?

Mr. Freeman: Limit control.

The Witness: Since 1922.

By Mr. Freeman:

Q. But at least since 1931 on?

A. Yes.

Q. So that since 1931 your company has made and sold, for use in connection with domestic oil burners, a room thermostat, in the space to be heated, which was in the low voltage circuit, is that correct?

A. That is right.

Q. And that thermostat in the low voltage circuit, controlled a primary in the high voltage circuit, is that correct?

A. Yes.

Q. And in that same high voltage circuit, which
327 included one primary, there was placed a limit control, is that correct?

A. In the high voltage circuit, yes.

Q. In the high voltage circuit. So that since 1931, the company has been selling the three controls which I have just referred to, to-wit, a primary temperature operated with the intermittent ignition type, together with a limit control, and a room thermostat?

A. Yes.

Mr. Freeman That is all.

Trial Examiner Sheppard: Thank you, Mr. McCabe.

Mr. Freeman: I would like to ask one more question, if I may.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. In order for your company to make and sell primary controls of the kind we have been discussing for domestic oil burners, since 1931, has it been necessary for your or your company to ask for any license from Minneapolis-Honeywell, under any of its primary control patents?

The Witness: Would you read that?

Trial Examiner Sheppard: Read the question.

(The question above referred to was read by the Reporter.)

The Witness: No.

328 Mr. Freeman: That is all.

(Witness excused.)

Trial Examiner Sheppard: We will take a recess.

(A short recess was taken.)

JAMES W. OWENS, was thereupon recalled as a witness for the Commission, and having been previously duly sworn, testified as follows:

Direct Examination by Mr. Haycraft.

Q. Mr. Owens, are you familiar with the M80 stack control or combination of limit control and fan switch?

A. I am.

Q. You heard Mr. McCabe testify with respect to the price at which that was sold during the years 1936, '37 and '38, and along in there?

A. It was 1937, I believe, was the first year.

Q. Can you tell us as to the price at which that switch was sold during the year 1939?

A. Yes.

Q. That device. Will you please do so, giving the dates, if you can?

A. Well, in the early part of the year of 1939, we had bracket prices established around $5.25 and $5.35, and then we handled special orders down to $4.75 and $4.80. I 329 quoted Cleveland Steel Products Company on August 3, 1939, a price of $4.95, on a special painted flange mounted M80 control.

Q. Then coming into the year 1940, at what price did you sell them?

A. We sold them generally at $4.75.

Q. As indicated in your price list?

A. As indicated in our price list.

Mr. Haycraft: That is all.

Mr. Freeman: What price list is that you are referring to?

Mr. Haycraft: It is in the M53, Commission's Exhibit 53, if you want to look at it.

Cross-Examination by Mr. Gilpatric.

Q. Did you sell this particular item to Sears, Roebuck in 1939 and 1940?

A. We did.

Q. What price did you quote them?

A. I believe the price to Sears, on the green paint case was $4.80.

Q. At what time?
A. In 1939.
Q. And in 1940?
A. In 1940, the price was $4.75.
Q. Was there an extra charge for the flange mounting?
330 A. Well, I should not have said a flange mounting on the Sears. That was what I call a screw mounting. It had three holes in the back of the case, and the flange mounting on the outside case was slightly more expensive than the Sears type.
Q. What was the flange type quoted at?
A. $4.95.
Q. Did you offer a different price where the control and switch was furnished without any adjustable mounting?
A. You will have to repeat that question.
(Whereupon the question above referred to was read by the Reporter.)
The Witness: I still don't understand the question.
By Mr. Gilpatric:
Q. Did you have any variance in price, depending on how the control and switch were to be mounted?
A. Yes. We quoted, with an adjustable flange we were quoting $4.75. That price included an adjustable flange. As a matter of fact, where we furnished a straight, non-adjustable flange, and not a flange on the case. The other price to Cleveland referred to a flange, or a flange mounted case. The other was a separate, straight flange we sold during 1940, or quoted on them, to two different concerns that could use that type, at $4.60.
Q. Still in 1939?
331 A. 1940.
Q. What time of the year?
A. I couldn't say. I would have to check my records. I recall that I quoted a couple of concerns. I think one was Lennox Furnace, and one other company. I can't remember who it was now, that could use a straight flange, and the price was $4.60. We made a 15-cent allowance for the adjustable flange over the straight flange.
Q. Did Sears, Roebuck use a straight flange in any of their control switches?
A. They use the three screws in the back of the case. The case was painted to match the furnace.

Q. That was the only type you sold them?

A. In 1940, when they were putting them out on what you might call conversion jobs, with their oil burners, they got the regular $4.75 price on the regular M80 combination control.

Mr. Gilpatric: All right. That is all.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Thank you.

(Witness excused.)

Mr. Haycraft: Mr. Examiner, I have some other testimony in mind, that I have to look into. If it develops, I will have them here Friday, so we can adjourn, take an adjournment to Milwaukee.

332 Trial Examiner Sheppard: I can take an adjournment until ten o'clock in the morning, if you want any?

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

In view of what Mr. Haycraft has said, we will take an adjournment to convene in the Post Office at Milwaukee, at ten o'clock on the morning of the 18th. We stand adjourned to that date.

(Whereupon, at 4 o'clock p. m., August 16, 1943, the hearing in the above-entitled matter was adjourned.)

333

Room 376,
Post Office Building,
Milwaukee, Wisconsin,
Wednesday, August 18, 1943.

Met, pursuant to adjournment, at 10:00 a. m. C. W. T.

Before: W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and B. R. Shute, Esq., 15 Broad St., New York, N. Y., and Bair & Freeman, by Will Freeman, Esq., 135 South La Salle Street, Chicago, Ill., appeared for the Respondent.

334 PROCEEDINGS.

Trial Examiner Sheppard: Are you ready to proceed, Mr. Haycraft?

Mr. Haycraft: I think so.

Trial Examiner Sheppard: Is your witness here?

Mr. Haycraft: We have one witness here, and another one will be here in a few minutes.

Trial Examiner Sheppard: Come to order. Mr. Reporter, show the usual appearances.

Mr. Haycraft: I will ask Mr. Luthe to take the stand.

JULIUS K. LUTHE, was thereupon called as a witness for the Commission and, having been first duly sworn testified as follows:

Trial Examiner Sheppard: Mr. Reporter, this is Mr. Julius K. Luthe of the Perfex Corporation, 500 West Oklahoma Avenue, Milwaukee, Wisconsin.

All right, Mr. Haycraft, proceed.

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Luthe?

A. President of the Perfex Corporation.

Q. Where is that located?

A. 500 West Oklahoma in this city.

335 Q. In what business is that company engaged?

A. We manufacture industrial radiators, and a line of automatic temperature controls.

Q. How long has the Perfex Company been engaged in the manufacture of a line of automatic temperature controls?

A. Since 1935.

Q. And you have been associated with the Company all that time?

A. Yes, sir.

Q. Before 1935 what was your occupation?

A. Up to the spring of 1933 I was associated with the Minneapolis-Honeywell Regulator Company.

Q. From when and to when?

A. From February 1931 until April or May of 1933, approximately.

Q. In what capacity were you associated with Minneapolis-Honeywell?

A. Director and vice-president.

Q. Before that what did you do?

A. I was president of the Time-O-Stat Corporation of Elkhart, Indiana.

Q. How long were you with that firm?

A. From the time it was organized, which was in January, 1929.

Q. What business was it engaged in?

336 A. Manufacture of automatic temperature controls.

Q. And was that firm merged with or bought out by the Minneapolis-Honeywell?

A. It was purchased by M H through the exchange of stock.

Q. Had you had any experience in the automatic temperature control industry prior to 1929?

A. I had been in the control business since 1924 as president of the Time-O-Stat Controls Company of Milwaukee, which was absorbed by the Time-O-Stat Corporation in January, 1929.

337 Q. At the time you were with Time-O-Stat, what line of temperature controls did you manufacture and sell?

Mr. Freeman: Which Time-O-Stat Company are you referring to?

Mr. Haycraft: Both of them.

The Witness: The original Time-O-Stat Company only

made a very limited line of temperature controls for automatic gas burners, automatic gas burners only. The later Time-O-Stat Corporation made a complete line of temperature controls for all types of fuel and also for refrigeration.

By Mr. Haycraft:

Q. Did they make a line of temperature controls for oil burners?

A. Yes, sir.

Q. What particular controls did they make at that time, that is, did they make primary, limit controls and thermostats?

A. They made a complete line, such as controls—such controls as are used to control a domestic oil burner.

Q. That was between 1929 and 1931?

A. Yes, sir.

Q. Who were your competitors at that time in that field?

A. Minneapolis-Honeywell Regulator, Mercoid Corporation, Penn Electric Switch Company are the only
338 ones I can now recall.

Q. When you were with Minneapolis-Honeywell, did you have anything to do with the temperature controls end of the business?

A. I was active as an officer, but practically all my time was devoted toward patent work.

Trial Examiner Sheppard: What year were you with the respondent?

The Witness: From the time it was merged with Minneapolis-Honeywell, which I believe was February, 1931, until I left in the spring of 1933.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. During that period of time, did you have anything to do with the acquisition of what is known as the Freeman Patent?

A. I did.

Q. Combination patent?

A. Yes.

Q. From whom did you purchase that patent, do you recall?

Mr. Freeman: The assignment records would be lots better than his memory.

The Witness: I would not state, because I am not certain.

By Mr. Haycraft:

339 Q. Do you remember what it cost?

A. The owner and inventor—

Q. Do you remember what the cost was?

Mr. Freeman: I object to that as immaterial, what that patent cost, or what we paid for it.

Trial Examiner Sheppard: It may be an item in the case. I will let you answer, if you know.

The Witness: I would rather have the record of it, because I think it probably would be available.

By Mr. Haycraft:

Q. Do you have any recollection on it?

A. My recollection tells me it was $5,000, but that is very hazy.

Q. Was there any use made of that patent at the time you got it?

A. What would you mean by use?

Q. Well, did you license anyone to make it, or did you manufacture under the patent at that time?

A. We were manufacturing controls that came within the claims,—we were manufacturing controls that came within the claims of that patent at that time.

Q. At that time?

A. Yes.

Q. Do you know of any other manufacturer that was doing the same thing at that time?

340 Mr. Freeman: You mean infringing or licensed?

Mr. Haycraft: I want to know whether or not there were any other manufacturers, any competitors that were manufacturing a combination control, that is, a combination of fan control and limit control that would in this witness' judgment come within the terms of that patent.

Mr. Freeman: That is objected to because I do not think this witness is competent to state what claim came within the scope of the claims of that patent, particularly when the structure was made by somebody else. If he is qualified to testify what Minneapolis-Honeywell made, because they themselves—

Mr. Haycraft: Withdraw the question.

By Mr. Haycraft:

Q. I will ask the witness whether or not any attempt was made, while he was with the Minneapolis-Honeywell, to license any other manufacturer under the patent.

A. Not to my recollection.

Trial Examiner Sheppard: I want to get straight in my mind, Mr. Luthe, did that patent cover the combination, I mean, of the fan and the other, or was that just straight, some patent that did not cover both? You said to Mr. Haycraft just now something I would like you to tell me about that patent, a little bit. Was it an improvement on the old, or something he had before used, had already been using?

341 Mr. Freeman: Would you let me tell you what that patent covers, Major?

Trial Examiner Sheppard: I would like to have him.

The Witness: Well, the patent covered the use and combination of a means of controlling the circulation in a warm air furnace, wherein a fan was used to provide forced circulation of the air, and the patent covered a device which would start and stop that fan within certain temperature limits.

Trial Examiner Sheppard: Was that an improvement over things that existed prior to that time?

The Witness: In my judgment it was.

Trial Examiner Sheppard: O. K.

By Mr. Haycraft:

Q. And it was a combination of the things that existed prior to that?

A. A combination which was an improvement of previous methods or practice.

Q. When you started the Perfex Corporation—you did start it, I take it, did you not?

A. I did.

Q. In 1935?

A. 1934, sir, June, 1934.

Q. June, 1934, and when you first started, what 342 automatic temperature controls did you manufacture?

A. You mean what did we first produce?

Q. Yes, what did you first produce?

A. First, we produced a line of limit controls.

Q. When did you start producing a line of limit controls, do you remember?

A. That I could not tell you, except that we did sell some in 1936. Whether we sold any in 1935, my memory does not serve me.

343 Q. And where did you attempt to sell limit controls in 1936?

A. To certain selected customers in the trade that bought such products.

Q. Do you have any recollection of any accounts that you were selling during that time?

A. I recall our first account was the Timken Oil Burner.

Q. You sold them limit controls for use on what type of burner?

A. I couldn't answer that, because it was entirely at their option as to what burner they wanted to use then on. They made more than one type.

Q. Do you remember what type they were making at the time that you sold them?

A. They were making both gun and rotary burners.

Q. Who had charge of your sales at the beginning of 1936, and on for the next few years?

A. I believe I was responsible for directing them.

Q. Did you make any contacts yourself with the trade?

A. Yes, sir.

Q. Do you recall some of the accounts that you were selling or attempting to sell when you had the limit control only to offer?

A. As far as I can recall, about the only account I personally contacted was Timken. The others were 344 contacted by other men in the organization.

Q. Did you contact or attempt to contact the Cleveland Steel Products Corporation?

A. I believe that was quite a later date.

Q. At a later date?

A. I believe it was.

Q. But the only account that you recall now that you personally contacted is the Timken account?

A. Well, during the first year, when we had the limit controls only to sell; yes, sir.

Q. Well, during the time that you only had limit controls to sell, did you have any difficulty in selling those controls to oil burner manufacturers because of the fact that you did not have a primary control to offer as well?

A. Well, it was very much of a handicap.

Q. And that was for what reason?

A. Well, the manufacturer for many years in trade practice preferred to have a complete set of controls on his burners produced by one manufacturer; and we really didn't very diligently try to sell many limit controls until our line was quite complete.

Q. Was that the only thing that you encountered in those early years when you had limit controls to offer, with respect to the lack of the other controls?

A. That is all that I can recall, as far as I can recall.

345 Q. Do you have any recollection of calling upon accounts that were using controls of other manufacturers, primary controls of other manufacturers, and thermostats of other manufacturers, aside from the Timken account?

A. Will you restate that?

Trial Examiner Sheppard: Read it.

(Question referred to above was read by the Reporter.)

The Witness: We sold other manufacturers, but I cannot recall our first customers.

By Mr. Haycraft:

Q. In your calling on the accounts in the early days, did you ever meet the objection on the part of the manufacturers, of the oil burner manufacturers, that they could not buy your product because of an arrangement that they may have had with the Minneapolis-Honeywell Corporation?

Mr. Freeman: That is objected to as leading, and grossly so.

Trial Examiner Sheppard: Well, I don't know. Leading questions may be indulged in, but not too much. Sometimes you can get at the truth of the question a good deal quicker by that method. I will allow both sides to do that to save time. Go on and answer the question.

The Witness: Well, the question of a contract, if the customer had one with the Minneapolis-Honeywell
346 Regulator, it usually came into the conversation in selling the controls.

By Mr. Haycraft:

Q. What did you find out with reference to those contracts?

A. Well, they questioned whether they had the moral or legal right to buy controls from another source after

they had entered into such a written contract with Minneapolis-Honeywell.

Trial Examiner Sheppard: Mr. Reporter, will you read that answer?

(The answer above referred to was read by the Reporter.)

By Mr. Haycraft:

Q. Were you familiar at that time with the written contract of Minneapolis-Honeywell Corporation, that they had entered into with the oil burner manufacturers?

A. I was.

Q. Are you familiar with the clause which provides, "because the company's costs are figured to cover a complete set of controls, the following breakdown prices are purely for invoicing purposes. It is agreed that the purchaser's yearly purchases will consist of at least 90% as many thermostats and 100% (but at the Company's option not more than 125%) as many limit controls as primary controls."

347 Are you familiar with that language?

A. Yes.

Trial Examiner Sheppard: What year was that used, Mr. Haycraft?

Mr. Haycraft: 1936—1937, according to this stipulation, at the beginning.

Trial Examiner Sheppard: All right.

Mr. Haycraft: It has been in a little changed language in the contract, according to this stipulation, pages 10, 14, 15, 16 and 17.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. Is that the language in the contract, the Minneapolis-Honeywell contract, which you referred to in your testimony a moment ago?

A. That paragraph was usually discussed; yes, sir.

Q. And how were you able, or were you able to overcome the provisions of those contracts in many instances?

A. Well, if the customer bought controls from us, in the light of having such a contract, he must have felt that they had some legal or moral right to proceed, in spite of that paragraph.

Q. Did you have some customers who did that?

A. Yes, sir.

Q. Timken is one that you have a definite recollection of?

348 A. Yes, sir.

Q. According to the stipulation that we have in this record, there was for a short period of time in the year 1937 the following clause in the contract which was offered to the Minneapolis-Honeywell accounts, and I will ask you whether or not you ever encountered or learned of this clause in your contracts with the trade in 1937:

"Purchaser agrees that at least 95 per cent of his requirements of Thermostats, primary controls and limit controls will be purchased from the Company."

Was that ever brought to your attention?

A. Yes, sir.

Q. Where did you learn of that provision?

A. Through our sales organization.

Q. And what if any effect did that have upon your contacts in the trade?

A. Well, temporarily it sort of tied up our contacts with such manufacturers who had signed such an agreement.

Q. According to this stipulation also in 1938, the beginning of 1938, the Minneapolis-Honeywell entered into contracts with some oil burner manufacturers for season requirements, or their estimated requirements, and so on. In your competition did you ever run into that sort of a contract?

349 A. Yes.

Q. What if any effect did that have upon your ability to sell those accounts?

A. In a very great majority of instances we sold accounts we were endeavoring to sell, in spite of the conditions set forth in the contract.

Q. Did you sell them in substantial quantities?

A. We did.

Q. I will call your attention to the Cleveland Steel Products Corporation of Cleveland, Ohio, which was one of the companies which had such a provision in the contract for the year 1938. Were you able to sell Cleveland Steel Products Corporation during the year 1938?

A. Well, we sold them controls, but I can't tell you whether it was 1937, '38 or '39.

Q. Do you remember in what quantities you sold them?

A. Well, for a while we sold them a fair volume of complete sets of controls.

350 Q. By the way, do you recall when it was that you first brought out your primary control to go along with your limit control?

A. I could not tell you that, except by looking at the record.

Q. Do you think Mr. Tate would be in position to tell us with respect to that?

A. I think it would be best to ask him that, or call the office.

Q. Do you remember whom you contacted in Cleveland Steel Products Company, or did you have any discussion with them?

A. Mr. Smith and Mr. O'Brien.

Q. Did you have a direct contact there yourself?

A. Yes, sir.

Q. Do you recall discussing with them that contract with Minneapolis-Honeywell Corporation?

A. When we received their initial order, yes, sir.

Q. What did they tell you at that time?

A. They felt free to buy from us, in spite of the situation.

Q. Do you remember what year that was?

A. Only as the record would show, when they bought the first sets of controls from us.

Q. You do not remember what year that was?

A. I could not say that. The record, again, would 351 establish it without question.

Q. And perhaps Mr. Tate can better tell as to that date?

A. Or by contacting our office.

Q. Did they ever inform you with respect to the contract later on, after that initial order was given?

A. They did not.

Q. They did not discuss it with you at any later date?

A. No, sir.

Q. Did they say at that time they had refused to sign a contract that had the 95 per cent provision in it?

A. I could not recall specifically, because some companies did tell us that, but which ones informed us of that at that time, my memory would not serve me at all.

Q. Now, with respect to this Freeman Patent, this combination patent, did you have any discussions with officials of the Minneapolis-Honeywell Corporation with respect to taking out a license under that patent?

A. I did.

Q. When did you first discuss that matter with officials of the Minneapolis-Honeywell Corporation?

A. Very shortly after that, after they sent us a written notice of infringement.

Q. Do you remember when that was?

A. I could not recall the date.

Q. I show you Page 1,051 of Commission's Exhibit 352 No. 53, and ask you if you recognize that as a copy of a letter received from Minneapolis-Honeywell dated April 18, 1939, with respect to the Freeman patent? (Handing document.)

A. I do.

Q. Does that refresh your recollection with respect to the time when you had your discussions with the officers of the Minneapolis-Honeywell Corporation, with respect to taking out the license?

A. It does not, because it does not refer to any time at which the license agreement had been entered into, except that it was previous to April 18, 1939.

Q. Previous to April 18, 1939?

A. Yes, sir.

Trial Examiner Sheppard: It would be subsequent to that date?

Mr. Freeman: No, earlier.

The Witness: No, previous. That letter refers to the license agreement, but does not refer to the date of the agreement.

Trial Examiner Sheppard: All right.

The Witness: I might add, I could have had all these dates and data for you, had I known you wanted the specific information.

By Mr. Haycraft:

Q. You do not remember the date that the license 353 agreement was entered into?

A. I cannot recall, no, sir.

Q. Do you recall that it was any substantial length of time prior to April, 1939?

A. I could not tell you whether it was in '37, '38 or '39.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

By Mr. Haycraft:

Q. Whenever it was, will you tell us what was said to you by the officials of the Minneapolis-Honeywell with respect to taking out that license?

A. Well, there were a number of lengthy conversations held, in trying to arrive at a mutual acceptable basis of proceeding.

Q. Was there anything said with regard to the price at which you were to sell—

A. The indication was if the license was allotted to us, that they would leave the agreement provide for both, in royalty, and the right on their part to determine the selling price.

Q. Was anything said at the time that these discussions took place, with respect to the prices at which the
354 Perfex Company was selling the combination fan and limit control?

A. That was discussed, yes, sir.

Q. What was said about that?

A. Well, the discussion came down to the fact that they wanted to determine the price, and the price they determined would be the one at which we would sell, and the price that was mentioned in the agreement was the price that was agreed upon.

Q. What was that price, do you remember?

A. I believe it was $5.25.

Q. Do you remember at what price you were selling the combination fan and limit control at that time, and prior to that time?

A. My recollection tells me that the lowest price at which we sold it was $4.85.

Q. Did you make any offer with respect to advancing that price, in the event that the license was granted, or what was said about that?

A. Could you state the question more specifically?

Q. What was said with respect—

A. Because these conversations lasted several half days.

Q. Who were present at these conversations?

A. At different times, Mr. Harold Sweatt, Mr. Willard Huff, Mr. Freeman, Mr. Tate of our company, and myself.

Q. And Mr. Freeman is Mr. Will Freeman, the attorney here?

355 A. Yes, sir.

Q. The question—what was said with respect to

that price at which you were selling the combination fan and limit control?

A. That a price of $5.25 was a fair price to the trade, as a minimum price.

Q. They did not think your price was sufficient?

A. They did not.

Q. Do you know whether or not any of your competitors at that time were selling a combination limit and fan control at or about that same price?

A. The competitors' prices, to my recollection, were all within fifty cents of that price, either higher or lower.

Q. By the way, did you ever attend any meetings of competitors, as well as yourself? Did you ever attend any meetings with competitors where this matter of the Freeman patent license was discussed?

A. It was never discussed except between officers of M. H. and officials of our company.

Q. You never were at a meeting where any other—

A. We had many, many meetings with competitors, but the Freeman patent was never discussed, at any of those other meetings.

Trial Examiner Sheppard: I want to know this. They may have asked it, but I did not catch it. Did you
356 gentlemen take over the license agreement with the Respondent at that time?

The Witness: We entered into a written license agreement.

Trial Examiner Sheppard: At that time?

The Witness: Subsequent to those conversations, which is still in effect.

Trial Examiner Sheppard: That included the royalty basis?

The Witness: Royalty basis, and right on the part of the licensor to establish the selling price.

Trial Examiner Sheppard: And that agreement automatically raised your price from $4.85 to $5—

The Witness: $5.25.

Trial Examiner Sheppard: $5.25?

The Witness: Yes.

Trial Examiner Sheppard: How long did that agreement stay in existence?

The Witness: It is in effect for the life of the agreement, unless cancelled by us, which the contract has provision to cover.

Trial Examiner Sheppard: All right.

Mr. Haycraft: Mark this Commission's Exhibit No. 54, for identification.

(The document referred to was marked Commission's Exhibit No. 54, for identification.)

357 By Mr. Haycraft:

Q. I show you photostatic copy of a memorandum marked Commission's Exhibit No. 54, for identification, which purports to be one issued by your firm, by Frederick Hanson, addressed to Gene Geldabini, with respect to the price of $4.75 series controls, dated April 18, 1939, and I ask you if you can identify that in any way? (Handing document.)

A. I recognize this.

Q. Was that issued by your office?

A. It was issued by our vice president of our company.

Q. In charge of sales?

A. Substantially so.

Q. What is that other gentleman's name there, Geldabini? Who is he?

A. He handles all the office correspondence, records and other data with reference to controls, sales.

Q. Did this go out to your sales force?

A. No, it did not.

Q. Where did it go?

A. We have regular price sheets in our salesmen's handbooks, and as a result of such a memorandum, Mr. Geldabini, to whom this is addressed, would then have a price sheet printed, or typed, to go into the salesmen's handbooks.

358 Mr. Haycraft: I offer that in evidence, Mr. Examiner.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: None.

Trial Examiner Sheppard: Let the Exhibit 54 be accepted in the record.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 54 was received in evidence.)

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

Mr. Luthe, what size is your company? Is it large or small, in reference to the output?

The Witness: You mean as far as automatic temperature controls are concerned?

Trial Examiner Sheppard: That is right.

The Witness: Well, for what year, sir? Presently the volume is very low.

Trial Examiner Sheppard: Say from 1936 on?

The Witness: The volume was very, very small in 1936. We did not reach a very substantial volume in relationship to our business, until the years 1939, '40 and '41.

359 Trial Examiner Sheppard: All right.

Mr. Haycraft: Mark this Commission's Exhibit 55, for identification.

(The paper referred to was marked Commission's Exhibit 55, for identification.)

360 By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 55 for identification, which purports to be a price list to oil burners manufacturers of Perfex automatic controls, No. 1031, issued June 15, 1936, and ask you if you can identify that as a photostatic copy of the price list as indicated?

(Handing exhibit to the witness.)

A. I do.

Q. What use was made of that price list?

A. Well, it is a price list for oil burner manufacturers, as indicated.

Q. What use was made of it? What did you do with them? Did you give them to your salesmen?

A. That is right.

Q. And were they given to the trade?

A. Yes, sir; that is right; they were distributed to the trade.

Q. Does that sheet give the price of the automatic temperature control being sold by your company on the date indicated?

A. I think so; yes, sir.

Mr. Haycraft: I offer it in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: None at all.

Trial Examiner Sheppard: Commission's Exhibit
361 No. 55 will be received for the record, Mr. Reporter.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 55, was received in evidence.)

By Mr. Haycraft:

Q. Referring to Commission's Exhibit No. 54, the 475D referred to there is the combination limit and fan control, is it not?

A. Yes, sir.

Mr. Haycraft: That is all I want to ask Mr. Luthe, Mr. Examiner. I have some more detailed questions when I get the next witness, that I want to ask, the next witness that comes from this firm.

Trial Examiner Sheppard: All right, cross-examine, please.

Cross-Examination by Mr. Freeman.

Q. Mr. Luthe, Commission's Exhibit No. 55 is a dealers' price list, is it not?

A. Yes, sir.

Q. And these are prices, even the lowest prices contained on Exhibit No. 55, are not prices at which you sold limit controls to oil burner manufacturers; by way of example, the Timken Company of Detroit, is that not so?

A. These are dealer and not manufacturers' prices.

362 Q. So that the prices contained upon the price list, Commission's Exhibit No. 55, are not applicable to Timken, or Cleveland Steel Products, or any other company such as Williams Oil-O-Matic, or Petroleum Heat and Power, Gilbert and Barker, and companies of that kind; is that not so?

A. Yes, sir.

Q. Will you mind telling us, and you can use 1936, since this is a price list as of June, 1936, what the prices were for limit controls, or whatever items appear upon the particular price list which I have in my hand, Commission's Exhibit No. 55, when such items were sold to such companies as Timken of Detroit, Cleveland Steel of Cleveland, and other large customers on whom you called in the year 1936?

A. If my memory serves me correctly, the list price of a standard limit control, such as are exhibited in this price list, was $2.50.

Q. Just so the record is complete, will you refer to the standard limit control that you referred to in your last answer, which appears upon Commission's Exhibit No. 55, and give us the low price appearing on Commission's Exhibit No. 55?

A. $5.70 is the lowest price shown on this price list of a similar type of product.

Q. What was that type numbered? In other words, identify the particular limit control involved which
363 you quoted at $2.50 to such companies as Timken, Cleveland Steel, and Petroleum Heat and Power?

A. No. 500-A-1 would be a typical example.

Q. Now, may I ask you, Mr. Luthe, whether or not on Commission's Exhibit No. 55, under the heading "Perfex Oil Burner Combustion Control (constant ignition)", if that had to do with the type of control which has been here referred to as a primary control?

A. It would.

Q. And were you then as of the date of Commission's Exhibit No. 55, June 15, 1936, making or getting ready to make a primary control for use in connection with domestic oil burners?

A. We were making such a control at that time.

Q. And actually selling them at that time?

A. Yes, sir.

Q. And do you recall at what price you quoted prospective customers; and I would like to limit your prospective customers in this connection to such companies as Cleveland Steel Products and Timken, to distinguish from dealers?

A. Yes. Well, I could not recall the price.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

364 By Mr. Freeman:

Q. Now, Mr. Luthe, do you know how that price compared with the primary control of a comparable type manufactured say, by Penn Electric Switch Company?

A. I would not know.

Q. About the same price, or more or less?

Mr. Haycraft: I object, Mr. Examiner, to questioning along this line. The witness has said he did not know the details of those prices, and I refrained from questioning him further with respect to that. I have another witness who is more familiar with the detailed prices.

Mr. Freeman: I have a perfect right to examine this witness with respect to any document put in by the Fed-

eral Trade Commission, and I am referring now to the data found on Commission's Exhibit No. 55.

Mr. Haycraft: If that is the basis, Mr. Examiner, if that is the basis for questioning him on that subject, I have the further objection that the document speaks for itself. The prices are there; I object to any further interrogation with respect to any other prices that are not on that document.

Mr. Freeman: Mr. Examiner, I think what we are all trying to do in this case is to find out the competition in connection with primary controls, thermostats and
365 limit controls; and we are talking about what were sold to oil burner manufacturers, not dealers. In other words, list prices has nothing to do with it. What we are really trying to find out is the low down, the rate at which Minneapolis, Perfex, Penn Switch, White-Rogers, Mercoid, and the other companies engaged in the manufacture and sale to oil burner manufacturers were competing with each other.

Mr. Haycraft: Mr. Examiner, I agree with that, but this witness is not offered for that purpose, and this exhibit is not offered for that purpose. This witness has testified to a general situation, and I have another witness, as I said before, who can answer these questions.

Mr. Freeman: With that understanding, that if the other witness does not answer those questions we will have the opportunity to further cross-examine Mr. Luthe—

Mr. Haycraft: No, I don't have any such understanding. This witness is not put on for that purpose, and is not qualified to testify to that. I object to having him brought back for that purpose.

Trial Examiner Sheppard: We will not have any fight about that, gentlemen. I will just ask Mr. Luthe myself, if you have any information; do you have any information by which you can answer the question that Mr. Freeman asked?

366 The Witness: It is available at the office.

Trial Examiner Sheppard: You haven't got that here?

The Witness: I was not asked for prices, and I did not prepare for it or refresh my recollection. I would like to state, however, that I believe that the price of the limit control at that time that I was asked about was $2.75 and not $2.50. I am sorry that I seem stupid—

Trial Examiner Sheppard: In other words, to save time I am going to support Mr. Haycraft's objection on the ground that you are not ready to testify to this now, and you will get that from the other witness. In other words, if not, I will ask that Mr. Luthe come back.

Mr. Freeman: With that understanding, fine.

Trial Examiner Sheppard: Yes. I want both of you gentlemen to have every access to submitting all the testimony that you want in this case, on both sides. All right.

By Mr. Freeman:

Q. Mr. Luthe, did you recognize the Penn Electric Switch Company's competition when you entered into the control burner field in 1935 and 1936?

A. They were competitors; yes, sir.

Q. And they were manufacturing primary controls, limit controls and thermostats for use in connection
367 with oil burners?

A. Yes, sir.

Q. And you were getting into that business to compete with Penn Electric Switch, as well as Minneapolis-Honeywell, and the other companies then engaged in the manufacture and sale of controls for use on domestic oil burners?

A. We opened that business to produce and sell a line of automatic controls, not particularly to compete with any company.

Q. But you recognized such companies as Penn Electric Switch, Minneapolis-Honeywell, and Mercoid, and such companies as that were engaged in the same line?

A. Certainly.

Q. And what companies then were then making an effort to sell to the general purchasing public, and by purchasing public I am limiting my question to oil burner manufacturers, making primary controls, room thermostats and limit controls?

A. Penn Electric Switch, Mercoid Corporation, Minneapolis-Honeywell.

Q. That is, as to primaries?

A. Yes, sir.

Q. How about the companies that were then making room thermostats and limit controls?

A. Well, there had been a number of companies
368 that produced a small quantity of room thermostats, but for some reason or other they never developed to

any considerable amount, but there was a variety of them made.

Q. Do you have any recollection, and can you give us a few names at this time?

Mr. Haycraft: That is objected to unless they are restricted to the sale of those products to the oil burner manufacturers.

Trial Examiner Sheppard: All right, I will limit it in that respect.

The Witness: Detroit Lubricator Company; the General Electric Company, the Iron—

Mr. Haycraft: Iron what?

The Witness: They are stoker people, that is all I can recall.

By Mr. Freeman:

Q. Do you recall Roy Johnston, of the Automatic Devices Corporation of Milwaukee?

A. Yes, sir. I very distinctly recall him now.

Q. Do you recall whether or not Automatic Devices offered room thermostats for sale to oil burner manufacturers?

A. They did.

Q. And then you had to meet the competition of the Automatic Products, that is, this Roy Johnston Company at Milwaukee, in connection with making your own 369 sale of room thermostats to oil burner manufacturers?

A. We have.

Q. Do you recall any other company that you have to meet competitively, who make and offer for sale to oil burner manufacturers of room thermostats and limit controls?

A. White-Rogers of St. Louis.

Q. Any other company; I am restricting my questions to those companies who make controls and offer them for sale to oil burner manufacturers for use in connection with domestic oil burners?

A. I can't recall any others right now.

Trial Examiner Sheppard: Where is that White-Rogers Company located?

The Witness: St. Louis.

By Mr. Freeman:

Q. Mr. Luthe, do you recall, or can you give us the approximate dollar volume of sales of limits controls by your Company to Timken in 1936?

A. I could not give it by the breakdown, no.

Q. Did you sell them some controls other than limit controls in 1936?

A. I believe we did.

Q. Then could you give us your over-all sales in dollars volume of controls sold to Timken in the year 1936?

A. I believe it was approximately $10,000.

370 Trial Examiner Sheppard: Is that a big account in this business?

The Witness: They were one of the largest buyers of limit control equipment for oil burners at that time.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. And do you mind giving us the over-all, approximately, sales volume of your company to Timken for the year 1937?

A. It was approximately $37,000.

Q. And does that include, if you know, primary controls as well as limit controls?

A. It did.

Q. And I take it from what you said earlier that oil burner manufacturers preferred to buy all of their controls, that is, the three controls usually used on a single oil burner, from a single control manufacturer; is that so?

A. That is the usual trade practice.

Q. And that is the practice that is followed now?

A. Yes.

Q. That practice has not changed in the last two years, has it?

A. It has not, it has not.

Q. Do you know from your personal experience, calling on the trade, why they preferred to buy controls from
371 a single company as distinguished from buying controls from several companies, and using those controls on the same burner?

A. Well, automatic oil burners are the kind of a device that have to have a certain amount of service. If the control equipment is supplied by different control manufacturers, the question arises as to who is responsible for the service of that burner; so the manufacturer usually likes to use all the controls of a single manufacturer on a single burner, from a single manufacturing source, so that, there is no divided responsibility when the question of service arises.

Q. Is the service problem of your company, or the control manufacturers, a real problem?

Mr. Haycraft: That is objected to as irrelevant and immaterial, and not proper cross-examination, and going into new matter.

Trial Examiner Sheppard: I will let him answer that.

The Witness: The question of service has always been one of the most important ones in the—the question of service on automatic controls, that is, the real extent to which they give trouble, or are trouble free, has always been one of the biggest bones of contention in the oil burner industry.

372 By Mr. Freeman:

Q. When you sold Timken controls in 1936, did they put them out under their own name, or did they put them out under the name of Perfex?

A. We developed an individual name plate for our controls, on which we left our name off and put on their name and trade-mark.

Q. So that the purchasing public bought a Timken control as distinguished from a Perfex control?

A. Yes.

Trial Examiner Sheppard: But your Company made them?

The Witness: Yes, sir.

Trial Examiner Sheppard: And put their name on them?

The Witness: On the outside cover of the control.

By Mr. Freeman:

Q. So that any of the Timken burners with your controls on, without your name on, if they got into trouble, Timken would be the company that the purchasers would look to for repair or replacement, is that correct?

A. That is right.

373 Q. Have you ever had any calls with respect to service, where your name appeared upon the controls, any of your salesmen or branch officers?

Mr. Haycraft: I am renewing my objection, going into a field that is not proper cross-examination. If he wants to go into that with his own witnesses, I have no objection, at the proper time.

Trial Examiner Sheppard: Yes. I am sorry I did not tell you before. It was my own fault, Mr. Freeman,

I want to restrict on cross-examination. I think you are going a little bit too far on that. I do not object, but it will all be brought out.

Mr. Freeman: I think we are about through on that line. I would like to get this answer. It fits in with this service problem, whether or not he knew, when selling one control, whether he sold a Perfex control, or whether it was sold as a Timken control.

Trial Examiner Sheppard: You may answer that, Mr. Luthe.

The Witness: I would rather have you state the specific question again, if you will, Mr. Freeman.

Mr. Freeman: I will reframe the question, Mr. Luthe.

By Mr. Freeman:

374 Q. Have you ever had occasion, in your experience as a manufacturer of oil burner controls, where an oil burner in someone's home got into trouble, wherein such person may have called you up, or your branch, or your salesman, whether your name appeared upon the thermostat?

A. Many times.

Q. Many times?

A. Yes. Our name appears inside on the control, attached to it in very small type, as made by Perfex Corporation, which is observable when the cover is removed.

Q. But your thermostat has your name on, has it not?

A. Yes, sir.

Q. Mr. Luthe, you stated that the so-called 95 per cent clause in the M-H 1937 contracts temporarily tied up your activities. You know, as a matter of fact, that that clause was eliminated within three or four weeks after it was put into effect?

A. That is right.

Q. So that the effect on your activities only lasted for a very short period of time?

A. That is it.

Q. And you have not had—

Trial Examiner Sheppard: Is that the one, Mr. Freeman, that was cancelled out?

Mr. Freeman: Yes.

By Mr. Freeman:

375 Q. You have not had any similar problems or troubles since January or February of 1937, is that correct?

A. No. The question continues to arise about the 90 per cent clause.

Q. I am speaking about the 95 per cent.

A. No, that has never come up subsequent thereto.

Q. Do you know of any instance where an M-H contract with an oil burner manufacturer prevented you from getting any business?

A. Yes, it did.

Q. Where?

A. I cannot tell you the companies without interviewing our representatives, but certain companies felt, after they had signed the Minneapolis-Honeywell contract, if they were not legally, at least they felt morally bound not to buy controls from us.

Q. Isn't it true that a good many of your customers that you sell controls, continued to sell the controls to since 1936, actually had Minneapolis-Honeywell signed contracts?

A. That is correct.

Q. And you have been able to break into the field notwithstanding those agreements?

A. That is correct.

376 Q. You manufacture your primary oil burner control in rather substantial volume, do you not?

A. Relative to the total volume in the industry, I would say yes.

Q. That is, you make a substantial number of primary controls?

A. Yes, sir.

Q. And a good percentage of the total over all primaries made by the industry?

A. I would say so.

Q. And the Examiner asked you as to how your company stood, whether it was a large company or small company. Am I correct in my understanding that your company is substantially second in position in the control field?

A. I would judge that to be correct, when you limit it to automatic temperature controls.

Q. This is all directed, Mr. Luthe, to automatic temperature controls.

A. Yes, sir.

Q. So that the record is clear, your company would come pretty much in the so-called second position?

A. I believe so.

Q. When you started, you started from scratch, in 1935, did you not?

A. Right, sir.

Q. That is, you did not take over any company,
377 I mean, any automatic temperature control company?

A. No, sir.

Q. You started from zero, then?

A. Yes, sir.

Q. And you have been able to build up your business year by year, until today you consider yourself substantially the second company in the industry?

A. I believe that is correct.

Trial Examiner Sheppard: The respondent being the largest?

Mr. Freeman: That is correct.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. And you have been able to do that notwithstanding Minneapolis-Honeywell's position in the field?

A. The record speaks for itself.

Q. And you have been able to do that notwithstanding the fact that you had to compete with the Penn Electric Switch Company, who likewise were selling thermostats, limit controls, primary controls for use in connection with domestic oil burners?

A. Yes.

Q. And you have done that notwithstanding Mercoid?

A. Yes, sir.

Q. Has been selling Oil burner controls?

378 A. Yes, sir.

Q. By the way, you said when you were with Time-O-Stat Controls Corporation, back about 1930 or '31, you then were in competition with Mercoid Corporation?

A. Yes, sir.

Q. And you know, do you not, that they then sold oil burner controls back in those days?

A. Yes, sir.

Q. If you know, what was Mercoid's standing in the trade, back in 1931? What was its position with respect to the making and selling of automatic controls, temperature controls?

Mr. Haycraft: I object. No foundation has been laid. The witness does not know anything about it, in the first place, and, secondly, it is not proper cross-examination.

Trial Examiner Sheppard: Objection sustained. I do not want to go into that. We will have a man on that, on the stand, and get all that information.

By Mr. Freeman:

Q. Do you know what the present position of Mercoid is?

Mr. Haycraft: The same objection.

Mr. Freeman: The same ruling, I suppose?

Trial Examiner Sheppard: I doubt this gentleman knows those things.

379 Mr. Freeman: I think he knows. It is not very far afield. Your Honor, I am trying to limit it pretty much to the line of examination that has gone on here.

Mr. Haycraft: I have been very lenient in my objections, Mr. Examiner, but I think that he has gone clear beyond any proper cross-examination.

Trial Examiner Sheppard: Yes. Objection sustained to anything in reference to Mercoid at this time because that will come out by a man who knows better than this man.

Mr. Freeman: That is all.

Mr. Haycraft: I just have a few questions.

Redirect Examination by Mr. Haycraft.

Q. You say you are second in the industry now?

A. Yes.

Q. How do you compare in volume in sales of automatic temperature controls with Minneapolis-Honeywell?

A. I could not tell, because they make so many other parts, and we can only know their approximate total sales volume.

Trial Examiner Sheppard: You mean the respondent?

The Witness: I base the statement on the fact that Penn Electric Switch published a financial statement 380 showing their sales volume each year, which includes automatic temperature controls, refrigeration controls, and pressure controls for pumps, and it is quite evident from that, that our volume of automatic temperature controls for heating alone must be somewhat greater than their volume.

Mr. Freeman: By "their," you mean the Penn Electric?

The Witness: Yes.

By Mr. Haycraft:

Q. But you haven't any way of comparing your volume of sales of such controls with the sales by Minneapolis-Honeywell?

A. We have no way of comparing that.

Q. Would you say they are many times as large as yours?

A. I believe it would be several times.

Q. You go beyond "many"?

A. Yes.

Q. How do you account—you were asked about your success in this field. How do you account for your rapid growth in the sale of automatic temperature controls?

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

381 Go on, Mr. Luthe, if you want to.

The Witness: Well, I believe one thing was that we endeavored to sell only large, nationally-known companies, and we approached them with the idea of putting their own name on the accessory, or their burner, instead of some accessory manufacturer's name, so that we had to have no public acceptance of the name "Perfex," but rather took the manufacturer's trade mark name, and put that on our product, which is called private brand type of merchandise, so that we had no real sales resistance toward acceptance of the new name in the industry.

Trial Examiner Sheppard: Are you through?

Mr. Haycraft: One question.

By Mr. Haycraft:

Q. Had there been a very substantial increase in the volume of oil burner business generally?

A. Up to the time of the war it was continuing to grow.

Q. In other words, it grew very rapidly?

A. It was expanding up to the time of the war.

Trial Examiner Sheppard: It is sort of at a standstill now?

The Witness: Completely restricted, practically, since the war started.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

382 Q. Do you know anything about the volume of business done with the oil burner manufacturers, by

the Detroit Lubricator Company, the General Electric and White-Rogers and these others you named?

A. Relatively, yes. I would say it is not very large.

Q. While you were with the Time-O-Stat Corporation, you contacted the oil burner manufacturing industry, also, did you not?

A. Yes, sir.

Q. So that you were not an unknown man in that field?

A. Correct.

Q. Would you say that had something to do with your success in building up the Perfex Corporation?

A. I hope it did not hinder it.

Mr. Haycraft: That is all, Mr. Examiner.

Mr. Freeman: That is all.

Trial Examiner Sheppard: Thank you, Mr. Luthe.

(Witness excused.)

Mr. Haycraft: I will call Mr. Tate to the stand.

Trial Examiner Sheppard: We will take a little recess.

(A short recess was taken.)

383 Trial Examiner Sheppard: Mr. Reporter, this gentleman is Mr. V. R. Tate, Secretary of the Perfex Corporation, 500 West Oklahoma Avenue, Milwaukee, Wisconsin.

V. R. TATE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Haycraft.

Q. What is your occupation?

A. I am secretary of the Perfex Corporation.

Q. How long have you been secretary of the Perfex Corporation?

A. I believe I was elected secretary in 1936, and I have been with the Perfex Corporation since December, 1934.

Q. What have been your duties generally with the company during that period of time, since 1934?

A. Primarily as patent attorney.

Q. Did you have anything to do with the sales end of the Company?

A. Yes, I have been closely associated with it, but I have not been directly responsible for sales.

Q. And who has been directly responsible for sales during that period of time?

A. Mr. Luthe, the president of the company, in
384 combination with Mr. Frederick B. Hanson, who is vice-president.

Q. Is Mr. Hanson now with the Company?

A. No, he is not. He is a Major in the Army.

Q. How long has he been away from the Company?

A. About two years.

Q. I show you Commission's Exhibit No. 55 and ask you if you are familiar with that price sheet which was identified by Mr. Luthe.

(Handing document to the witness.)

A. Yes, I am.

Q. Will you refer to that and tell us which of those items listed there are limit controls, and which are primary controls, and which are thermostats, by giving their number.

A. Do you want me to describe them by the numbers down here?

Q. Yes, sir.

A. 100-A-1, room thermostat; 150-A-1, room thermostat; 170-A-1, room thermostat; 120-A-1, room thermostat; 400-A-1 is a limit control; 402-A-1 is a limit control; 401-A-1 is a limit control; 500-A-1 is a limit control; 501-A-1 is a limit control; 700-A-1 is a limit control; 701-A-1 is a limit control; 702-A-1 is a limit control; 703-A-1 is a limit control; 704-A-1 is a limit control; 705-A-1 is a limit control; 706-A-E is a limit control; 707-A-1 is a limit control; 708-A-1 is a limit control.

385 5200-DB-1 is an oil burner primary control; 5000-DB-1, electrical relay; 3000-D-1 is solenoid water valve; 3000-B-1 is a solenoid water valve; 3000-J-1 is a solenoid water valve.

Trial Examiner Sheppard: Do you want that latter part, Mr. Haycraft? Or did you just want the primary and limit controls?

Mr. Haycraft: That is all right, that gives a complete story of the exhibit.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. Were those limit controls that you mentioned there for use on oil burners, or for other than oil burners?

A. Oil burners and stokers.

Q. They could be used on either one?

A. That is right.

Q. Now, the primary control, was that for use on oil burners?

A. Domestic oil burners.

Q. Domestic Oil burners?

A. Yes.

Q. Now, do you recall when the primary control which you described as 5200—

A. (Interposing) 5200-DB-1.

Q. 5200-DB-1; when you went into production of
386 them and began to sell and offer them to the trade?

A. This price sheet was published in June, 1936, and it is my recollection that shipments were not made until probably several months after this went out. I believe this was in advance of actual production, to the best of my recollection.

Q. Do you recall the prices at which those various items were sold to the oil burner manufacturers, or some of the principal items there, for use on oil burners, along in 1936, late in 1936 or early in 1937?

A. Yes, I have some prices here.

Trial Examiner Sheppard: Refer to any data that you brought with you, Mr. Tate, and then testify from it, but not from the paper itself.

The Witness: Which did you want, sir?

By Mr. Haycraft:

Q. Take some of the limit controls first that you have there listed, that were most popularly sold to the oil burner manufacturers.

A. Limit controls; the low prices to some of the manufacturers were $2.50 and $2.60.

Q. What were the prices on the primary controls?

A. The primary control was around $8.00, as I remember it. I have a figure here of $7.90 to one manufacturer at that time.

387 Q. Did you contact the trade at all, or did you just work in the office?

A. I contacted the trade very little. I have called on a few accounts, mostly in connection with patent work.

Q. In the sale of limit controls, do you know whether they were sold to the manufacturers who had their own thermostats and their own primary controls, or purchased them from other sources of supply?

A. Well, in 1936 before we had primary controls, they were sold to manufacturers who were using primary controls of other manufacturers.

Mr. Haycraft: Will you mark these?

(The documents referred to were marked Commission's Exhibits Nos. 56, 57, 58 and 59-A and 59-B, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 56 for identification, entitled, "Instruction Sheet for Series 500 Strap On Hot Water Control; Models 500-D-1, 500-D-4 and 500-D-5"; and Commission's Exhibit No. 57, "Instruction Sheet for Series 5300 Primary Controls"; also Commission's Exhibit No. 58, entitled "Perfex Pressure Control, Series 700"; and also 59-A and B, "Instruction Sheet for No. 100 Supersensitive Low Voltage Room Thermostat, Model 100-A-3"; and ask you if you can identify these, and if so, what use was made of them 388 by your organization?

(Handing exhibits to the witness.)

Trial Examiner Sheppard: Take them up one at a time. Begin with Exhibit No. 56.

The Witness: Exhibit No. 56 is an instruction sheet covering one of our limit controls, Series 500.

Mr. Haycraft: I offer that in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: No.

Trial Examiner Sheppard: Exhibit No. 56 will be admitted.

(The document referred to heretofore marked for identification COMMISSION'S EXHIBIT No. 56 was received in evidence.)

By Mr. Haycraft:

Q. What use was made of that?

A. This was shipped with each control, and it was also distributed to our salesmen and to our customers for use in their service manual at that time.

Q. All right, take 57.

A. 57 is an instruction sheet covering our Series 503 primary controls, which was printed in May, 1943.

Trial Examiner Sheppard: That is rather recently, isn't it?

The Witness: Yes.

389 By Mr. Haycraft:

Q. What is No. 58?

Trial Examiner Sheppard: Better offer that.

Mr. Haycraft: I will offer it.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: We object to it because it has to do with stoker primary controls, which are not involved or in issue in this case.

Trial Examiner Sheppard: How about that, Mr. Haycraft?

Mr. Haycraft: I see that it has. I did not know it was when I first had it marked.

Trial Examiner Sheppard: Objection sustained.

Mr. Freeman: And I ask that the testimony with reference to Exhibit 57 for identification be stricken.

Trial Examiner Sheppard: It may be stricken.

Mr. Haycraft: I will withdraw the offer.

Trial Examiner Sheppard: Offer withdrawn. Cancel, Mr. Reporter, Commission's Exhibit No. 57.

By Mr. Haycraft:

Q. Take up No. 58.

390 A. Exhibit 58 is an instruction sheet covering our Series 700 pressure controls.

Q. When was it published?

A. January, 1936.

Q. Is that for use on an oil burner?

A. This is for use on oil burners, and other heating equipment.

Mr. Haycraft: I offer that in evidence.

Trial Examiner Sheppard: Any objection, Mr. Freeman?

Mr. Freeman: Has he offered it?

Trial Examiner Sheppard: Yes.

Mr. Freeman: May we look at it first?

Trial Examiner Sheppard: Yes.

Mr. Freeman: No objection.

Trial Examiner Sheppard: Let Exhibit 58 be received in evidence.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 58, was received in evidence.)

Trial Examiner Sheppard: Take up the next.

The Witness: Exhibit 59, instruction sheet covering our

Series 100 room thermostat, was printed October 1936. It was shipped out with each room thermostat of that type
391 and was also distributed to our salesmen and customers.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. What use was made of Exhibit 57 in that respect? Was that sent out?

Mr. Freeman: 58.

The Witness: 58 was also packed with each pressure control, as well as distributed to our salesmen in the trade.

Mr. Haycraft: I offer Exhibit 59 in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: May I see it?

The Witness: Yes. (Handing document.)

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

Mr. Freeman: If the witness will merely state this has to do with room thermostats with reference to oil burners, we have no objection.

By Mr. Haycraft:

Q. Can that be used in connection with domestic oil burners?

A. It can.

Mr. Freeman: No objection.

392 Trial Examiner Sheppard: Exhibit 59 may be admitted in evidence.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 59-A and 59-B, was received in evidence.)

By Mr. Haycraft:

Q. What was the purpose of the preparation and publication of these exhibits I just called your attention to, Mr. Tate?

A. They are the instructions for the installation in installing the equipment and containing wiring diagrams, suggesting methods by which the controls can be wired in connection with other controls, to control oil burners and other heating equipment.

Q. That is, other controls, manufactured by other manufacturers?

A. That is right.

Q. And included in other manufacturers were Minneapolis-Honeywell?

A. In some of the diagrams I believe we have the Minneapolis-Honeywell controls, or at least inferentially included, probably by the word "Series 10". In the trade generally that is recognized as Minneapolis-Honeywell.

Q. Where reference is made to Series 10, in this exhibit, that refers to Minneapolis-Honeywell?

393 A. The device.

Mr. Freeman: He has already testified.

The Witness: That the trade would accept it as that.

Mr. Haycraft: Mark this Exhibit 60.

(The paper referred to was marked Commission's Exhibit 60, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 60, and ask you if you can identify that as a price list of Perfex Company of 1941?

A. Exhibit 60 is our dealer's trade price list. It was published in March, 1941.

Q. Does that contain prices as to products having to do with oil burner equipment?

A. This includes dealer prices on controls for use in oil burners, stokers, gas burners, and so forth.

Mr. Haycraft: Mark this Commission's Exhibit 61, for identification.

(The paper referred to was marked Commission's Exhibit 61, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 61, for identification, which purports to be Perfex twin contact controls handbook or catalog, and ask you if you can identify

394 that as a catalog of the Perfex company containing, among other things, the oil burner controls?

A. Exhibit 61 is our handbook, illustrating and describing our controls, many of which are for use with oil burners, domestic oil burners.

Mr. Haycraft: I offer the two exhibits in evidence.

Trial Examiner Sheppard: Any objections?

Mr. Freeman: With the understanding that we may ex-

amine him with respect to any domestic oil burner controls illustrated in the Perfex handbook, Exhibit 61.

Mr. Haycraft: Having to do with oil burners.

Mr. Freeman: I limited it to oil burners.

Trial Examiner Sheppard: Let the exhibits Nos. 60 and 61 be admitted in evidence.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 60 and 61, were received in evidence.)

Trial Examiner Sheppard: Is there a picture in there of a primary control?

Mr. Haycraft: I was just going to ask the witness to refer to the different principal controls for use on oil burners, giving the page number.

The Witness: Such controls are illustrated.

By Mr. Haycraft:

395 Q. Will you look through the catalogue and describe and refer to those that are the principal items for use on oil burners?

Trial Examiner Sheppard: Mr. Tate, for my information, I want you to give me the description, in your own words, of a limit control and a primary control. I have no idea of what they look like, and I want to see one. I want to see what I am hearing on this, what it is about. I want to get some idea of the difference between a limit and primary control.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

Mr. Freeman: It is understood further that Exhibit 61 will be treated as a physical exhibit.

Mr. Haycraft: Oh yes, by all means.

Trial Examiner Sheppard: Yes.

Mr. Haycraft: Always.

Trial Examiner Sheppard: Whatever use you gentlemen want to make of it, and me.

Mr. Freeman: Will that kind of understanding, then, govern throughout this case, so that every time some big document comes in, we do not have to worry whether you have two thousand pages to reprint?

396 Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

Give us a good description of a limit control.

The Witness: A limit control as known in this industry is an electrical control device which is mounted on a domestic heating system, whether warm air furnace or hot water boiler or steam boiler, to protect the furnace or boiler from overheating the oil burner. In other words, on a steam boiler, when the pressure increases to a certain predetermined amount, the limit control opens the circuit and causes the oil burner to stop operation.

Trial Examiner Sheppard: That is automatic?

The Witness: Automatic, and the same is true on a warm air furnace, or on a hot water boiler. These controls are different for different types of heating systems.

Trial Examiner Sheppard: Look at that exhibit 61, and see if you can find a picture, an illustration of a limit control, and I want the reporter to get the page number, so I can give it consideration.

Mr. Haycraft: The page number and item number.

The Witness: Our Series 400, warm air limit controls, are shown on Form 113. There is no actual page 397 number. I believe the sheets are filed according to form number.

Trial Examiner Sheppard: All right. Is that the only one, or are there several of them?

The Witness: On the same page there is a Series 405, warm air limit control.

Trial Examiner Sheppard: All these are limit controls?

The Witness: Series 450 and Series 455 are also warm air limit controls. Correction on that. Series 450 and 455 are hot water fan controls that are also mounted on a warm air furnace, but they are for the purpose of controlling the operation of the fan, and not for the purpose of starting and stopping the primary heating unit. They are shown on Form 114.

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

The Witness: The internal mechanism of Series 400 limit controls is shown on Form 216, in Exhibit 61.

Mr. Haycraft: That is on a green sheet in the back of the catalogue.

Off the record.

Trial Examiner Sheppard: Off the record.

398 (Discussion off the record.)

Trial Examiner Sheppard: On the record.

399 By Mr. Haycraft:

Q. In those Exhibits 60 and 61 is there a description of what is known as the combination fan and limit control sold by Perfex?

A. There is.

Q. What is that?

A. That is our No. 475.

Q. Do you remember when you first put that device on the market?

A. Approximately in 1938. I don't have anything with which to refresh my recollection as to the exact date.

Mr. Haycraft: Will you number these?

(The documents referred to were marked Commission's Exhibits Nos. 62, 63, 64, and 65, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 62, for identification, which purports to be a photostatic copy of an invoice of a Perfex combination fan and limit control to the Timken Company in October, 1938; also Exhibit No. 63, a photostatic copy of an invoice of a Perfex combination fan and warm air control, to Electrol, Inc., under date of November 25, 1938; also Exhibit No. 64, a photostatic copy of a posting medium, covering the sale of a Perfex combination fan and warm air control to Timken Silent

400 Automatic Division of the Timken Detroit Axle Company, under date of April 26, 1939; and Commission's Exhibit No. 65 for identification, which purports to be a photostatic copy of a posting medium covering the sale of a Perfex combination fan and warm air control to Timken under date of June 30, 1939, and ask you if you can identify these as copies of invoices and posting mediums taken from the files of the Perfex Corporation representing the sale of that item on the dates indicated?

(Handing documents to the witness.)

Trial Examiner Sheppard: Take them up one at a time.

The Witness: Exhibit No. 62 is the photostatic copy of our invoice C-7036 to Timken, covering one of our 475-D combination fan and limit controls.

By Mr. Haycraft:

Q. The date was correct that I mentioned, October, 1938?

A. This invoice is dated October 28, 1938.

Exhibit No. 63 is a photostatic copy of our invoice C-7954, dated November 22, 1938, to Electrol, Incorporated, covering two of our 475-D combination fan and limit controls.

Exhibit No. 64 is a photostatic copy of our invoice C-2401, dated April 25, 1939, to Timken, covering 50 of our 475-D combination fan and limit controls. This
401 particular photostatic copy was made from the posting copy of the invoice.

Exhibit No. 65 is a photostatic copy of our invoice C-4029, dated June 30, 1939, to Timken, covering 50 of our No. 475-D combination fan and limit controls. This photostatic copy was made from a posting copy of that invoice.

Q. Those invoices correctly state the prices at which those controls were sold to the parties indicated?

A. They do.

Mr. Haycraft: I offer them in evidence.

Mr. Freeman: No objection.

Trial Examiner Sheppard: Exhibits Nos. 62 to 65 both inclusive will be admitted into evidence.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 62, 63, 64 and 65 were received in evidence.)

By Mr. Haycraft:

Q. Were you present at any of the discussions between Mr. Luthe and the officers of the Minneapolis-Honeywell Corporation with respect to a license under the Freeman patent of your combination fan and warm air control?

A. I can't be positive. To the best of my recollection I was at one meeting in Chicago with Mr. Harold Sweatt.

Q. Do you have any recollection of a discussion
402 with respect to the price at which Perfex was selling its combination fan and warm air controls in 1939, 1938 and 1939?

A. The price was discussed, yes.

Q. What is that?

A. The price was discussed.

Q. Do you recall what was said with respect to that price by Mr. Sweatt?

A. I don't remember the exact words, but the facts as I remember them were that we were selling them at a lower price than Minneapolis was selling them at that time.

Q. Did he call your attention to that, or did you already know it?

A. I think it was known.

Q. And was anything said with respect to advancing that price by the Perfex Corporation? Was anything said by you or Mr. Luthe or Mr. Sweatt?

A. Only in connection with this Freeman license.

Q. What was said with respect to that?

A. Well, the license agreement as it was proposed at that time, and later executed, gave Minneapolis the right to fix the minimum selling price.

Q. Do you remember the price which was fixed?

A. It was later fixed at $5.25.

Q. And does that account for the price on Com-
403 mission's Exhibit No. 65?

A. It does.

Q. Now, I call your attention to Commission's Exhibit No. 64, which shows the same item sold for $4.95 in April, 1939; and also direct your attention to the fact that in 1938 the two invoices which you identified, 61 and 62, show the price at $4.85. Have you any explanation of the difference in the price of $4.85 and $4.95 between those two years?

A. My recollection at this time is that we raised that price voluntarily from $4.85 to $4.95 sometime around the first of the year 1939.

Q. And what was the purpose in raising the price at that time?

A. Well, there might have been more than one reason, but I think one of the reasons discussed was that we were negotiating for this license agreement, and were in hopes that the minimum price—that the maximum price would be $4.95 instead of $5.25. We did not know at that time, I don't think, what the figures might be.

Trial Examiner Sheppard: You raised this price voluntarily?

The Witness: Yes.

Trial Examiner Sheppard: Do you remember when this license agreement was executed?

404 The Witness: I think it was in April, 1939, approximately.

Mr. Haycraft: See if that will refresh your recollection. (Handing document to the witness.)

The Witness: I think it was approximately the 18th of April, 1939.

By Mr. Haycraft:

Q. When did you put the higher price into effect?

A. The $5.25 price?

Q. Yes.

A. 30 days from that time.

Q. 30 days from April 18th?

A. Yes.

Q. So that the price of $4.95 on April 26th was still the old price, you had not put the new price into effect?

A. That is right.

Q. The new price did not go into effect until May 18, 1939, is that right?

A. That is correct.

Q. Are you familiar with the various accounts that were sold by Perfex Corporation during the years beginning, say, about 1936 or 1937?

A. Generally.

Q. Have you any data, or have you refreshed your 405 recollection so that you can testify as to the extent of sales, for instance, to the Automatic Burner Corporation since that time?

A. According to our records our first sales to Automatic Burner Corporation in Chicago were in 1938, and that amounted to almost $6600.

Q. Do you have any way of knowing what those items were?

A. No, I haven't.

Q. The same question with respect to the Gould Oil Burner Corporation, Cambridge, Massachusetts.

A. We sold Gould Oil Burner some controls in 1936 and 1937, none in 1938.

Q. Do you know what items they were?

A. No, I don't. They would be oil burner controls, and they might have been thermostats, or limit controls, or they might have been primary controls late in 1937.

Q. Were your sales substantial, or otherwise?

A. About $2300 in 1936.

Q. In dollars?

A. In dollars, and a little over $1,000 in 1937, and no sales in 1938.

Q. The same question with respect to the Malleable Iron Fittings Company, Branford, Connecticut?

A. We sold them $800 worth of controls in 1936 and only $4.00 in 1937, and nothing in 1938.

406 Q. The Wayne Oil Burner Company, Fort Wayne, Indiana?

A. We did not sell them any controls in 1936. We sold them about $1,600 in 1937.

Q. What about 1938?

A. We sold them about $16,000 in 1938. And we have continued to sell them ever since that time.

Q. The Wisconsin Oil Burner?

A. In 1936 we sold the Wisconsin Oil Burner a little over $500 worth of controls, and about $2,500 worth of controls in 1937, and nothing in 1938.

Q. The York Oil Burner Company, York, Pennsylvania?

A. We sold the York Oil Burner $25.00 in 1936, $900 in 1937, and $2400 in 1938.

Q. And the Reif-Rex Oil, Inc., Buffalo, New York?

407 A. Our first sales to Reif-Rex Oil, in 1938, about $6,000.

Q. Acme Tool & Gauge Co., Pawtucket, Rhode Island?

A. We did not sell Acme Tool & Gauge Company anything in 1936. We sold $150 in '37; nothing in 1938.

Q. Alida Manufacturing Company, Brooklyn, New York?

A. We have not sold them anything.

Q. Citro Oil Burner Corporation, Pompton Lakes, New Jersey?

Mr. Freeman: What is that last company?

Mr. Haycraft: Citro Oil Burner Corporation, Pompton Lakes, New Jersey.

The Witness: Citro Oil Burner Corporation, we did not sell them any controls in 1936; we sold them $139 in '37, $21 in 1938.

By Mr. Haycraft:

Q. Concord Oil Corporation, Brooklyn, New York?

A. I believe about $600 in 1936 we sold Concord Oil Corporation; about $300 in 1937, nothing in '38.

Q. Auburn Burner Corporation, Auburn, Indiana?

A. We did not sell Auburn Burner any controls in '36; we sold them about $600 in 1937; about $3,200 in 1938.

Q. Bedard Johnson Company, Minneapolis, Minnesota?

A. I have no record of any sales to them.

Q. Berggren Engineering Company, Brooklyn, New York?

408 A. I have no record of any sales for them.

Q. Braden Engineering, Incorporated, Providence, Rhode Island?

A. I have no record of any sales to Braden.

Q. Brown Oil Burner Equipment Company, Cambridge, Massachusetts?

A. In 1936 we sold Brown Oil Burner a little less than $300, and 1937 a little over $300. Nothing since.

Q. Buck Engineering Company, Incorporated, Freehold, New Jersey?

A. I have no record of any sales to them.

Q. Burner Parts & Service, Lancaster, Pennsylvania?

A. In 1936 we sold Burner Parts & Service about $760; 1937, about $2,500; 1938, $735.

Q. Campbell Machinery, Minneapolis?

A. We sold Campbell Machinery $18 in 1936 and $125 in 1937; nothing in '38.

Q. Capitol Oil Burner Company, Hartford, Connecticut?

A. I have no record of any sales to them.

Q. Carlson Brothers Tool & Machine Company, Boston, Massachusetts?

A. In 1936 we sold Carlson Brothers $10 worth of controls; $128 in 1937; nothing in '38.

Q. Carter-Korth Oil Burner Company, Roselle Park, New Jersey?

409 A. We did not sell Carter-Korth any controls in '36; we sold them about $400 in 1937; $21 in 1938.

Q. Harrison Sales Company, Seattle, Washington?

A. I have no record of any sales.

Q. Hart Oil Burner Corporation, Peoria, Illinois?

A. No record of any sales.

Q. Harvey-Whipple, Incorporated, Springfield, Massachusetts?

A. 1936, we sold Harvey-Whipple $28; 1937, about $300; 1938, about $900.

Q. D'Elia Oil Burner Company, Bridgeport, Connecticut?

A. In 1936, we sold D'Elia $29; nothing in 1937; $18 in 1938.

Q. David Duff & Sons, New Bedford, Massachusetts?

A. I have no record of any sales.

Q. Eisler Engineering Company, Newark, New Jersey?

A. No record of any sales.

Q. Electromatic Oil Burner Company, Malverne, New York?

A. 1936, we sold Electromatic Oil Burner Company $24 worth of controls; nothing in 1937 or '38.

Q. Interprise Oil Burner Corporation, San Francisco, California?

A. We did not sell them any controls in '36, '37 or '38.

Q. Fairfield Oil Heating Company, Greenwich, Connecticut?

A. Fairfield, we sold about $550 in 1937; about 410 $470 in 1938.

Q. Fargo Foundry Company, Fargo, North Dakota?

A. We sold Fargo Foundry $19 in '37; nothing in '36 or '38.

Q. Gar Wood Industries, Inc., Detroit, Michigan?

A. We sold Gar Wood Industries $22 in 1936; nothing in 1937 or 1938.

Q. General Oil Burner Corporation, Baltimore, Maryland?

A. We sold General Oil Burner Corporation about $260 in 1937; nothing in 1936 or 1938.

Q. General Oil Heating Corporation, West New York, N. Y.?

A. We did not sell General any controls in 1936, but we sold them a little over $200 in 1937, about $750 in 1938.

Q. Gold Star Oil Burner Manufacturing Company, Yonkers, New York?

A. We sold Gold Star Oil Burner Manufacturing Company $62 in 1936; $2,000 in 1937; a little less than $1,000 in 1938.

Q. Goodrich Oil Burner Manufacturing Corporation, New Haven, Connecticut?

A. I have no record of any sales.

Q. Greenwood Engineering Company, Glenarm, Maryland?

A. We sold Greenwood Engineering Company $17 in 1937; nothing in 1936 or 1938.

Q. Lynn Products Company, Inc., Lynn, Massachusetts?

411 A. I have no record of any sales in 1936, '37 or '38.

Q. Hayward Manufacturing Company, Brooklyn, New York?

A. I have no record of any sales to Hayward Manufacturing Company.

Q. Hi-Point Corporation, Bellefontaine, Ohio?

A. I have no record of any sales.

Q. Hoben Manufacturing Company, Waltham, Massachusetts?

A. We sold Hoben $24 in 1936, $4 in 1937, nothing in 1938.

Q. Holtum Manufacturing Company, Freeport, Illinois?

A. I have no record of any sales.

Q. Homestead Engraving Corporation, Brooklyn, New York?

A. We sold Homestead $23 in 1936, nothing in '37 or '38.

Q. Hubbard Oil Burner Company, Minneapolis?

A. I have no record of any sales in 1936, '37 or '38.

Q. Hupp Oil Burner Company, Brooklyn, New York?

A. 1936, we sold Hupp approximately $150; $65 in 1937, and about $1,100 in 1938.

Q. Hyle Oil Burner Company, Baltimore, Maryland?

A. We sold Hyle $52 in 1936, $300 in 1937, $27 in 1938.

Q. Jacobson Manufacturing Company, Racine, Wisconsin?

A. I have no record of any sales.

Q. Kelly Oil Sales Corporation, Arlington, Massachusetts?

A. I have no record of sales.

Q. LaGrace Oil Burner Company, Woonsocket, Rhode Island?

412 A. We sold LaGrace Company $36 in 1936 and about $117 in 1937.

Q. Liberty Research Laboratory, Farmingdale, New York?

A. We did not sell Liberty any controls in 1936, but $130 in 1937, and $46 in 1938.

Q. Penn Petroleum Products Company, Providence, Rhode Island?

A. I have no record of any sales.

Q. Petroleum Heat & Power Company, Stamford, Connecticut?

A. The only year we sold Petroleum was in 1937, a little less than $1,000.

Q. Progressive Machine, Minneapolis?

A. I have no sales to Progressive in 1936; we sold them $30 in 1937 and a little over $200 in 1938.

Q. Quiet Heet Manufacturing Corporation, Newark, New Jersey?

A. We sold Quiet Heet $460 in 1936; nothing since.

Q. Master Oil Burner Company, Seattle, Washington?

A. I have no record of any sales.

Q. Messer Company, Newark, New Jersey?

A. We sold Messer $3 in 1936 and $70 in 1937; nothing in 1938.

Q. Micro-Westco, Inc., Bettendorf, Iowa?

A. We sold Micro-Westco $37 in 1937; nothing in 1936 or '38.

413 Q. Mohawk Oil Burner Manufacturing Company, New York, New York?

A. We sold Mohawk about $50 in 1936; about $700 in 1937, and nothing in '38.

Q. Montag Stove & Furnace Works, Portland, Oregon?

A. I have no record of any sales.

Q. Muehlbach, G. T. Muehlbach, Minneapolis, Minnesota?

A. We did not sell Muehlbach any controls in '36 or '37; we sold about $130 in 1938.

Q. National Devices Company, Bellmore, New York?

A. We sold National $17 in 1936; $140 in 1937, and $300 in 1938.

Q. Neis & Brechtl, West Allis, Wisconsin?

A. I have no record of any sales.

Q. Oil Equipment Laboratories, Elizabeth, New Jersey?

A. I have no record of any sales.

Q. Old Colony Machine Works Company, Fall River, Massachusetts?

A. I have no record of any sales.

Q. Osher and Reiss, Brooklyn, New York?

A. 1936, Osher & Reiss, $15; $37 in 1937.

Q. Packard Oil Burner Manufacturing Company, Bridgeport, Connecticut?

A. I have no record of any sales.

Q. Pan-American Engineering Corporation, Berke-
414 ley, California?

A. I have no record of any sales.

Q. Standard Products Company, Clinton, Massachusetts?

A. 1936 we sold Standard about $2,400; about $3,300 in 1937; about $500 in 1938.

Q. Sunray Oil Burner Corporation, Rockaway Park, New York?

A. We sold Sunray about $125 in 1936, and in 1937 or '38, nothing.

Q. Todd Combustion Equipment, New York, New York?

Mr. Gilpatric: Isn't that industrial?

Mr. Haycraft: Yes, take that out.

415 Trial Examiner Sheppard: I think we had better suspend.

Mr. Haycraft: I am pretty near through.

The Witness: We sold Reliable about $180; $15.00 in 1937 and $78 in 1938.

By Mr. Haycraft:

Q. Rossoe Manufacturing Company, Seattle, Washington.

A. No record of any sales whatever.

Q. The Silent Flash Oil Burners Corporation, Brooklyn, New York?

A. No record of any sales.

Q. S-K Company, Camden, New Jersey?

A. No record of any sales.

Q. Simplex Oil Heating Corporation, New York?

A. No record of any sales.

Q. Cleveland Steel Products, Cleveland.

A. In 1936 we sold Cleveland Steel Products about $375, in 1937 about $2,000 and $2,200 in 1938.

Q. On that Cleveland Steel Products account, do you remember what the items were that you sold them?

A. We sold them room thermostats, limit controls and primary controls, but the ratio I don't know.

Q. Can you break that down as to the number of units, and the various items of the various units that you sold?

A. I don't have it for 1936 or 1937, but I have the 416 breakdown for 1938.

Q. Suppose you give us that, then?

A. In 1938 we sold 36 of our 475-D combination controls; 200 of our 400-D limit controls, 200 of our 402-D limit controls; 52 of our 650-D limit controls; 206 of our 502-D limit controls; 1 700-D-4 limit controls; 25 5520-D oil burner primary controls, and 25 100-A room thermostats. That is all in 1938.

Q. Do you have your sales to Electrol, Incorporated?

A. We sold Electrol approximately $2,000 in 1936, and $11,000 in 1937, and $22,000 in 1938.

Q. Do you know what items they were that you sold that firm?

A. That was also room thermostats, limit controls and primary controls. I think most of them were room thermostats and limit controls, because Electrol built a large percentage of their own primary controls.

Q. The Heil Company, Milwaukee, Wisconsin?

A. We did not sell Heil any controls in 1936; in 1937, $300; and about $16,000 in 1938.

Q. Do you remember the items that you sold Heil?

A. We sold Heil our room thermostats, limit controls and primary controls.

Q. The Williams Oil-O-Matic Corporation, Bloomington, Illinois?

A. No sales in 1936 or 1937, and about $250 in 1938.

417 Q. Volcano Burner Corporation, New York City?

A. In 1936 we sold $20.00; $300 in 1937 and $20 in 1938.

Q. Harry C. Weiskittel Company, Baltimore, Maryland?

A. We sold Weiskittel $100 in 1936 and nothing in 1937 or '38.

Q. Westchester Home Equipment Company, Mount Vernon, New York?

A. We sold Westchester about $67 in 1936, $300 in 1937, and nothing in 1938.

Q. Bock Corporation, Madison?

A. We only sold Bock about $4.00 in 1936, $65 in 1937, and $40 in 1938.

Q. Diesel Burners, Mossup, Connecticut?

A. No record of any sales.

Q. Scott-Newcomb, St. Louis?

A. We did not sell Scott-Newcomb any in 1936 or 1937, and in 1938 we sold about $6700.

Q. When you first started in business how much of a sales force did you have selling temperature controls, and where were they located?

A. Well, we had one man in Boston, one in New York, and one in Chicago, and we had two at the home office.

Q. Did you increase that force later as time went on? How many did you have in 1938?

A. In 1938 we had one in Philadelphia, and one
418 additional in New York at that time, and one or two more in our home office. In 1938 we also had two in our Chicago office.

Q. Did you make any attempt to sell in the western part of the United States?

A. One of the salesmen made that trip several times, yes. We did not contact them regularly.

Mr. Haycraft: That is all I have at this time. I may have a question or two later, we may have our recess now.

Mr. Freeman: Just before we leave, I understood that Mr. Tate was going to testify with respect to prices at which these devices were sold to oil burner manufacturers. At least I so understood, or we were to have Mr. Luthe back.

Mr. Haycraft: To Timken and the Cleveland Steel Products. Those were the ones that we were talking about.

Mr. Freeman: No, I asked for the price list at which these products were sold at oil burner prices to oil burner manufacturers, and I understood I was going to get that.

Mr. Haycraft: No, sir; I didn't have any such understanding, we were talking about Timken and Cleveland Steel.

Mr. Freeman: Then I want Mr. Luthe recalled, or Mr.
Tate to get the information from the Company. We
419 are entitled to that.

Mr. Haycraft: I called on this witness to testify as to what he sold these various accounts.

Mr. Gilpatric: You put in evidence of prices to dealers from 1936 to 1941.

Mr. Haycraft: And I restricted it to Timken, for illustration. I don't think it is fair to hunt out every manufacturer that they sold to.

Mr. Freeman: I am not asking that. I am just asking for their low prices.

Mr. Haycraft: He has given it to you. He has testified what he got. That is in the record.

Trial Examiner Sheppard: That is what I understood.

Mr. Haycraft: You can get that further on cross-examination if you want to.

Mr. Freeman: We will get it again. Mr. Luthe was excused with the understanding that we would get it from Mr. Tate, or we would have Mr. Luthe back.

Mr. Haycraft: I did not have any understanding to that effect at all.

Mr. Gilpatric: All the direct examination was directed to that.

Trial Examiner Sheppard: We will have the gentleman give this information.

420 Mr. Haycraft: He has. He can't give us any more.

The Witness: I think you had better tell me definitely what you want so that I will know what I have to get.

Trial Examiner Sheppard: Tell him right now what you want.

Mr. Freeman: Mr. Tate, I would like to get this, the price which your company quoted oil burner manufacturers for the several types of thermostats and controls for the years 1936 to 1941.

Mr. Haycraft: I object to that. I think he is entitled to cross-examine with respect to the prices for 1936 and 1937. That is what my direct was on.

Mr. Freeman: But you introduced the price list up to 1941.

Mr. Haycraft: That was merely for a description of the articles. I am willing to strike out any reference to prices.

Mr. Freeman: I don't see where that has anything to do with the description. This is the prices.

Trial Examiner Sheppard: When I consider this, I will not consider the prices.

Mr. Freeman: Any time we have sort of tough going we have the thought of reneging about what was to

421 be put in, and I don't like it.

Mr. Gilpatric: He has the catalogue if he wants the description of the articles. He did not have to put the prices in.

Trial Examiner Sheppard: I don't think it would hurt any to have the prices in.

Mr. Freeman: I move that the exhibit on Dealers Prices for 1941 and all the testimony of this witness thereon be stricken.

Mr. Haycraft: I am willing to have it understood that no reference will be made to the prices listed in the exhibit, because they do not mean anything.

Mr. Freeman: I still move that it be stricken because when you take that out the exhibit means nothing. It ought not to be in there to clutter up the record.

Mr. Haycraft: The exhibit is offered as a concise statement of the items that this company makes and sells.

Otherwise you would have to thumb through the catalogue of over 100 pages, and this lists all the products sold by the company.

Trial Examiner Sheppard: Mr. Freeman, to decide this little matter which has come up between you and Mr. Haycraft with reference to Exhibit No. 60, the Examiner will consider only the list of materials appearing in here and not anything with reference to prices.

422 Mr. Freeman: Then I move that the testimony of this witness be stricken.

Mr. Haycraft: There is no testimony of this witness with respect to the prices in that exhibit. There is nothing to strike.

Trial Examiner Sheppard: Objection overruled.

Have you made up your mind what you want this gentleman to give you, because I am going to have him give it to you.

Mr. Freeman: I want the prices of the Perfex Company for the years 1936, 1937 and 1938—

Mr. Haycraft: (Interposing) 1936 is in evidence.

Mr. Freeman: No, it is not. That is what we have been talking about.

Mr. Haycraft: Yes, it is, it is in evidence.

Mr. Freeman: What I am asking for is the manufacturer's price list.

Trial Examiner Sheppard: All right, get that for Mr. Freeman.

Mr. Haycraft: I don't think that there is any such thing.

Mr. Freeman: Let him testify.

Mr. Haycraft: The witness has testified as to what the prices were, and that is in evidence.

Trial Examiner Sheppard: Of course, I don't know 423 anything about that. I will leave that to Mr. Tate to get the manufacturers prices for the years 1936, 1937, 1938. Do you know what they want now?

The Witness: Do you mean some particular manufacturer?

Mr. Freeman: No, just your low price. I don't want you to go back and check through a thousand records. I realize that is an imposition. You can tell us what your low price was to oil burner manufacturers.

Mr. Haycraft: He has already done that, Mr. Examiner.

Trial Examiner Sheppard: Let him do it again.
Mr. Haycraft: He has done that once.
Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. Mr. Tate, in my examination did you give me the low price to oil burner manufacturers?
Mr. Freeman: The record speaks for itself.

By Mr. Haycraft:

Q. During the year 1937?
A. The prices that I gave you were taken off of the record of one manufacturer. I don't know that they were the lowest, I have no way of testifying to that.
Trial Examiner Sheppard: You can get that for us and give it to Mr. Freeman this afternoon.
424 All right, Mr. Reporter, take an adjournment until two o'clock.

(Whereupon, at 12:50 p. m., a recess was taken until 2:00 p. m., this day.)

425 Afternoon Session.

2:00 p. m.

Trial Examiner Sheppard: We will proceed.

V. R. TATE, resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Haycraft.

Q. Mr. Tate, can you tell us the lowest price at which Perfex sold their thermostats, limit controls and primary controls in 1936, 1937 and 1938?
A. Yes. I was able to find a price list for 1938, and I picked off the price for the standard controls. I took off two thermostats, one of which is 100A. That was 2.25, and 150A, which was our standard thermostat. was 2.65. The limit controls, standards, were all 2.50.
Q. What numbers were those?
A. 400, 500, 700. 5200 constant ignition oil burner primary controls, 8.60.

Mr. Gilpatric: What year is this?

Mr. Haycraft: 1938 he is speaking of.

The Witness: 1938. No. 5500 and 5520 oil burner intermittent ignition controls, 9.60. Now, for those years 1936 and '37, I was unable to find a price list, sent the boys to the warehouse, who pulled the invoices for
426 Timken, and this tabulation I am giving you is off the invoices to Timken, which was a company receiving our lowest price in 1936 and '37.

Q. Your biggest customer at that time?

A. That is right. Series 100 thermostat, 1936, 2.75, and 1937 I was unable to find a price for it. I don't think we sold them any of that model for that year. 150A thermostat, 3.50 in 1936; 2.95 in 1937. Of the limit controls, 400, series 400, $3.00 in 1936, 2.40 in 1937.

Mr. Freeman: $3 in 1936?

The Witness: 2.40 in 1937.

Series 500 is $3.00 for 1936, 2.40 in 1937.

Series 700 was $3 in 1936, 2.40 in 1937.

5200 oil burner primary control, 10.25 in 1936, 7.90 in 1937.

The 5500 and 5520 oil burner primary controls, were not sold in 1936; in 1937 the price was 8.90.

By Mr. Haycraft:

Q. Do you remember anything about an attempt to sell the Cleveland Steel Products Company in 1938?

A. Recently I reviewed the correspondence and sales reports, but I was unable to pick up much information, except the salesman was always reporting it looked like he was going to get the business, in report after report, and that is about all I found in the correspondence.

427 Q. Did you make any contact with the firm, yourself?

A. I never contracted the firm, myself.

Mr. Haycraft: That is all. You may cross-examine.

Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Freeman.

Q. Mr. Tate, did you sell oil burner controls to the Anchor-Post Company in 1936, 1937 or 1938?

Mr. Haycraft: That is objected to as irrelevant and immaterial, and not proper cross-examination.

Mr. Freeman: That was brought out on direct. He named some 75 different companies.

Mr. Haycraft: That was not one of them. Mr. Examiner, I confined my direct examination to those companies that are mentioned in Commission's Exhibit No. 1, which is the stipulation, where there was the contract in 1936 and 1937; I mean, the season's requirements, or the 1938 contract that had the season's requirements or group of contracts.

Mr. Freeman: Anchor-Post is referred to in connection with his examination of Mercoid, for the same reason.

Mr. Haycraft: No, Mr. Examiner, there was an entirely different proposition with Mercoid, and it has
428 nothing to do with this witness.

Trial Examiner Sheppard: I do not want to broaden the scope.

Mr. Freeman: I do not either, but I think there are three or four companies, and I think we are entitled to know. They were omitted for some reason or other.

Mr. Haycraft: I have just given the reason.

Mr. Freeman: I think we are entitled to have some information.

Mr. Haycraft: There was no evidence, Mr. Examiner,—I don't know whether there was or not, but no evidence of any restrictive clause in any contract with the Anchor-Post. That is the reason we did not ask the witness.

Mr. Freeman: We object to the term "restrictive clauses." That remains to be seen.

Mr. Haycraft: I will stand on the record on that.

Trial Examiner Sheppard: Objection sustained.

By Mr. Freeman:

Q. Will you tell us whether or not you sold, in 1936, '37 and '38, Silent Glow?

Mr. Haycraft: The same objection. That is not in the group.

Trial Examiner Sheppard: Was there anything on direct on that?

Mr. Haycraft: No.

429 Trial Examiner Sheppard: Objection sustained.

By Mr. Freeman:

Q. I will ask you the same question with respect to Chrysler Air Temp?

Mr. Haycraft: The same objection.

Trial Examiner Sheppard: Sustained.

By Mr. Freeman:

Q. Mr. Tate, your business in the sale of oil burner controls was better in 1937 than it was in 1936, was it not?

A. That is correct.

Q. And likewise the sale of oil burner controls by your company was better in 1938 than it was in 1937?

A. I think that is correct. Generally business dropped back in 1938, but I think, to the best of my recollection, that is correct.

Q. And likewise your business was better in 1939 than it was in 1938?

Mr. Haycraft: I object to that as irrelevant and immaterial. We have not presented any testimony with this witness, Mr. Examiner, as to contentions beyond 1938. As I understand it, the season's requirements clause was left out of the accounts after that date, and that is what the direct examination was.

Trial Examiner Sheppard: Is that your under-
430 standing?

Mr. Gilpatric: Mr. Examiner, the complaint in this case defines the issues after alleging these contract provisions in the years 1937 and '38. Your Honor then assumes the same conditions obtained for the following years.

Trial Examiner Sheppard: I will let you go into 1939 on both sides, if you want to.

Mr. Freeman: I think we ought to.

Mr. Haycraft: All right, then. We will get total figures from both sides.

Trial Examiner Sheppard: Go ahead. I think that will be all right there.

Mr. Freeman: Will you answer the question, now?

Trial Examiner Sheppard: Repeat it.

(Question read by the reporter.)

The Witness: That is correct.

431 Q. And would the same follow for 1940 and 1941?

A. Yes.

Q. So that each year from the inception of your business, that is, when you began selling oil burner controls, there has been an increase in the over-all volume year after year up to 1941? I am excluding 1942 because of the war situation.

A. That is correct.

Q. What were your sales to the Wayne Oil Burner Company in 1939?

A. About $18,000.
Q. And how about York Oil Burner in 1939?
A. About $20,000.
Q. And the Rief-Rex Oil Company?
A. About $10,000.
Q. And the Auburn Oil Burner Company?
A. $1400.
Mr. Haycraft: These are all dollars, I take it?
The Witness: Dollars, for the year 1939.

By Mr. Freeman:
Q. Harvey Whipple?
A. $6400.
Q. Lynn Products?
A. $5,000, approximately $5,000.
Q. And if my memory is correct, you did not sell
432 them in 1936, '37, or '38?
A. That is correct.
Q. And how about the Hayward Company?
A. Hayward Manufacturing Company?
Q. Yes.
A. I have no record of any sales to them.
Q. Did your Company ever sell oil burner controls to that company?
A. I have this sheet prepared from our records, and it shows no sales to them. It could be in error, but it does not show on this sheet.
Q. Did you sell any controls in 1939 to the Micro-Westco, and if so, give us the dollar volume?
A. Micro-Westco; no sales to them except in the year 1937.
Q. And sales to Heil in 1939; I have reference to the Heil Company of Milwaukee.
A. $22,600.
Q. And how about Electrol?
A. $42,000.
Q. $42,000?
A. Yes.
Trial Examiner Sheppard: What year is this?
The Witness: 1939.

By Mr. Freeman:
433 Q. Do you know whether that breakdown includes limit controls, thermostats and primary controls; that being the company that you testified this morning made a good many of its own primaries?

A. I don't have that breakdown. Sometime along there, it might have been later, we sold them some primary controls. I think we sold them primary controls in 1939.

Q. And how about the Scott-Newcomb Company in St. Louis?

A. $1,200 in 1939.

Q. Did you sell any controls to Quiet Heet in 1939?

A. I have two Quiet Heets listed; one in Newark and one in Brooklyn.

Q. The one in Newark, New Jersey?

A. Nothing in 1939.

Q. How about the Cleveland Steel Products in 1939?

A. $700.

Q. You heard Mr. Luthe testify this morning that he made it a point to call on large users of oil burner controls. Might I ask if you know when that policy was adopted, or when you began calling on large oil burner accounts?

A. I think that policy was followed from the beginning in 1936, primarily for the reason that we only had a few men and it was almost impossible to contact all the manufacturers.

Q. So there might have been many manufacturers in that year, in 1937, that were not contacted because of 434 lack of manpower?

A. I think that is correct. There might have been enough manpower to contact them once, but I might say that we did not feel that we had enough manpower to service the accounts.

Q. I understood you to say that you really came on the market with a primary control in the fall of 1936?

A. The constant ignition oil burner control was put in production in the fall of 1936.

Q. And when did you come out with the intermittent ignition?

A. Sometime in the spring of 1937.

Q. Isn't it true that in the oil burner control field, from your experience, before a company will adopt any given control for its oil burners, it buys a few controls and uses them for field test purposes?

A. That is correct.

Trial Examiner Sheppard: You mean before they buy in big bunches they sort of try it out?

Mr. Freeman: What I mean is this, and I think Mr. Tate means the same thing, and he can correct me if I

state it erroneously; before any one changes from one type of burner control to another type, they buy a few of them and put them out in the field and find out what is necessary in the way of servicing them, how they fit into their scheme of doing things; and all those different things, and if it turns out o.k., they come back to them
435 and talk quantities.

Trial Examiner Sheppard: That seems a reasonable thing to do.

By Mr. Freeman:

Q. Mr. Tate, I have stated that accurately, have I not?

A. That is right.

Q. So in 1936, in the fall, when you came out with the constant ignition type of oil burner control, you were just then feeling your way in making your sales, is that correct?

A. That is right.

Q. And you expected larger sales in 1937 as a result of the field experience that you obtained in 1936?

A. That is correct.

Q. And did your company succeed in enjoying a better business in 1937 than it did in 1936 in connection with the constant ignition primary controls?

A. We did.

Q. And in 1937, when you came out with your intermittent ignition primary control, you likewise felt your way; that is, sold a few controls to customers for the purpose of having them go through the field test experiments?

A. That is correct.

Q. And that would even be true, even though during the preceding year you had made another primary control of the constant ignition type?

436 A. That is correct, but not to the same degree. The manufacturers will change easier, make a switch from one model to another model of the same manufacturer, than they will to a control of another manufacturer.

Q. They are a little reluctant to make the change, but they will still go through the field test. Maybe for not so long a period, is that correct?

A. That is correct.

Q. So that in 1938 you expected better business on primary controls of the intermittent ignition type than you experienced in the year 1937?

A. Yes, sir.

Q. And did that expectancy come true?

A. It did.

Q. And likewise I take it that in 1938 you sold more constant ignition primary controls than you did in 1937?

A. That is correct.

Q. So that the first full oil burner year in connection with the sale of the intermittent ignition type primary control was the year 1938?

A. Well, as I remember it, we had the intermittent primary control out shortly after Christmas—shortly after the first of the year, 1937. I don't remember how much field experience we had that spring, but it is my recollection that we got enough field experience in the spring of
437 1937 to increase the sales in the fall of 1937.

Q. And those sales increased during 1938?

A. That is right.

Q. And you had substantially the same experience, that is, with the upward trend of sales in your constant ignition type of primary control from the time you came on the market in 1936, up through 1937 and 1938?

A. Yes, sir.

Trial Examiner Sheppard: Why do you use the word "constant" there?

Mr. Freeman: I use the term "constant" because there are two types of primary controls. Mr. Tate is a patent attorney, and he understands these structures as well as I do, and he can correct me if I am wrong. In one case, when the burner goes on, the ignition is on constantly.

Trial Examiner Sheppard: That is -c-o-n-s-t-a-n-t?

Mr. Freeman: Yes. Then the intermittent is a type that goes on and stays on until the oil burner starts to burn, and then goes off.

Trial Examiner Sheppard: I see.

By Mr. Freeman:

Q. You did testify, did you not, that the intermittent type of oil burner control sold for more money than the constant ignition type?

A. That is correct.

438 Q. And I take it that there has always been the same practice followed from 1936 and 1937 on up?

A. Yes, sir.

Q. In other words, the intermittent type has always sold for more money?

A. It is a more expensive control, and has always sold for more money.

Q. Do you happen to have the Timken volume for 1938 and 1939? We got the 1936 and 1937 from Mr. Luthe this morning.

A. No, I don't have the Timken. I only have the list that we have prepared here.

Q. Could you tell us whether or not Timken increased its business in 1938 over 1937? I am not asking for the exact dollar volume, Mr. Tate.

A. If they increased in 1938 over 1937?

Mr. Haycraft: I have something here, a confidential statement prepared by the witness with respect to that particular account, if you will let him look at it.

Mr. Freeman: He can look at it, or you can help him out, that is agreeable to me. All I want to know is whether it was more.

Mr. Haycraft: For what years are you asking?

Mr. Freeman: 1938 and 1939 for Timken.

Trial Examiner Sheppard: Hand it to the witness and let him testify to it.

439 Mr. Haycraft: That happens to be units I am showing him now.

The Witness: Our sales in 1938 were slightly less than in 1937. In 1939 there was an increase. 1937 was 11,000 units, 1938 10,000, 1939 21,000.

By Mr. Freeman:

Q. Did I understand you to say that 1938 was a little less than 1937?

A. That is right.

Q. And that was the year—

A. It was the second depression.

440 Q. What was the year?

A. It was the second depression.

Q. Were you giving us the unit figures in 1938?

A. Those figures I just gave you were units. The total dollar sales would be roughly three and a half times that, four times that.

Q. So that the dollar volume in 1938 would run between thirty-five and $40,000?

A. That is correct.

Q. And the dollar volume then, for 1939, would run anywhere from between seventy thousand and perhaps $80,000? That is correct?

A. Yes.

Q. What were the Perfex sales of oil burner controls to A, B, C, in 1939?

Mr. Haycraft: To the Automatic Burner Corporation.

The Witness: We had no sales in 1939.

By Mr. Freeman:

Q. Now, I understand you to say that you were in charge of the Patent Department of the Perfex Corporation?

A. That is correct.

Q. You are a patent attorney, and a lawyer?

A. I am.

Q. I understood you to say that you were employed
441 by Minneapolis-Honeywell prior to the formation of the Perfex Corporation, that is correct?

A. I was with Minneapolis-Honeywell three and a half years.

Trial Examiner Sheppard: Let me get that. Were you employed by the respondent, too?

The Witness: Three and a half years, 1931 to '34.

Trial Examiner Sheppard: I knew that the gentleman who preceded you was.

Mr. Freeman: I thought he testified to that.

Mr. Haycraft: He didn't.

Mr. Freeman: We will bring it out so the record is clear, anyway.

Trial Examiner Sheppard: O. K.

By Mr. Freeman:

Q. And you were in the Patent Department of the respondent, Minneapolis-Honeywell Regulator Company?

A. I was.

Q. I take it that Perfex followed the usual practice of taking out patents on its primary controls, the kind you have been referring to in your testimony today, and the kind that are illustrated in the catalog that has been introduced as Commission's Exhibit 61?

A. Yes, we do.

Q. Would you mind telling us approximately the
442 number of patents that your company either owns or controls or operates under in connection with its manufacture and sale of oil burner primaries?

A. What number, did you say?

Q. The number, yes?

A. I don't remember the exact number, but I prepared a list for you the other day. I don't have the carbon copy with me.

Q. I hand you the list, and ask you to refresh your memory, and then tell us.

A. With reference to oil burner primary controls, we either own or operate eight patents. We own eight patents, and operate under five additional.

Q. So that the primary controls made and sold by your company come under one or more of some thirteen primary control patents?

A. That is correct.

Q. Will you look at that same list that you are now holding in your hands, and tell us the number of patents under which your company manufactures and sells room thermostats for use in connection with oil burners, particularly referring to that type of room thermostats which you identified this morning, and as illustrated in Commission's Exhibit 61?

A. We own four thermostat patents, and operate 443 under three additional.

Q. So that your thermostats are made under one or more of some seven patents owned or controlled by your company?

Mr. Haycraft: That is not what he said. I object to that. He did not say those were exclusive licenses.

The Witness: I don't think that is correct.

Mr. Freeman: Strike out my question as to "or controlled." You operate under—all I am interested in is the number of patents having to do with thermostats under which you operate.

Trial Examiner Sheppard: That is right.

The Witness: We operate under seven at the present time.

By Mr. Freeman:

Q. In connection with the manufacture and sale of either your constant ignition type oil burner control or the intermittent ignition type oil burner control, was it necessary for your company to seek from Minneapolis-Honeywell any license in order to be free to make the primary controls for oil burners you are now making?

A. No, it wasn't necessary to secure a license. We were able to buy some patents, get some licenses under some additional, and handle the rest of it by a matter of design.

Q. From your experience in the oil burner control field, do you know of any company, outside of Timken, I be-
444 lieve that was referred to by Mr. Luthe, where primary controls manufactured by one control manufacturer are used, and a thermostat of another manufacturer is used, with a limit control of still another manufacturer?

A. I personally do not know of any manufacturer today that is following that practice, using three controls made by three separate control manufacturers.

Q. Do you know of any oil burner manufacturers that follow the practice of using a primary made by one of the control manufacturers, and a thermostat made by still another control manufacturer?

A. No, I don't.

Q. I notice on these exhibits that the Commission introduced, particularly Exhibit 56, the figure 10 illustrates a Series 10 relay, does it not?

A. Yes, it does.

Q. And that Series 10 relay is understood by the trade to be a Minneapolis-Honeywell product, is that not so?

A. That is correct.

Q. Minneapolis-Honeywell is the only company, as far as you know, that refers to its electrical hook-up by the term "Series 10"?

A. That is correct.

Trial Examiner Sheppard: I did not get that term.
445 The Witness: Series 10.

Mr. Haycraft: Series 10.

Trial Examiner Sheppard: O. K.

By Mr. Freeman:

Q. A Series 10 circuit is a peculiar type of circuit, where contacts are successively made and successively broken, is that correct?

A. That is correct.

Q. And the one that makes contact first breaks last, and the one that makes last breaks first, is that correct?

A. That is correct.

Q. I think you said you are familiar with the primary control made by Minneapolis-Honeywell, employing the Series 10 circuit?

A. I am.

Q. And you are likewise familiar with the thermostat that goes with that primary, embodying a Series 10 circuit?

A. I am.

Q. I take it, Mr. Tate, you are familiar with the sequence of operation of the primary, when the thermostat makes its first contact and then makes its second contact?

A. That is correct.

Q. I take it, likewise, that you are familiar with the electrical operations that occur when the last contact to make on the thermostat breaks first, are you not?

446 A. Yes.

Q. And then, of course, you understand what takes place with the primary when the first made contact of the thermostat breaks last?

A. That is correct.

Q. And you are familiar with the Series 10 hookup as used by Minneapolis-Honeywell, on its primary controls, and its room thermostats?

A. I am.

Q. You understand the sequence of operation as a result of the cooperation of the thermostat with the primary control?

A. Yes, sir.

Q. Now, when you use the ordinary thermostat that merely has a make-and-break contact, which we might call a single line make and break, as distinguished from a three-wire job, that we sometimes refer to as Series 10, that is, when you use the standard conventional thermostat with a Series 10 circuit arrangement, primary control, you then omit use of one of the contact points or binders or the primary, is that not so?

Mr. Haycraft: That is objected to as irrelevant and immaterial, Mr. Examiner, not proper cross-examination.

Mr. Freeman: Your Honor, it is cross-examination, because we have here a Series 10 and wire. I want to

447 examine him with respect to what takes place with respect to the co-mingling or mixing of the controls.

Mr. Haycraft: But he is going outside. He is taking something that is not the Series 10, or not the thermostat.

Mr. Freeman: I am asking about Series 10, the Perfex thermostat.

Mr. Haycraft: Then why didn't you say so?

Trial Examiner Sheppard: Let's proceed.

Mr. Freeman: I have assumed we were talking about what was on the Commission's Exhibit No. 56.

Trial Examiner Sheppard: All right. I think I am learning. Go on, Mr. Tate.

The Witness: I think I will have to state it a little bit differently than you did now.

By Mr. Freeman:

Q. You state it as you wish.

A. When you use a two-wire room thermostat, such as this one on the list, described on Exhibit 56, with the Series 10 primary control, you have to short two other terminals on the primary control, because there are three terminals on there for the thermostat, and you only use two wires for our standard thermostat.

Q. When you short two of the terminals, what you are really saying is you connect two of the terminals up
448 electrically, as though there was one terminal there?

A. That is correct.

Q. And when you do that, do you then eliminate any of the function of the Series 10 relay, as made by Minneapolis-Honeywell?

A. There is one set of contacts on the relay that become inoperative, or not used.

Q. But those contacts are usable when properly connected with a thermostat of the Series 10 type?

A. That is right.

449 Q. That set of contacts is just an unnecessary, or extra, or at least not used or made use of, when you connect that Series 10 primary control to a Perfex thermostat of the two-wire type?

A. That is right.

Q. Now, what happens with the use of a Perfex thermostat of the heat anticipating type with a Series 10 Minneapolis-Honeywell relay, assuming that you use a jumper or short circuit two of the terminals of the primary? What problems arise electricaly?

A. Since our heater thermostat is equipped with an electrical resister in series with the line, that is balanced against the relay coil in the transformer, so that we do not get the proper amount of heat in the thermostat. In other words, the relay in the Minneapolis-Honeywell Series 10 oil burner primary control draws a different amount of current than is drawn by the relay in our oil burner primary control.

Trial Examiner Sheppard: Is there a difference in the cost of operation?

The Witness: I would not say so, no.

So that the record is straight, this particular piece of

literature is not on a heater type thermostat. The one that was in there was on a plain type of thermostat.

450 By Mr. Freeman:

Q. The Perfex Catalogue, Commission's Exhibit No. 61, does illustrate a heater type thermostat?

A. That is correct, but I don't believe that it shows any wiring diagram connected to a Minneapolis-Honeywell Series 10 circuit.

Mr. Haycraft: I move to strike the testimony contained in the last two questions and answers, Mr. Examiner. In other words, if he did not cross-examine on this exhibit, if the cross-examination did not go to this exhibit, where there were wiring designs shown, then the testimony has no place in the record.

Trial Examiner Sheppard: All right.

Mr. Freeman: I wonder if you will reserve ruling on that until we check this catalogue.

Trial Examiner Sheppard: Yes.

By Mr. Freeman:

Q. What is meant in your catalogue on page 120, of Commission's Exhibit 61, wherein it is stated:

"In selecting the proper model of heater type thermostat make sure that the heater element is matched with the current characteristics of the device to be controlled. For instance, see specifications."

Does that not refer to using a thermostat of the
451 heater type with a device that is controlled by the thermostat?

A. I think the statement is clear. A further explanation merely means that with a heater type of thermostat it has to be matched with the relay coil, or the device that it is controlling, so that the proper amount of current is flowing through the thermostat into the resister, which is inside the thermostat.

Mr. Haycraft: Now, Mr. Examiner, as I understand it, the document to which the cross-examination was directed was not the heater type.

Mr. Freeman: Oh yes, it was.

Mr. Haycraft: No, it was not the heater type. I am talking about the one that he was testifying to when you asked him questions about the design and the hook up between the thermostat and the primary control.

Trial Examiner Sheppard: I don't know. I have

been letting him go into this because I thought it would make the record clear.

Mr. Haycraft: The trouble is, Mr. Examiner, as the witness pointed out a few moments ago, that he had not been talking about the heater type; and these exhibits are put in evidence showing the wiring designs were not the heater type.

Mr. Freeman: I think I can shorten this materially by asking just one question.

452 Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Would you say that a room thermostat of the heater type could not be used successfully with a primary control of the Series 10 type?

Mr. Haycraft: That is objected to as irrelevant and immaterial. We did not go into that on direct.

Mr. Freeman: That will cut out the heater type if he answers that it can't be.

Trial Examiner Sheppard: I will let him answer, it may shorten it.

The Witness: On that particular question I would have to say yes, because the Minneapolis Series 10 has a thermostat of the heater type, but its wiring is different. But as a general proposition, maybe this will clear the proposition, as a general proposition the heater type thermostats cannot be promiscuously connected to control devices, like the plain thermostats can.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. And when you connect plain thermostats of Perfex manufacture to a Series 10 primary control you have to take the control and provide a permanent jumper between two of the binding posts provided on the primary. Is that correct?

A. That is correct.

453 Q. And that is what is illustrated in Commission's Exhibit No. 59?

A. That is correct.

Q. Do you provide your customers with a jumper to put across two terminals?

A. We do not.

Q. And you have to know which particular two ter-

minals to put the jumper across in order to get any sort of operation, is that not so?

A. That is right.

Q. And you cannot connect your ordinary thermostat to just any two terminals, that is, any two of the three terminals on the Minneapolis-Honeywell primary and get satisfactory operation?

A. No, you cannot.

Q. There are three terminals on the Minneapolis-Honeywell primary?

A. That is right.

Q. And you might get the two that would work, provided that you included there an auxiliary and you had a jumper between two of the three terminals?

A. That is correct. The terminals are color coded.

Q. If the average installer using your two-wire thermostat connected color to color, which is the usual way, that is, red to red, or white to white, or blue to blue, using
454 your room thermostat of the kind illustrated in Commission's Exhibit No. 56, would you then get a proper connection?

Mr. Haycraft: That is objected to, because we have no definition of what an average installer is. These products are sold, Mr. Examiner, to experts, to oil burner manufacturers, and I submit that the question is improper.

Mr. Freeman: With that change in the question, so what it is understood that I am referring to any installer who goes out and installs these devices.

Trial Examiner Sheppard: With that explanation, you may answer.

By Mr. Freeman:

Q. Just answer my question. Would he connect color to color?

Mr. Haycraft: Mr. Examiner, he must also assume that he does not see the letter of instructions that goes along with the burner. I don't think that is fair. These instructions go with the burner. Now, he is asking him to suppose that the man who is doing the thing does not have the instructions, and does not know what he is doing. That is what the question assumes.

Trial Examiner Sheppard: That is very far fetched, but I will let Mr. Tate straighten that out.

The Witness: I don't believe the record is com-

pletely clear, because this is not a room thermostat. I
455 think that is confusing. I think you had better get another sheet.

By Mr. Freeman:

Q. I am now handing you Commission's Exhibit No. 59, and ask you that question with respect to Commission's Exhibit No. 59?

(Handing document to the witness.)

Trial Examiner Sheppard: Would you like to have the question repeated?

The Witness: It is not necessary.

Trial Examiner Sheppard: All right.

The Witness: There is no color code on our thermostat Series 100 shown on Exhibit No. 59, so that the question raised by Mr. Freeman would not exist.

Trial Examiner Sheppard: You don't have those different colors?

The Witness: Not on that thermostat.

By Mr. Freeman:

Q. And if the individual making the installation had misplaced the instruction sheet that you sent along, and he was endeavoring to connect the thermostat made by Perfex to a Minneapolis-Honeywell primary of the Series 10 type, he would not have any way of knowing when he made the correct and proper installation, is that correct?

A. That is correct. He could not do it unless he had
456 the sheet or unless he knew from personal experience how to do it.

Q. Then on primaries manufactured by your Company, where you have two terminals but do not employ any Series 10 arrangement, the installer connects the two terminals of the thermostat with two terminals of the primary and he gets satisfactory operation, is that correct?

A. That is correct.

Q. And he can connect either terminal of the thermostat to either terminal of the primary and get a proper connection and satisfactory operation?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. So that when a room thermostat of the two-wire type, distinguished from the Series 10 type, is used with a Minneapolis-Honeywell primary, either the R116 or the

R117, it is necessary to do something more to the primary controls made by Minneapolis-Honeywell than merely connect the two terminals of the thermostat with two terminals of the primaries?

A. That is correct.

Trial Examiner Sheppard: Let him say what is necessary.

457 By Mr. Freeman:

Q. What is necessary to be done is to follow your instruction sheet wherein a permanent jumper is used for connecting two of the binding posts or terminals of the primary, is that correct?

A. That is correct.

Q. And it is necessary, in addition, to connect a particular two of the three together, is that correct?

A. That is correct.

Q. And improper connection or connecting just any two terminals by a permanent jumper would not provide a proper connection, is that so?

A. That is right.

Q. So that the installer would not only have to have the controls but a set of detailed instructions to use the Minneapolis-Honeywell primary with your thermostat?

A. That is correct.

Q. Incidentally, Mr. Tate, do you know from your own experience whether or not the color code of the Minneapolis-Honeywell primaries in years gone by have been changed?

A. They have two color codes, one for Series 10 and one for Series 20; and the Series 20 is different than the Series 20 used by the old Honeywell Company before the merger.

458 Q. Now, how many companies do you actually know of that actually go to the pains necessary to connect up the two of the Terminals of the Minneapolis—primaries so that they can use your thermostat? I am asking now what is an actuality as distinguished from what might be done?

A. Will you read the question, please?

(The question above referred to was read by the Reporter.)

The Witness: I don't know of any company that is following that as a standard practice.

By Mr. Freeman:

Q. It is a makeshift, from your experience, is that not so?

A. Maybe that is a little bit loose.

Q. Well, we had one loose connection, so the question might be a little loose. But seriously you don't know of anybody doing that in the field?

A. Not as standard practice in the regular line, no.

Q. Now, in addition to having just an ordinary thermostat—and we have been talking about an ordinary thermostat—being connected with the Minneapolis Series 10 primary, the thermostat would have to be of the snap acting kind, wouldn't it, in order to function?

A. That is correct.

Q. So that if you used the ordinary thermostat, with the walking off connections, that is, contacts, it would not work, would it?

A. No, it would not.

459 Q. In other words, any of your thermostats, even though they did not have a heater in them, might not work with a Minneapolis-Honeywell primary, even though the individual followed your instructions, and put a permanent jumper across two of the binding posts?

A. As far as our thermostats are concerned, I think that would be attempting to serve a slow-moving contact thermostat in the line.

Q. Are all of the thermostats snap acting?

A. Yes.

Q. How about the phrase that I find in your catalogue, Commission's Exhibit 61, wherein you say, "Important. Do not use a non-snap-acting Series 10 or Series 20 thermostat or limit control"? Why was that put in, that I have just read?

Mr. Haycraft: In connection with what? What are you referring to?

By Mr. Freeman:

Q. Do you understand my question, Mr. Witness?

Mr. Haycraft: I would like to have the question read.

(The question above referred to was read by the Reporter.)

Mr. Haycraft: That is objected to, unless the question includes what item they are talking about. What is
460 the product? What is the device you are referring to?

Mr. Freeman: I will reframe the question.

Trial Examiner Sheppard: All right, reframe it.

By Mr. Freeman:

Q. Can you use a non-snap acting thermostat with a Minneapolis-Honeywell primary of the Series 10 type, and I am referring to the two devices involved here, the R116 and the R117, made by respondent.

Mr. Haycraft: I object to that question, Mr. Examiner, because the witness has said the Perfex Company will have only the snap-acting type. That is what we are talking about.

Trial Examiner Sheppard: That is what I understand. Go ahead. We will let you answer the question, Mr. Tate, if you can.

Mr. Freeman: I think he is well qualified to answer these questions, your Honor.

The Witness: I will answer it in the positive way, that you must use a snap-acting thermostat. The negative is you cannot use a non-snap-acting thermostat of the 2A type, with a Minneapolis-Honeywell Series 10 primary control.

Mr. Haycraft: I move to strike that, Mr. Examiner, as having no value in this case, with respect to this witness, certainly, because he does not have that type. Why
461 go into that? Why put up a straw man and knock him down?

Mr. Freeman: Mr. Haycraft, are you willing to stipulate now you cannot use these controls interchangeably, and state on the record that there may be a particualr type of thermostat that might, under some exceptional circumstance, be used with a Minneapolis-Honeywell primary? If you will so state, I will stop quickly.

Mr. Haycraft: I will not do anything of the kind, but I am trying to restrict this cross-examination to the direct examination. By this witness we put in certain exhibits and certain testimony with respect to it. I have no objection to cross-examination as to those exhibits and what they mean, as far as that is concerned, but I do object to going beyond that, and some other product that is not in the record.

Mr. Freeman: May it please the Examiner, when Mr. Tate referred to the exhibit I hold in my hand, Exhibit 59, he said you could connect up a thermostat with a Series

10. That is the way the record stands, and I think we are certainly entitled to show that it just can't be any thermostat.

Mr. Haycraft: He is talking about his own thermostat, and that is all he is talking about. Anything beyond that is improper.

462 Mr. Freeman: He did not say, at the time he testified when you asked him, anything with respect to a heater thermostat. He said "our" thermostat, and I think that we are entitled to define what kind of a thermostat will under some exceptional circumstances work.

Mr. Haycraft: He has restricted it to his own thermostat. If you go beyond, it is just encumbering the record.

Trial Examiner Sheppard: All right. I am going to let the record stay like it is, taking it all into consideration, Mr. Tate's testimony on that point.

Mr. Haycraft: The motion to strike, I take it, is overruled? I believe I made a motion to strike.

Trial Examiner Sheppard: Well, I will deny that motion. I will let it stay in for whatever it is worth.

By Mr. Freeman:

Q. I would like now to ask you what is meant, in your catalogue, Commission's Exhibit No. 61, wherein it is stated: "Important. Do not use a non-snap-acting Series 10 or Series 20 thermostat or limit control." What does that refer to?

Mr. Gilpatric: Page 111.

The Witness: That phrase in our catalogue means that our relays in our primary controls are so designed that they will not operate except with a two-wire snap-
463 acting thermostat. Therefore, we put the caution in, telling them not to use any thermostat or limit control in which the contacts move slowly.

By Mr. Freeman:

Q. In other words, your company recognizes that an improper thermostat connected up with your primary would not give satisfactory operation?

Mr. Haycraft: I object. There is no basis, no foundation.

Mr. Freeman: I am reading right from the catalogue now.

Trial Examiner Sheppard: Yes, I will let him answer that.

The Witness: Will you read the question?

(The question above referred to was read by the Reporter.)

The Witness: We do.

By Mr. Freeman:

Q. So that it would be improper, or you would not get satisfactory operation from the hook-up for an oil burner, using your primary controls and limit controls, and using, say, automatic product device thermostat, of the non-snap-acting type?

Mr. Haycraft: That is objected to as irrelevant, immaterial, and not proper cross-examination,

464 Mr. Freeman: That is only an example, your Honor, so that we all understand what we are talking about, what is meant by the caution in the catalogue.

Mr. Haycraft: Yes, but the caution in the catalogue was not brought to the witness' attention in direct examination. It is not a matter which should be gone into at this time with this witness. We are going to have to present this case from time to time. I am not saying I am going to, but if I wish to present a different type of primary with this limit control and this thermostat, I will do it at the proper time. That is not what this examination is, and there is nothing in here to show either in this exhibit, or any exhibit received in evidence, other than the respondent's devices, with the Minneapolis-Honeywell device. When you go beyond that, and go into something else, into someone else's device, you are going beyond the direct examination, and beyond the purpose of the offer.

Mr. Freeman: As a matter of fact, I think it is very proper cross-examination. They produce a circular and they show how you can connect a room thermostat. They do not say what kind, with a Minneapolis-Honeywell primary, and I think you can use it for no other purpose, if you wanted to impress this witness, although we are not trying to do so, to show they themselves—Commis-

465 sion's exhibit clearly indicates you have to use a proper thermostat. That is the only point we want to make, and I am confining all of my questions to these two documents.

Mr. Haycraft: Your last question, about those documents, 59 and 61, the last question, went beyond those documents, and assumed something entirely different.

Mr. Freeman: Strike out "Roy Johnson" or "Auto-

matic Products," and say a thermostat of the non-snap-acting type.

Mr. Haycraft: That is objected to.

Trial Examiner Sheppard: Gentlemen, you all know more about this case than I do. I do not want any of you to go beyond the scope of the case. I do not want to merge our hearing into something that is going to take place in the court here in the next six months or a year. Mr. Haycraft says this is not relevant to the issues. You say it is relevant.

Mr. Freeman: The Commission will have all the information and facts, and that is one thing we want to give them.

Mr. Haycraft: Many things tend to mislead.

Mr. Freeman: You are looking through your glasses, and not mine.

Trial Examiner Sheppard: I am going to let Mr. Tate testify in reference to that last question, you just
466 brought out, and then I want you to move to something else. Repeat that question to Mr. Tate.

(The question referred to was thereupon read by the reporter.)

By Mr. Freeman:

Q. And you will recall I amended that by even excluding the name of the company that has now been mentioned, so we are just talking about non-snap-acting types, whether made by any company?

Trial Examiner Sheppard: Mr. Tate, if you have that in your mind, you may answer.

The Witness: That combination would not operate correctly.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. And that reference as to not using a snap-acting type thermostat is referred to on Page 41 of Commission's Exhibit 61?

A. That is correct.

Q. That same notation is referred to again on Page 43 of Commission's Exhibit No. 61?

A. Correct.

Q. And likewise on Page 45 of Commission's Exhibit 61?

A. Correct.

Q. And likewise on Page 51 of Commission's Exhibit 61?

467 A. Correct.

Q. And likewise on Page 53?

A. Correct.

Q. And likewise on Page 57?

A. That is correct.

Q. And likewise on Page 59?

A. That is correct.

Q. And Page 61?

A. Correct.

Q. And Page 63?

A. Correct.

Q. The pages I have been referring to had to do with oil burner controls, that is, installations for oil burners?

A. That is correct.

Mr. Freeman: That is all.

Trial Examiner Sheppard: Anything else, Mr. Haycraft?

Mr. Haycraft: Yes.

Redirect Examination by Mr. Haycraft.

Q. Does your company sell any thermostat that is not a snap-acting type?

Trial Examiner Sheppard: Read the question.

(The question referred to was thereupon read by the witness.)

468 The Witness: We do not.

By Mr. Haycraft:

Q. What was the purpose of printing this precautionary language in your catalogue?

A. To prevent the dealer or installer from using some thermostat that he might have on hand of some other manufacturer, or trying to use one that was already in the home from an old damper operator set, or something like that.

Q. You simply were trying to give them a proper thermostat for use with your device?

A. That is correct.

Q. You said you did not know of any oil burner manufacturer that had used your devices, about which you testified in directions, Exhibits 56, 57, 58 and 59? Is that at the

present time, or would you say you never had known any manufacturer to use those devices as suggested in your instructions?

A. Use these devices with—

Q. No. 56?

Mr. Freeman: You do not mean to use 56?

Mr. Haycraft: Nos. 55, 57, 58 and 59.

The Witness: Repeat the question.

(The question referred to was thereupon read by the reporter.)

The Witness: They were used to a considerable
469 extent by Timken back several years ago. I believe in the last few years they tried to match them up in sets.

By Mr. Haycraft:

Q. Was Timken the only manufacturer you personally knew that had used those?

A. No, there were others, because most of our sales in 1936, our controls had to be used with other primary controls.

Q. Do you remember some of your customers back in those years?

Mr. Freeman: We want customers that you know that actually used your thermostat with somebody else's primary. We are talking about your thermostat and somebody else's primary.

The Witness: Electro used our thermostats with their own primary. That is the only one I know for sure, offhand, on the thermostats.

By Mr. Haycraft:

Q. How about the limit controls that you sold?

A. Limit controls generally go in the main line, and we don't have this problem of terminal connections, and so forth.

Q. It was not necessary, then, for you to issue special instructions for the use of your limit controls, with the Minneapolis-Honeywell setup?

470 A. Not if they were hooked in the high voltage line, where they are ordinarily recommended for, although in the oil burner, of course, a lot of installers do connect them in the low voltage line. For that reason, we did issue special instructions in connection with the limit controls.

Q. What is that exhibit number?

A. Exhibit 58. The other one, I believe, you have over there. This is the stoker.

Q. The stoker is out.

What companies, to your knowledge, used your limit control in conjunction with Minneapolis-Honeywell primary?

Mr. Freeman: What was that question?

Trial Examiner Sheppard: Read it.

(The question above referred to was thereupon read by the reporter.)

The Witness: The only one I know, of my own knowledge, would be Timken, but since we sold quite a few limit controls to other oil burner manufacturers, I would assume a percentage of those was used in connection with Minneapolis-Honeywell primaries.

Mr. Freeman: I move the last portion of that answer be stricken, especially where he starts with an assumption.

Trial Examiner Sheppard: That can go out.

By Mr. Haycraft:

471 Q. I will put it this way:

What companies bought limit controls from you before you mentioned the primary controls? Could you give us a list of those?

A. No, I couldn't. I have this list that I made up, of the names you gave me, which merely shows the dollar volume sold the companies. We did not have much to sell in the case of controls in the year 1936, except limit controls, and thermostats, but I cannot tell, from the information I have here.

Q. Don't you have any recollection on it, outside of that?

Mr. Freeman: That recollection should be limited to limit controls used in connection with oil burners, controls for oil burners.

Mr. Haycraft: Yes.

Mr. Freeman: As distinguished from stokers or commercial installation, because the same limit control can be used interchangeably with gas or oil.

The Witness: I have no recollection on that.

By Mr. Haycraft:

Q. Do you know whether Timken did?

A. Whether Timken used our limit control or Minneapolis-Honeywell Series 10 primary?

Q. Yes.

472 A. I would say they did.

Q. Do you know whether Cleveland Steel Products did?

A. Not of my own knowledge. They bought some $378 worth of controls in 1936, but I don't know.

Q. You know Electro did?

A. Electro bought limit controls.

Mr. Freeman: He has already testified Electro used them in connection with their own primary. I thought you were limiting this to limit controls of Perfex with Minneapolis-Honeywell primaries.

The Witness: You asked about Cleveland Steel Products?

By Mr. Haycraft:

Q. Yes.

A. Even up in 1938, we sold them some 650 limit controls, and only 25 primary controls.

Q. Do you know whether or not they were using Minneapolis-Honeywell primary controls in that year?

A. I do not.

Mr. Haycraft: That is all.

Recross Examination by Mr. Freeman.

Q. Mr. Tate, of your own personal knowledge, do you know whether Timken ever used one of your limit controls with the Minneapolis-Honeywell primary?

473 A. I have never been out and inspected them, but I have been told by the Chief Engineer they did.

Q. Strictly hearsay?

Mr. Haycraft: I object to that, Mr. Examiner.

Trial Examiner Sheppard: Yes.

Mr. Freeman: I am asking you, then, Mr. Tate, as a lawyer, whether or not that is not hearsay, or your understanding?

Mr. Haycraft: I object to that question and the form of it.

Trial Examiner Sheppard: Do you understand that question?

The Witness: I did not think it was a question to me.

Mr. Haycraft: He is asking him to characterize his testimony as hearsay.

474 Trial Examiner Sheppard: Well, I thought it would be that.

Mr. Haycraft: That is what it amounted to.

Trial Examiner Sheppard: That is the impression I had in mind. The objection is sustained.

The Witness: There was one question back in there some place I think should be clarified. I did not answer it correctly or completely.

Trial Examiner Sheppard: All right, straighten it out right now, Mr. Tate.

The Witness: I can't paraphrase the question, but I can give you the substance of it.

Trial Examiner Sheppard: Was it Mr. Freeman's question or Mr. Haycraft's?

The Witness: It was Mr. Freeman's question. The question was that we did not need any license from Minneapolis-Honeywell in order to design our primary controls, and I answered that "no", that we bought some patents and licensed under some other patents, and licensed around the Minneapolis controls. There was a group of controls at that time in which Minneapolis-Honeywell was the licensee, and there was some question as to whether it was an exclusive license, and whether they had a right to grant licenses, known as the Zoro patent group; but those patents were later invalidated, so they are no longer in
475 the picture. I did not bring that in before, but that was a part of the record back in 1936 and 1937.

Trial Examiner Sheppard: I remember his asking that question and your answering it in the negative, and I will consider the answer you made now with the answer that you made then.

Mr. Freeman: I would like to ask him a question on that.

Mr. Haycraft: I would like to ask a question on that, too.

Trial Examiner Sheppard: All right.

Mr. Haycraft: You mean by that it was necessary that you get the license under the Zoro patent?

The Witness: My recollection is that we asked for one. I don't know whether we did in writing or not.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Mr. Tate, do you know whether you asked the Minneapolis-Honeywell Company or did you ask the Cleveland Trust Company, the owners of the Zoro patents?

A. I don't remember which now.

Q. And the Zoro patent, that is a group of patents which are collectively referred to as the Zoro patents, they never kept your company from going ahead and making a primary control?

476 A. No, we went ahead in face of the patents.

Q. And those patents were ultimately knocked out by the Second Circuit Court of Appeals?

A. That is right.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Freeman:

Q. Reference was made on your direct to Commission's Exhibit 58, having to do with a pressure control where you now have a limit control. The Perfex limit control has a plurality of terminals on it, is that correct?

A. The one illustrated in that piece of literature does.

Q. I am referring to Figure 4 of the illustrations.

A. That is correct.

Q. In that case it is shown connected to a Series 10 relay?

A. That is correct.

Q. And I take it that Series 10 is illustrative of the Minneapolis-Honeywell relay, or the Protectorelay, either type of R116 or R117?

A. That is correct.

Q. In that case I notice the Perfex wiring diagram connects the terminal marked W, which I take it means white, and the terminal on the relay marked R, which

477 I take it means red.

A. That is correct.

Q. So when your Perfex limit control of the kind illustrated on Commission's Exhibit No. 58 is connected up with a Minneapolis-Honeywell Series 10 relay, you connect white to red?

A. That is right.

Q. And I notice that there is a second connection on your Perfex control also, marked W. That is a second white terminal, is that correct?

A. Yes, sir.

Q. And in that case you connect white to white?

A. That is right.

Q. And it is also necessary, is it not, in the wiring

diagram illustrated on Commission's Exhibit No. 58 to provide a permanent jumper between the R terminal and the B terminal, that is, representing the blue terminal on the Series 10 relay?

A. Yes, sir.

Q. And that illustration here does not refer to the connection at B, between R and B, as any example or any special notation that the individual who does the connecting up must provide a jumper between the two, other than the diagramatic illustration; is that correct?

A. That is correct.

478 Q. And in following the color combination, that is, connecting the R terminal on the Perfex control with the R terminal on the Series 10 primary, the way that you would connect color to color, will give you a wrong connection, is that correct?

A. That is right.

Trial Examiner Sheppard: Do you mean red to red?

Mr. Freeman: Red to red.

By Mr. Freeman:

Q. Connecting B or blue on your Perfex color combination to B or blue on the Minneapolis-Honeywell Series 10 relay will give you a wrong connection?

A. That is right.

Q. So the color combination of the Perfex control and the color combination of the Minneapolis-Honeywell Series 10 primary would be confusing; that is, you could not make a proper connection if you connected white to white, or red to red or blue to blue?

A. That is correct. Also, I would like to say that I don't believe that we manufactured that particular control around 1936 and 1937.

Q. So that any testimony as to any use of this control that is illustrated on Commission's Exhibit No. 58 occurred more than six or seven years ago at least, at least six or seven years ago?

479 A. Well, we will build Series 700, and we merely added two additional terminals, and left the color code there as it was, and left the two-wire pressure control.

Q. And then you would have to know just what two terminals of the Series 10 relay to connect together by a jumper in order to get the proper connection with the Perfex control?

A. That is right.

Q. I take it that this literature which illustrates the four different color combinations of a Perfex control has been off the market for the past six or seven years? I mean, illustrated on Commission's Exhibit No. 58?

A. About that length of time.

Q. How do you recommend that your present Series 700 control, the connection of it with a Minneapolis-Honeywell Series 10? In other words, some modern version of it, as distinguished from digging back into the archives?

A. Did you ask me how to connect it, or what did we sell the customer?

Q. What do you do now, since you no longer use a color combination and no longer use the four terminals; just what do you now illustrate as diagramatic or as bringing about the elimination of one of the binders or terminals on the Minneapolis-Honeywell primaries?

A. It would be connected as shown on Exhibit No. 59.

Q. And 59 has to do with a thermostat, and you are
480 now telling us that you do very much the same way if you used one of your pressure controls or limit controls?

A. That would be correct. Well, that is not exactly correct either. You would connect if as shown here if you were connecting a limit control. It is meant to be used in series with a low voltage thermostat or used in series with the main line of the motor.

Q. This diagram illustrated on Exhibit No. 59 is a room thermostat, and it would not necessarily follow that you would use a 700 series relay there?

A. That is correct.

Q. That is the thing I wanted to get at. Do you have a wiring diagram that would tell us now how you would connect up a limit control in the circuit with Minneapolis-Honeywell's primary of the Series 10 type?

A. I don't have any of the literature with me.

Q. Without the literature then, Mr. Tate, am I correct in my understanding that the room thermostat would be connected up one way with a Series 10, even though your room thermostat has two terminals on it, and a limit control would be connected up another way even though your limit control had two terminals on it?

A. That is correct.

Q. So the individual making the connection would not

necessarily follow the two terminals from thermostat
481 to the primary and use this same connection for the limit control?

A. That is correct.

Q. Isn't it true that in your catalogue you show a good many limit controls where the limit control is not at all connected up with the primary circuit but is used merely as a safety boiler control coordinating with the primary?

A. That is correct.

Q. In such case it is not used as a safety device?

A. That is correct.

Q. What we have been talking about here, that is, proper connections, had to do with a thermostat and limit control and the primary controls; those three controls that we all think of as standard in connection with the oil burner. That is correct, is it not?

A. That is correct.

Q. So that some limit controls, even of the same kind, might be used, even on an oil burner, but not in the primary circuit, but in that case it would not serve as a safety boiler control coordinating with the primary; is that correct?

A. That is correct. There are quite a few auxiliary controls used on heating plants.

Q. And the problems of connecting up the auxiliary controls, even though they be a limit control, is different than connecting up with a direct connection with three
482 controls that are used as the main controls for the proper functioning of an oil burner; is that correct?

A. That is correct.

Mr. Freeman: That is all.

Trial Examiner Sheppard: Anything else?

Mr. Haycraft: That is all.

(Witness excused.)

Trial Examiner Sheppard: Anything else this evening?

Mr. Haycraft: I have nothing further. Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Take an adjournment until nine-thirty o'clock tomorrow morning, Thursday, August 19th, 1943.

(Whereupon, at 4:30 o'clock p. m., August 18, 1943, the hearing in the above-entitled matter was adjourned.)

483 Room 376,
United States Post Office,
Milwaukee, Wisconsin,
Thursday, August 19, 1943.

Met, pursuant to adjournment at 9:30 a. m. C. W. T.

Before W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and B. R. Shute, Esq., 15 Broad Street, New York, N. Y., and

Bair & Freeman, by Will Freeman, Esq., 135 South La Salle Street, Chicago, Illinois, appeared for the Respondent.

484 PROCEEDINGS.

Trial Examiner Sheppard: Mr. Reporter, show Mr. Arthur H. Lockrae on the stand, having been previously sworn, and appearing again at the call of the Commission.

ARTHUR H. LOCKRAE was recalled as a witness for the Commission and, having been previously sworn was examined and testified as follows:

Mr. Haycraft: Mr. Examiner, you will recall we had some discussion with respect to Commission's Exhibit No. 11, whether or not it was the agreement entered into between the Minneapolis-Honeywell Regulator Company and the Timken Silent Automatic Company on December 2, 1935; and we have here a statement which has been furnished me by counsel, which they state is the contract entered into for that season, dated February 19, 1936; and I would like to substitute if I may, this agreement for the one that has already been received in evidence as No. 11, because of the fact I know this is correct and the other one is not.

Trial Examiner Sheppard: All right.

Mr. Freeman: That is not going to be very clear on the record.

Mr. Gilpatric: 11 and 12 were mixed up before.

Mr. Haycraft: It does not make any difference, 485 if you want me to, I will give them a separate number.

Mr. Freeman: I think it should be filed as a substitute, but when you say "this" it does not mean anything in the record.

Mr. Haycraft: All right, I will give it a number now.

Trial Examiner Sheppard: Mr. Haycraft, as those two things are together, let us make this 11-F, G and H.

Mr. Freeman: Off the record, please.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mark this 66-A, B, C, and D.

(The documents referred to were marked Commission's Exhibits 66-A, 66-B, 66-C and 66-D, for identification.)

Trial Examiner Sheppard: By agreement of counsel, Commission's Exhibit 66-A, B, C, and D is accepted into the record and will be considered by the Examiner in lieu of Commission's Exhibit No. 11-A, B, C and D.

(The documents referred to heretofore marked for identification COMMISSION'S EXHIBIT NO. 66-A, 66-B, 66-C, and 66-D, were received in evidence.)

Mr. Haycraft: I ask to be marked for identifica- 486 tion as Commission's Exhibit No. 67, a letter from the Timken Silent Automatic Company to the Minneapolis-Honeywell Regulator Company, dated June 11, 1935.

As Commission's Exhibit No. 68, I ask to have marked for identification a carbon copy of a letter from the Minneapolis-Honeywell Regulator Company, by J. W. Pauling, to the Timken Silent Automatic Company, dated June 18, 1935.

As Commission's Exhibit No. 69, a letter dated September 27, 1935, to Mr. M. J. Powers, care of the Timken Silent Automatic Company, from the Minneapolis-Honeywell Regulator Company.

As Commission's Exhibit 70, for identification, a letter from the Timken Silent Automatic Company, dated September 30, 1935, to Mr. John Pauling, Minneapolis-Honeywell Regulator Company.

As Commission's Exhibit No. 71, a letter from the Minneapolis-Honeywell Regulator Company to Mr. M. A. Powers, Timken Silent Automatic Company, dated October 3, 1935.

As Commission's Exhibit No. 72, a letter from the Timken Silent Automatic Company, dated November 26, 1935, to Mr. J. W. Pauling, Minneapolis Regulator Company.

And as Commission's Exhibit No. 73, a copy of Manufacturers Contract Report of the Minneapolis-Honey-
487 well Regulator Company signed by D. J. Peterson, giving report on Timken Detroit Axle Company, Timken Silent Automatic Division, bearing a date of January 15, 1937.

(The documents referred to were marked Commission's Exhibits Nos. 67, 68, 69, 70, 71, 72 and 73 for identification.)

Mr. Haycraft: Will you mark this document Commission's Exhibit No. 74-A and B?

(The document referred to was marked Commission's Exhibit No. 74-A and 74-B, for identification.)

Direct Examination by Mr. Haycraft.

Q. Mr. Lockrae, I show you Commission's Exhibit No. 74-A and B for identification, and ask you if you can identify that as correspondence between yourself and the Cleveland Steel Products Company with respect to the 1938 contract for that firm?

(Handing exhibit to the witness.)

A. Yes, sir; I can.

Mr. Haycraft: I offer in evidence then, Mr. Examiner, Commission's Exhibit No. 74-A, which is a carbon copy of a letter from the witness to the Cleveland Steel Products Company, dated February 3, 1938; and a telegram from the Cleveland Steel Products Company to Minneap-
olis-Honeywell Regulator Company, A. H. Lockrae,
488 dated February 2nd, 1938.

Trial Examiner Sheppard: Is there any objection?

Mr. Freeman: No.

Trial Examiner Sheppard: Mr. Reporter, show that the Exhibit 74-A and B is accepted for the record.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 74-A and 74-B was received in evidence.)

Mr. Haycraft: Will you mark this for identification?

(The document referred to was marked Commission's Exhibit No. 75-A and 75-B, for identification.)

Mr. Haycraft: And also mark these for identification.

(The documents referred to were marked Commission's Exhibits Nos. 76, 77, 78, 79, 80, 81, 82 and 83, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 75 for identification, 75-A being a carbon copy of a letter dated February 15, 1938 from C. B. Sweatt, Vice-President of the Minneapolis-Honeywell Regulator Company, to the Fairfield Oil Heating Company, Inc., Greenwich, Connecticut, and 75-B being an original letter from J. R. Johnson,
489 president of the Fairfield Oil Heating Company, Incorporated, to C. B. Sweatt, Minneapolis-Honeywell Regulator Company, dated February 18, 1938, and ask you if that was produced in response to my request with respect to correspondence of your Company with the Fairfield Oil Heating Company?

A. It was.

Mr. Haycraft: I offer it in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: No.

Trial Examiner Sheppard: Exhibit No. 75-A and B will be accepted.

(The documents above referred to heretofore marked for identification COMMISSION'S EXHIBIT NO. 75-A and 75-B was received in evidence.)

By Mr. Haycraft:

Q. Mr. Lockrae, I show you Commission's Exhibit No. 76 for identification, which is a carbon copy of a letter from yourself to the Rae Oil Burner Company, San Francisco, California, dated January 18, 1938, and ask if that was produced in response to my request with respect to correspondence with that firm?

(Handing exhibit to the witness.)

A. Yes, sir.

Q. I notice at the top there is a note about C. L. Peterson. Who was he at that time?

490 A. He was and still is manager of our San Francisco branch.

Q. And who is the John referred to in that paragraph?

A. Let me see that again.

(Document handed to witness.)

The Witness: Mr. Pauling.

491 By Mr. Haycraft:

Q. The reference to John also in the body of the letter is the same party?

A. The same party.

Q. Hayward is mentioned in the paragraph at the top of the page. Is that the Hayward who is one of your customers out on the Pacific Coast?

A. Mr. Hayward is the vice president of Ray Burner Company.

Mr. Haycraft: I offer this exhibit in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Gilpatric: No objection.

Trial Examiner Sheppard: It may be accepted as Exhibit 76.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 76, was received in evidence.)

By Mr. Haycraft:

Q. I now show you Commission's Exhibit No. 77, a carbon copy of a letter from yourself to the Century Engineering Corporation, attention E. J. Lattner, President, dated January 21, 1937, and Commission's Exhibit No. 78, for identification, an original letter from Century Engineering Corporation to the Minneapolis-Honeywell Regulator Company, dated January 29, 1937; Commission's Exhibit 79, for identification, a carbon copy of a letter
492 from the Minneapolis-Honeywell Regulator Company, signed by C. E. Swanson, addressed to the Century Engineering Corporation, dated February 2, 1937; Commission's Exhibit No. 80, for identification, a carbon copy of a letter from yourself to Mr. E. J. Lattner, President of Century Engineering Corporation, dated January 5, 1939; Exhibit 81, for identification, a carbon copy of a letter from Minneapolis-Honeywell Regulator Company, signed by Charles S. Saunders, Vice President, addressed to the Century Engineering Corporation, dated January 29, 1940; Exhibit 82, for identification, a carbon copy of a letter from yourself to Mr. E. J. Lattner, dated September 22, 1941, and Exhibit 83, for identification, an original letter from the Century Engineering Corporation to Min-

neapolis-Honeywell Regulator Company, attention Mr. Lockrae, dated October 20, 1941, and ask you if this correspondence I have just described was furnished by you pursuant to my request a few days ago?

A. It was.

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

By Mr. Haycraft:

Q. I notice some typewritten notations on Commission's Exhibit No. 81, for identification, at the top of
493 the page; were they put on there in your office, directing the filing of the copy of the letter, as to what was done, or what was the significance of that?

A. No, sir. Apparently those were put on in our Chicago office, simply directing where the carbon copies would go.

Mr. Haycraft: I offer those in evidence, Mr. Examiner.

Trial Examiner Sheppard: Any objection?

Mr. Gilpatric: No objection.

Trial Examiner Sheppard: Let them be accepted as Exhibits 77 to 83, inclusive.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 77, 78, 79, 80, 81, 82 and 83, respectively, were received in evidence.)

By Mr. Haycraft:

Q. I show you Commission's Exhibits No. 84-A to D. It does not have a title, but it contains certain figures under dates, with respect to a number of oil burner manufacturers, customers of Minneapolis-Honeywell Regulator Company. Would you describe that for the record, as to how it was prepared and what it purports to contain?

A. This is a list of accounts that Mr. Haycraft asked
494 that we get some figures to show their purchases of Minneapolis-Honeywell controls, in the years of 1937 to 1939, inclusive.

Q. And these were taken from your books?

A. Our records.

Q. You are satisfied they are correct?

A. As far as I know, they are correct.

Mr. Haycraft: I offer that exhibit in evidence.

Mr. Gilpatric: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

Mr. Gilpatric: No objection.

Trial Examiner Sheppard: It may be admitted as Exhibits 84-A to D.

(The papers referred to were marked for identification COMMISSION'S EXHIBITS 84-A, 84-B, 84-C and 84-D, respectively, and were received in evidence.)

495 Trial Examiner Sheppard: Now, Mr. Haycraft, you have everything in here except—

Mr. Haycraft: (Interposing.) Everything except 67 through 73, and I am taking them up with Mr. Pauling when he takes the stand.

Trial Examiner Sheppard: O. K.

By Mr. Haycraft:

Q. Did you conduct the negotiations with the Cleveland Steel Products Corporation leading up to the signing of their 1938 contract?

A. Yes, sir.

Q. In this letter which you wrote to Mr. O'Brien, Commission's Exhibit No. 74-A, dated February 3, 1938, do you remember whether you saw Mr. O'Brien after the date of that letter and before the signing of the contract in April?

A. I am not certain.

Q. I notice that you state here:

"If you could standardize on our constant ignition controls it would go a long way toward obtaining a lower price; but failing that, then if you can see your way to place as nominal a price difference as possible between your burner equipped with our controls and our competitors', it would be extremely beneficial."

496 Who were you referring to there? Were you not referring to the Mercoid—well, which one were you referring to, either the Mercoid or Perfex?

A. They were kind of intermingled that year, as I remember. I am sure that Mercoid was involved, and I think Perfex was involved.

Q. Did you know that Perfex at that time was making name plates for the Cleveland Steel Products Company to put on their oil burners?

A. I know that was a practice of theirs, and they could very well have been doing it at that time.

Q. But you don't recall then which competitor you had in mind in that paragraph, or both of those paragraphs?

A. Well, as I say, I am sure Mercoid was involved, and Perfex might have been, I am not certain.

Q. Previously the oil burners of the Cleveland Steel Products Company equipped with the Mercoid controls had been selling for $5.00 less than the one with the Minneapolis-Honeywell controls?

A. They had been sold for less, and I believe the amount was $5.00.

Q. Do you know, as a result of your negotiations in 1938, what was done with respect to that; what came out of that situation there?

A. As I recall, Mr. Haycraft, they continued to use
497 the Mercoid controls that year.

Q. Well, you heard the testimony on that in the record, which showed the volume of sales of Mercoid in 1938?

A. I just did not recall that, but it is my recollection that they did continue in 1938 and bought some Mercoid and used it.

Q. Very small. But the point is, your proposition was either to standardize on your control or to wipe out the differential. Do you remember whether or not they wiped out the differential?

A. No, sir; they did not.

Mr. Freeman: The letter does not say wipe out the differential.

The Witness: No, reduce it, if I remember correctly.

Mr. Haycraft: Perhaps that would be better.

The Witness: Yes.

By Mr. Haycraft:

Q. But they did sign a contract calling for their season requirements, estimated at 3,000 sets?

A. As I recall it, they did.

Q. And your sales of primaries and thermostats during the preceding year, according to Commission's Exhibit 84, was about 1200, around 1200 sets; is that correct?

498 A. That is correct.

Q. So what I am trying to get at is, what transpired between February 3, 1938 and April, 1938 that led up to the signing of this agreement. Do you have any recollection of any further negotiations on that?

A. I do not, Mr. Haycraft. I just remember that the agreement was executed.

Q. In your letter to the Century Engineering Company, dated January 21, 1937, Commission's Exhibit No. 77, you make a quotation on 7500 sets, or bracket 5, and state:

"It would mean that those sets of controls would cost you approximately $1.25 more than the figure you mentioned at which you could obtain low voltage competitive controls, and that this means if a dealer difference in price could be set we know that we could get our share of the business, as on other business with our dealers this has been done on line voltage controls."

What competitor did you have in mind there?

A. What year was that, Mr. Haycraft?

Q. This was in January, 1937.

A. I believe at that time that there were two competitors involved, Mercoid and Penn Switch.

Q. Now, you mentioned in there a low voltage competitive control. Does that indicate who the competitors were?

499 A. No, because they both made low voltage.

Q. In the last line you referred to line voltage controls.

A. Century had previously used a line voltage control.

Q. And who manufactured the line voltage controls?

A. Well, at that time Perfex—pardon me, at that time Penn and Mercoid both manufactured a line voltage control, and we also manufactured one.

Q. Will you explain for the record the difference between what you referred to as a line voltage control and low voltage controls? That term has been used before, and I think it would be a good idea to get some definition of it.

A. With a line voltage control there is no transformer in the primary control, and you have to lead the line voltage wires from the primary control to the room thermostat, which meant the requirement calls for BX or conduit, and that is because of the absence of the transformer it was a lower priced control.

500 Q. The Minneapolis-Honeywell made both?

A. Yes.

Q. That is, R116 and R117?

A. That is the low voltage control.

Q. Did your competitors specialize on low voltage controls, or did they sell more line voltage controls?

A. They had both.

Q. You do not know whether or not they had more of one than the other?

A. I can say this, Mr. Haycraft, if it will help the record any. I can tell you the line voltage control went out of the picture very shortly after 1937. In other words, the field requirement was for the low voltage control. It was no longer necessary to manufacture the line voltage for general usage.

Q. How long would you say, then, that the line voltage control was out of the picture?

A. Its popularity was on the wane in 1937, and shortly thereafter it was out of the picture.

Q. What is the number of your line voltage primary controls, what line, or series?

A. The R416 for constant ignition, and the R417 for intermittent ignition.

Mr. Haycraft: I haven't anything further to ask Mr. Lockrae at this time, Mr. Examiner, and I should like 501 to call Mr. Pauling for the correspondence that I have, that he had to do with.

Trial Examiner Sheppard: Gentlemen, do you want to cross-examine Mr. Lockrae?

Mr. Gilpatric: No. You have nothing to ask him on the Fairfield matter?

Mr. Haycraft: No, I think the correspondence speaks for itself.

Trial Examiner Sheppard: Whatever you want to touch on can be done later.

You are excused, Mr. Lockrae.

(Witness excused.)

Mr. Haycraft: You can call him any time you want to, anyway.

Mr. Gilpatric: I am refraining on cross-examination, on the basis when we come to our case we can include it.

J. W. PAULING was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Sheppard: Give us your name and address, please.

The Witness: J. W. Pauling.

502 By Mr. Haycraft:

Q. Mr. Pauling, what is your occupation?

A. Vice President, Minneapolis-Honeywell Regulator Company.

Q. As such, what are your duties?

A. I am manager of the heating controls division.

Q. How long have you been occupying that position?

A. Since about 1928, I think.

Q. Do you have any particular territory, other than the United States, that you cover, or any particular accounts?

A. I have no particular territory. My position is more of an executive one in Minneapolis, but I do make various contacts over the United States.

Q. On what occasion? What occasions those contacts?

A. Oh, I accompany other salesmen, and make what we might term good will contacts, sales promotion.

503 Trial Examiner Sheppard: Your address, Mr. Pauling.

The Witness: Minneapolis.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

Mr. Haycraft: Mark these documents Commission's Exhibits 85, 86 and 87, for identification.

(The papers referred to were marked Commission's Exhibits 85, 86 and 87 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 85, for identification, a photostatic copy of a letter from Mr. T. A. Crawford, General Chief Manager of the Timken Sound Automatic Division of Timken-Detroit Axle Company, Detroit,

Michigan, addressed to the Minneapolis-Honeywell Regulator Company, attention J. W. Pauling, dated May 19, 1936, and ask you whether or not you received that letter, and can identify that as a photostatic copy of it?

A. I received this letter.

Q. And there are some pencil notations apparently on the original, on the lower left hand corner. Do you recognize those?

A. I do not.

504 Trial Examiner Sheppard: You do not recognize the handwriting?

The Witness: I do not.

Trial Examiner Sheppard: Possibly somebody not in your office?

The Witness: Probably someone in our office that I had passed this letter along to, to get the information.

By Mr. Haycraft:

Q. Can you interpret the notations?

A. I assume it was Timken's price.

Q. We will take that up later.

A. The fourth bracket, $12, the third, $12.30, Timken price, $9.15. That is the different brackets, I presume.

Mr. Haycraft: I offer that in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Gilpatric: No.

Trial Examiner Sheppard: Let Exhibit 85 be accepted in evidence.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 85, was received in evidence.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 86, for identification, purporting to be a carbon copy of a letter from yourself to the Timken Sound Automatic, Attention T. A.

505 Crawford, dated May 22, 1936, which is apparently in reply to Commission's Exhibit 85, and I ask you if you mailed the original of that letter to Mr. Crawford?

A. Yes, sir.

Mr. Haycraft: I offer that in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Gilpatric: No objection.

Trial Examiner Sheppard: Let Exhibit 86 be accepted in evidence.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 86, was received in evidence.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 87, for identification, which is a letter from H. C. Shafer, Purchasing Agent of the Timken Sound Automatic, dated January 15, 1937, addressed to Minneapolis-Honeywell Regulator Company, in the form of an agreement, in view of the noted acceptance in the lower left hand corner, and I ask you to identify that as your signature, and as an agreement that was entered into between Minneapolis-Honeywell Regulator Company and the Timken Company.

A. Yes, sir.

Mr. Haycraft: I offer that in evidence.

Trial Examiner Sheppard: Any objection?

506 Mr. Gilpatric: No objection.

Trial Examiner Sheppard: Let Commission's Exhibit 87 be accepted into evidence.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 87, was received in evidence.)

By Mr. Haycraft:

Q. I also show you Commission's Exhibit 67, for identification, the original letter from H. C. Shafer, addressed to the Minneapolis-Honeywell Regulator Company, attention John Pauling, dated June 11, 1935; Exhibit 68, for identification, a carbon copy of your letter to Timken, attention H. C. Shafer, in reply to Commission's Exhibit No. 67, dated June 18, 1935; also carbon copy of a letter unsigned, addressed to M. A. Powers, Timken Sound Automatic, dated September 27, 1935, Commission's Exhibit No. 69, for identification; also a letter from M. A. Powers, Vice President and Chief Engineer of Timken Sound Automatic, dated September 30, 1935, addressed to you, John Pauling, Commission's Exhibit No. 70, for identification; also Commission's Exhibit No. 71, for identification, a carbon copy of a letter from yourself to Mr. Powers, dated October 3, 1935, apparently in reply to Exhibit 70, for identification. I show you Commission's Exhibit No. 72, for identification, the original letter from M. J.

507 Roberts, Vice President and General Manager of Timken Sound Automatic, to J. W. Pauling, dated

November 26, 1935, and ask you if you can identify those papers as correspondence passing between you and the representative officials or employees of the Timken Sound Automatic Company, on the dates indicated?

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

The Witness: Except this one. I think that that is my letter, but it has no identification. It is probably a personal letter.

By Mr. Haycraft:

Q. What is the date of that one?

A. The date of it is September 27, 1935.

Q. Exhibit No. 69, for identification?

A. I don't recall having written the letter, but I think I probably did, as a personal letter.

Trial Examiner Sheppard: If it not important, you can blank it out.

Mr. Haycraft: I will ask him some questions about it.

Are you willing to stipulate you did write that? for the record?

Mr. Freeman: Off the record.

508 Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

509 Mr. Haycraft: Will you stipulate that he wrote that letter?

Mr. Freeman: No, we will not stipulate, when he says that he does not remember it, that he wrote it. Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Haycraft: I offer them all in evidence.

Trial Examiner Sheppard: Let them be accepted. Those are Commission's Exhibits Nos. 67 to 72.

Mr. Haycraft: Yes, I haven't offered 73 yet.

(The documents referred to heretofore marked for identification COMMISSION'S EXHIBITS NOS. 67, 68, 69, 70, 71 and 72, were received in evidence.)

By Mr. Haycraft:

Q. I will show you Commission's Exhibit No. 73 for identification, which purports to be a carbon copy of a report of Salesman D. J. Peterson, under date of January 15, 1937, with respect to his call on the Timken Detroit Axle Company, and a number of individuals named, and ask you if you can identify that as a copy of an original report from Mr. Peterson which came to your attention on or about the time that it was written?

A. Yes, sir.

510 Mr. Haycraft: I offer that in evidence.

Mr. Freeman: No objection.

Trial Examiner Sheppard: It may be accepted.

(The document referred to heretofore marked for identification COMMISSION'S EXHIBIT NO. 73, was received in evidence.)

By Mr. Haycraft:

Q. Did you accompany Mr. Peterson on the call referred to in this report?

A. Yes, sir.

Q. Does it correctly state your recollection of what transpired?

A. It does.

Q. Do you remember when it was that you submitted the contract to Timken with respect to the 1937 business?

A. I don't remember the exact date. It would be late in the winter of 1936.

Q. I show you Commission's Exhibits 12-A; B and C, and 11-D, and ask you if you can identify those pages as the sheets of the form of the agreement which you submitted to Timken on or about December, 1936?

A. This is a contract that I submitted on December 2nd.

Q. Did any one from the Timken Company sign it?

A. No, it was not signed.

Q. Do you recall what reason was given by the

511 officials of the Timken Company, as to why they would not sign that contract as submitted?

A. I think I can.

Q. And what were those reasons, as you recall them?

A. I think at that time they told me that they were not signing any contract or any commitments for the year; and if the contract had to be signed at that time, it necessi-

tated referring it to their legal department, which would involve quite some delay.

Q. Did they ever sign any contract after that?

A. I think so.

Q. With your company?

A. Yes. Just before this there had been a change in the Timken management.

Q. Will you explain what the change was, and what took place?

A. I don't know just the date, but just before 1935 the Rockwell people came in, replacing the previous management at Timken.

Q. Did you negotiate the 1935 contract, dated in 1935, and entered into for the 1936 business with the Timken Company, the year previous?

A. Yes, I did.

Q. And was Rockwell in there at that time?

A. I don't recall.

512 Q. Do you recall whether he was the one that you contacted or not?

A. No.

Q. Were you able to get a contract signed after 1937 with the Timken Company, for 1938 and 1939?

A. I don't believe that after that date they signed a contract, I am not sure.

Trial Examiner Sheppard: What is the date of that contract that they did not sign?

Mr. Haycraft: December 2, 1936.

Trial Examiner Sheppard: December 2, 1936?

Mr. Gilpatric: Yes.

Trial Examiner Sheppard: All right.

Mr. Haycraft: I will ask now, just in order to keep the record straight at this point, whether or not counsel for the Respondent will produce any such agreement for 1938 and 1939.

Mr. Gilpatric: There are no such agreements after the year 1937.

Mr. Haycraft: You have made a search on that?

Mr. Gilpatric: Yes, we have made a search, and there are none.

Mr. Haycraft: I just wanted to make that clear right there on that point, so we will not have to come back to it again.

513 By Mr. Haycraft:

Q. Who was Mr. Roberts mentioned in Commission's Exhibit No. 67?

A. Mr. Roberts was manager of the oil heating division of Timken, manager of the Timken Silent Automatic Company.

Q. Mr. Schaeffer was the purchasing agent?

A. That is right.

Q. Now, in your letter of June 18th, Commission's Exhibit No. 68—

Mr. Gilpatric: What year is that?

Mr. Haycraft: 1935, June 18, 1935.

By Mr. Haycraft:

Q. You state that on the basis of your price that you were making to them, that it was based on "purchases from us this year of 40,000 units."

Do you recall whether or not that many units had been purchased at that time or not? Whether they came up to that amount?

A. In what year?

Q. In 1935.

A. I do not.

Q. Do you recall having a conversation, a telephone conversation with Mr. Powers of the Timken Company? By the way, who is Mr. Powers, or who was he at that time?

A. Engineer.

514 Q. In 1935, in September, 1935?

A. Engineer of the heating division.

Q. Do you recall talking with him with respect to the subject matter of this letter of September 27th, 1935, Commission's Exhibit No. 69?

(Handing document to the witness.)

A. No, I do not recall that conversation.

Q. Do you have any recollection at all with respect to the competitors who were making a quotation of $2.50, or, as he says in a letter in response to that, dated September 30, 1935, Commission's Exhibit No. 70, as low as $2.00 for Pressure controls?

A. I recall a discussion with Powers regarding this particular type of Pressuretrol, building a cheaper Pressuretrol, leaving off some of the features which were on our standard unit. At that time, if my memory serves

me, he told me that there were other companies, I don't remember how many, that were designing a less expensive unit and offering them to the Timken Company.

Q. And that is what you call a limit control, is it not?

A. That is right.

Q. What type was Timken putting out at that time?

A. At that time, well, I am not sure, but I think that at that time that they were building a rotary type of burner, but along in there somewhere they started developing
515 a pressure type, what is commonly known as a gun type.

Trial Examiner Sheppard: Is the gun type sometimes known as the pressure type?

The Witness: Yes.

By Mr. Hayeraft:

Q. This letter of October 3, 1935, Commission's Exhibit No. 71, what does that refer to?

(Handing document to the witness.)

A. It relates to the design of a cheaper Pressuretrol.

Q. By your firm?

A. Yes. The letter is quite specific. It says:

"I have had it up with our engineering department and we have started to design a Pressuretrol to meet the specifications set forth."

Q. And did they succeed in getting one which was satisfactory?

A. We did.

Q. And did you sell them that after that?

A. We did.

Q. What number did you give to that Pressuretrol, do you remember?

A. I do not. I think that the line voltage was numbered P-404, I would not swear to that.

Q. Would that be high or low voltage?

516 A. P-404 would be a line voltage.

Q. Calling your attention now to Commission's Exhibit No. 85, and Commission's Exhibit No. 86, correspondence between you and Mr. Crawford with respect to the Mueller Furnace Company, dated in May, 1936, I ask you if you can recall the subject matter of that correspondence?

A. Yes, sir.

Q. And what is this R126 primary control referred to there? How does that differ from R116 and R117?

A. R116 and R117 are stack mounted controls, and R126 is a boiler mounted control that sights the flame, affected by the radiant heat of the fire, whereas R116 and R117 are actuated or affected by the temperature of the stack gases.

Q. Did this deal go through?

A. No, it did not go through.

Q. I wish to show you Commission's Exhibit No. 87—

A. (Interposing.) I wish to correct my answer. I think that there were some few that were sold to the Mueller Furnace Company, but not many.

Q. Not in the quantity—

A. (Interposing.) Not in the quantity that we were talking about.

Q. I show you Commission's Exhibit No. 87, and ask you whether or not that is not the agreement entered into between your firm, that is, Minneapolis-Honeywell
517 Regulator Company, and the Timken Company, referred to in Commission's Exhibit No. 73, which is the report of Mr. Peterson. In other words, isn't that the 1937 agreement between Minneapolis-Honeywell and Timken?

(Handing exhibit to the witness.)

518 A. Yes, this refers to the '37 agreement with Timken.

Q. Is that the 1937 agreement?

A. No.

Q. Exhibit 87, that photostatic exhibit, is that the agreement?

A. That is the agreement.

Q. Do you know whether or not any such similar agreements were made for any succeeding years? In other words, that is not on your regular form, but was any agreement to that same effect made for succeeding years?

A. I don't recall a similar agreement.

Q. Do you recall any understanding or agreement between Minneapolis-Honeywell and Timken, that you were a party to, or that you negotiated for the years 1938 and 1939?

A. I don't recall offhand any agreement in writing.

Q. That is what I mean?

A. There may have been.

Q. That calls for a minimum of 23,000 units, does it not?

A. 23,000 units to be shipped in the first six months of the year.

Q. Let me see it.

A. Yes. (Handing document.)

Q. Do you know whether or not that was carried out?

A. I think so.

Q. They bought, according to Commission's Exhibit
519 84, in 1937, approximately 30,000 units, and it is your recollection about 23,000 orders were placed before the 1st of July, 1937?

A. I had definite orders for 23,000 units when I executed this agreement.

Mr. Haycraft: That is all, Mr. Examiner.

Trial Examiner Sheppard: Cross-examine.

Mr. Gilpatric: No cross-examination.

Trial Examiner Sheppard: O. K. Thank you, Mr. Pauling.

(Witness excused.)

Trial Examiner Sheppard: Anything further, gentlemen?

Mr. Haycraft: I haven't anything at this time further here, and there was a matter that I had in mind, of putting in some more, a couple of volumes of transcript, in respect to the cross patents in Chicago, and at our hearing to be held there tomorrow, and that is all I have now, in addition to what has been done here, except that I may want to possibly recall someone from the Mercoid Corporation, but I do not know. I would like, if it would not inconvenience the Examiner and counsel for the respondent, to set a tentative hearing for tomorrow morning at eleven o'clock, in Chicago.

Mr. Freeman: Off the record.

(Two volumes were marked Commission's Exhibits 88, 89 for identification.)

520 Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

Mr. Gilpatric: Our suggestion is, Mr. Examiner, that Mr. Haycraft be permitted at this time to make an offer of the record in the cross case, which is entitled "In the United States District Court of Appeals, for the Seventh Circuit, October Term, in session, 1942, No. 8008, Midcontinent Investment Company, a corporation, and Minneapolis-Honeywell Regulator Company, plaintiffs-appel-

lants, *vs.* The Mercoid Corporation, defendant-appellee; and No. 8009, Midcontinent Investment Company, a corporation, and Minneapolis-Honeywell Regulator Company, plaintiffs-appellees, *vs.* The Mercoid Corporation, defendant-appellants, on appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division," and to such an offer we will agree on the understanding that he can supply the reporter with the record at a later time, and presently offer the two volumes in evidence.

Mr. Haycraft: I offer the two volumes, as Commission's Exhibits Nos. 88 and 89.

Trial Examiner Sheppard: That is right, 88 and 89.

521 Mr. Gilpatric: And those will be physical exhibits.

Mr. Haycraft: That is right.

Trial Examiner Sheppard: Physical exhibits 88 and 89, and the examiner accepts those into the record.

(The books referred to, heretofore marked for identification COMMISSION'S EXHIBITS 88 and 89, were received in evidence.)

Mr. Haycraft: Then, in view of that, Mr. Examiner, and the understanding also that at any hearing held in Chicago in behalf of the respondents, if there is any piece of evidence that I need to put in that I may have overlooked, they will allow me to do it at that time.

Trial Examiner Sheppard: Before they start their case.

Mr. Haycraft: Before they start taking their testimony.

Trial Examiner Sheppard: All right.

Mr. Haycraft: I will then not ask for another hearing in Chicago, and ask that we now adjourn to reconvene in Detroit, on next Monday morning, at 10 o'clock a. m.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

Mr. Haycraft: I might say, Mr. Examiner, that
522 with respect to the hearing set for Cleveland on August 26th, I find that it is not possible to have the witnesses present, and therefore I am asking that that hearing be cancelled, and that a new hearing be set for September 14, 1943.

Trial Examiner Sheppard: And I will have the hearing in New York, if you want one, four days later. I think that would give you plenty of time.

Mr. Haycraft: Three days later.

Trial Examiner Sheppard: Three days later. I do this, gentlemen, because it is very had to make arrangements to travel, and I want you all to have plenty of time.

Mr. Gilpatric: We are in complete agreement.

Trial Examiner Sheppard: I will fix the hearing in Cleveland for the 14th, at 10 o'clock, in a room that will be designated later, and the hearing in New York for the morning of the 16th of September, at 45 Broadway, New York City, which is our regular hearing room there.

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

On the record.

Is that all we can do at this hearing?

Mr. Haycraft: Yes.

Trial Examiner Sheppard: Miss Reporter, we will take an adjournment, to reconvene in the City of Detroit, Michigan, in Court Room No. 713, Federal Building, at 10 o'clock in the morning on August 23, 1943, and we stand adjourned.

523

(Whereupon, at 11:15 a. m., August 19, 1943, the hearing in the above-entitled matter was adjourned.)

524

Room 715,
United States Post Office,
Detroit, Michigan,
Monday, August 23, 1943.

Met, pursuant to adjournment at 10:00 a. m. C.W.T.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and B. R. Shute, Esq., 15 Broad Street, New York, N. Y., and

Bair & Freeman, by Will Freeman, Esq., 135 South La Salle Street, Chicago, Illinois, appeared for the Respondent.

525

PROCEEDINGS.

Trial Examiner Sheppard: Mr. Reporter, you can convene the hearing in the Minneapolis-Honeywell Case, Docket No. 4920, in accordance with the adjournment taken in Milwaukee on the 19th day of August, 1943.

You will show the usual appearances of Mr. Haycraft and the Respondent's counsel.

Mr. Haycraft has informed me that the first witness has requested that he appear on the stand at two o'clock, and therefore we will take a recess and reconvene at two o'clock in this room, Court Room 715.

We will stand in recess until that time.

(Whereupon, at 10:05 a. m. a recess was taken until 2:00 o'clock p. m. of the same day.)

526 Afternoon Session.

2:00 o'clock p. m.

Trial Examiner Sheppard: All right, gentlemen, come to order. Mr. Reporter, you can get on the record.

Mr. Haycraft, you may call your first witness at this time.

Mr. Haycraft: I will ask Mr. Rockwell to take the stand.

WALTER F. ROCKWELL was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Trial Examiner Sheppard: Give me your name, please, Mr. Rockwell.

The Witness: Walter F. Rockwell.

Trial Examiner Sheppard: And your address, Mr. Rockwell?

The Witness: 2240 Seminole Avenue, Detroit.

Trial Examiner Sheppard: All right.

Direct Examination by Mr. Haycraft.

Q. What is your occupation?

A. I am president of the Timken Detroit Axle Company.

Q. And where is that company located?

A. 100 Clark Avenue, Detroit, Michigan.

527 Q. In what business is that company engaged?

A. Its principal business is the manufacture of truck axles and transmissions.

Q. Does it, among other things, manufacture oil burners?

A. That is a relatively small part of our business, yes.

Q. Is it operated as a division of the Company?

A. That is right.

Q. How familiar are you with the operations of that division?

A. Well, only in a general way. My duties naturally require supervision of that division, but I don't have any direct working connection with it. That is, the division

is managed by Mr. Crawford, and the purchasing, contracting and sales work, and so forth, is done by executives employed in that division. We haven't, of course, made any oil burners for a couple of years, and we are now entirely devoting our energies towards the production of war materials.

Q. How long have you been president of the Timken Detroit Axle Company?

A. Since 1939, I think, '39.

Q. Before that did you have a position with the firm?

A. I was vice-president and general manager.

Q. How long had you been vice-president and general manager?

A. Since 1933.

528 Q. Who is the individual in the organization who has charge of signing of agreements for the purchase of materials and equipment?

A. Well, the actual physical purchasing is done by Mr. Shafer; but the policies with regard to that are probably established by Mr. Crawford, who is general manager of that division, for the most part.

Q. What position does Mr. Shafer hold?

A. He is purchasing agent.

Q. Do you recall ever having any business relations with the Minneapolis-Honeywell Regulator Company?

A. Yes.

Q. And what were those business relations that you recall?

A. Largely in connection with the purchases that we made or contemplated making from them from time to time.

Q. Purchases of what?

A. Controls for our oil burners.

Q. Controls for your oil burners?

A. Yes.

Q. Do you recall the different item of controls that you were accustomed to buy or did buy from the Minneapolis-Honeywell Regulator Company?

A. No, I could not name them. There were four different controls involved.

Q. I take it Mr. Crawford would be more familiar

529 with those items?

A. Yes, he would.

Q. I show you Commission's Exhibits 24-A and B and 25-A and B, and ask you to look those over.

(Handing documents to the witness.)

A. I have recently looked at these, Mr. Haycraft, so I am familiar with their contents.

Q. You wrote Commission's Exhibit No. 24-A and B and you received Commission's Exhibit No. 25-A and B?

A. That is right.

Q. How did you come to write this letter? You say you are not very close to the details of the business; do you recall the occasion, and how you were prompted to write the letter?

A. Well, I think it is a normal course of business. We had an argument about this matter, and it was put up to me to see what I could do about it.

Q. What was it that was put up to you; what was the argument?

A. Well, we figured that we had a lower price coming to us as a result of having purchased a quantity of units.

Q. What was the basis of that belief on your part?

A. Well, I think largely because we figured we bought a large quantity of material and we were entitled to a lower price.

530 Q. Did you have any discussion with any representative of the Minneapolis-Honeywell Company with respect to that matter prior to the time that you wrote this letter?

A. I can't recall.

Trial Examiner Hayward: When is the letter dated?

Mr. Haycraft: December 24, 1936.

By Mr. Haycraft:

Q. You mention in the second paragraph that Mr. Pauling had made you a visit in the week previous to that time.

A. That is right.

Q. But you were out of town?

A. That is right.

Q. Was Mr. Pauling the representative of Minneapolis-Honeywell who regularly called upon you?

A. That is right.

Q. And you had business relations with him before?

A. That is right.

531 Q. You refer to, in this second paragraph, an agreement between Mr. Roberts,—and who is he?

A. Roberts was formerly the manager of the division. He died.

Q. He preceded Mr. Crawford?

A. That is right.

Q. You referred to an agreement reached with Mr. Roberts early this year, which agreement was the basis for our favoring you with our business during 1936.

What was that agreement that you recall?

A. Well, as I recall, Roberts had an understanding with them to the effect if we bought a certain number of units, we would get a lower price.

Q. Do you recall what that number of units was?

A. No, I don't.

Q. Do you have any memorandum or any data in your hand that can refresh your recollection on that?

A. No, I don't believe so. The figures have been made available, I think, to you.

Q. A reference is made in this paragraph to a memorandum prepared by Mr. Roberts, with respect to that agreement. Do you still have that memorandum?

A. Well, there should be a copy of it in the file.

Q. Do you want to consult Mr. Shafer or Mr. Crawford to see if there is such a thing?

532 A. Yes.

(Consultation off the record.)

The Witness: No.

By Mr. Haycraft:

Q. What is the memorandum that you have there?

A. Just a pencil notation. I don't know who wrote it, and it is not my handwriting.

Q. Do you recognize the handwriting?

A. No, I don't, Mr. Haycraft. It is not mine. I don't believe it is Roberts'.

Q. Is this the memorandum you had in mind when you wrote the letter?

A. I doubt it.

Q. Is that the only memorandum you can find that bears on that question?

A. Well, I haven't personally searched for it, but Mr. Cooper has, and Mr. Crawford, and I assume if it was available it would be here.

Q. You say you do not recognize that handwriting?

A. No, I don't. I don't see where this has much to do with the letter either.

Mr. Haycraft: Mark this Commission's Exhibit No. 90.

(The document referred to was marked Commission's Exhibit No. 90 for identification.)

533 The Witness: (Continuing.) Because, as I see it, we agreed to buy a certain number of units from him, and for that G. C. burner, and if we bought that many we were to get a lower price. Isn't that what the letter says, in effect?

By Mr. Haycraft:

Q. What is the G. C. Burner?

A. The gun type burner, that differs from our larger production burner in its type.

Q. How long had that burner been in production?

A. Well, I think it went into production at about that time, or maybe a little before that.

Q. Did it go into production in 1935?

A. I think it probably did, yes.

Q. Do you recall from whom you purchased the controls for the burner when it first went into production?

A. No, I do not.

Q. Do you have any way of refreshing your recollection on that?

A. I think Mr. Crawford would know.

Q. Do you remember from whom you were buying controls for the gun type burner at the time this letter was written in December, 1936?

A. Well, we had bought controls from the Penn Automatic Switch Company, or whatever the name is, then.

534 Q. Penn?

A. Penn control.

Q. And it was the Penn Company, then, you had in mind in the third paragraph, where you say, "This concession was apparently made to persuade us to drop another make of control"?

A. It is possible.

Q. Was it a fact? I am trying to find out what the fact is.

A. I couldn't say it was a fact.

Q. Do you have any way of refreshing your recollection on that?

A. Well, I rather imagine the records would show where we bought the controls in prior years.

Q. What did you do in 1936? Had you purchased controls for your G. C. burner from Minneapolis-Honeywell?

A. I think we probably did, along with other makes, too.

Q. You stated here in this second paragraph, "I believe, our purchases from you during this year will exceed $300,000".

Did that include any controls for your G. C. burners?

A. I would assume it probably includes both the G. C. and the wall flame type.

Q. How many types of burners were you making at that time?

A. Two types, our largest production being in the
535 wall flame type.

Q. The wall flame type?

A. The wall flame type, yes.

Q. Is that sometimes referred to as the rotary type?

A. That is right.

Q. How did the percentage run, do you recall, approximately?

A. Well, I rather imagine it was about two-thirds of the rotary, one-third gun type.

Q. In Mr. Sweatt's reply to you he referred to a plan or sale of gun type burners to Reynolds and Mueller and other manufacturers than yourself. Did that coincide with your recollection of the situation, or not?

A. I do know we had a contract with Reynolds to supply them with burners. I don't recall whether or not that is specified, a certain make of control, or not.

Q. Were you using thermostatic, limit controls and primary controls from Minneapolis-Honeywell during this period of time?

A. I assume so, although I am not familiar enough with the exact workings of this oil burner division to state specifically.

Mr. Freeman: Mr. Haycraft, when you refer to "this period of time", are you referring to the year 1936?

Mr. Haycraft: Yes.

536 Mr. Freeman: Or 1935?

Mr. Haycraft: 1936, at the time this letter was written.

Mr. Freeman: Then your question was restricted to the year 1936, when you said "this period of time", is that correct?

Mr. Haycraft: That was my intention, yes.

By Mr. Haycraft:

Q. In Mr. Sweatt's letter, in reply to your letter, he says, "At the time of this conversation, the Reynolds Company had specified a competitive type of control."

Do you remember what that competitive type of control was that the Reynolds Company had specified?

A. No, I do not.

537 Mr. Haycraft: Will you mark these?

(The documents referred to were marked Commission's Exhibits 91-A, 91-B, 91-C and 91-D, for identification.)

By Mr. Haycraft:

Q. Mr. Rockwell, I show you Commission's Exhibit 91-A, B, C, D, and ask you whether or not this Exhibit was prepared under your direction pursuant to the requirements in the subpoena served upon you?

(Handing documents to the witness.)

A. Yes, I have seen it.

Q. Who prepared this exhibit?

A. It was prepared by our purchasing department under the direction of Mr. Shafer.

Mr. Haycraft: That is all, Mr. Examiner, that I wish to ask Mr. Rockwell at this time. I am going to call Mr. Crawford and Mr. Shafer for the details.

Trial Examiner Sheppard: Have you any cross-examination?

Mr. Gilpatric: Yes.

Trial Examiner Sheppard: Proceed.

Cross-Examination by Mr. Gilpatric.

Q. Mr. Rockwell, you said in answer to Mr. Haycraft's questions on this letter which you wrote to Mr. Sweatt
538 in 1936, that you had some argument about prices.

Were you always trying to get the lowest price you could on materials that you purchased from the Minneapolis-Honeywell Regulator Company?

Mr. Haycraft: That is objected to as irrelevant and immaterial, and not proper cross-examination.

Trial Examiner Sheppard: I will let you answer that. Go ahead and answer that question.

The Witness: Yes, sir.

Mr. Haycraft: Mr. Examiner, I wish to urge further

that objection for the reason that the question did not correctly summarize the witness' testimony, in view of the fact that he said that the purchasing was done by the purchasing department, and it was only when there was a case of an argument that it was put up to him as a final proposition; so the witness does not do the purchasing, and is not in the position of seeking the lowest price, and so on. I object to that sort of question being propounded to this witness, because there is no foundation laid for it, either in the testimony or any other place.

Mr. Gilpatric: This witness stated that on matters of policy he was consulted as the principal executive, and I am asking the witness if it has always been his objective to get the best price he could from the Minneapolis-Honeywell Company.

539 Trial Examiner Sheppard: I think that is apparent to every businessman.

Mr. Gilpatric: I am beginning a line of questions which I think are relevant.

Trial Examiner Sheppard: I will let him answer. He has already answered it, and I will give the answer the weight which I think it deserves.

By Mr. Gilpatric:

Q. Now, during the year 1936, Mr. Rockwell, you said that your Company had purchased controls from the Penn Company, I understand. Is that correct?

A. That is right, yes.

Q. Did you also buy controls from the Perfex Company during 1936?

A. That is possible. I could not state for sure without checking the records on that.

Q. You did purchase from Perfex in subsequent years?

A. That is right, yes, sir.

Q. What was your objective in buying controls from other control manufacturers besides Minneapolis-Honeywell?

A. To secure a better price.

Q. Are you familiar with the contract which your Company entered into for the year 1936 with the Minneapolis-Honeywell Regulator Company, which I show you, being Commission's Exhibit No. 66.

540 Mr. Haycraft: I am going to object to that, Mr. Examiner, not proper cross-examination, and state in connection with that objection that I purposely refrained

from questioning this witness with reference to this agreement because I have another witness who is more familiar with that, and who will go into details, and be subject to cross-examination.

Trial Examiner Sheppard: I don't think he went into that on direct.

Mr. Gilpatric: Mr. Examiner, this gentleman has been asked about purchases by his company of controls, from the Respondent during 1936. Now, that is certainly connected with the contract. If this witness does not know anything about that contract, he can say so, and I will not pursue that line any further.

Trial Examiner Sheppard: What about that, Mr. Rockwell; do you know anything about that, do you know enough about it to testify?

The Witness: Do you want me to answer the question?

Trial Examiner Sheppard: Yes.

The Witness: Well, I am familiar with the contract only to this extent, that I recently have seen a copy of it, and probably saw it when it was under discussion; but personally I do not consider it a contract. It is a pur-
541 chase agreement entered into between our purchasing department and the sales department of the Minneapolis-Honeywell. Similar agreements are being made, I assume, right along. If it had been a binding contract on the Company, it would have been signed by an officer of the company. Since it was not, I assume it was treated by us as a purchase agreement only.

By Mr. Gilpatric:

Q. Mr. Rockwell, do you know anything about the clause in Commission's Exhibit No. 66—

Mr. Haycraft: I am going to object to any further interrogation about this document. It is not proper cross-examination, particularly in view of what the witness has just stated, as to what he considers this document.

Mr. Gilpatric: He stated that he knows about the agreement.

Mr. Haycraft: That does not entitle you to cross-examine him on it.

Mr. Freeman: We are entitled to find out what he knows.

Mr. Gilpatric: We are entitled to that.

Mr. Haycraft: Not when it is on a matter which is not touched upon on direct examination. There are a lot of things that I did not ask him about on direct.

Trial Examiner Sheppard: I will sustain the ob-
542 jection. There is no use of going ahead with the argument.

Mr. Gilpatric: Mr. Examiner, I make an offer to prove on this point that this witness knows about the clause in Commission's Exhibit No. 66 which reads as follows:

"In view of the special prices listed in this agreement it is understood that the purchaser will standardize on and use the company's products exclusively, except for field tests, or when other makes are specified by the dealer."

I further propose to show according to this witness that did not have the effect in the mind of the Timken Company of binding it to buy exclusively Minneapolis-Honeywell controls; and that it was this witness who determined the policy of the Timken Company in that respect; and that the phrase beginning with the words "of other companies" were added at the insistence of the Timken management when the contract was presented to them by Minneapolis-Honeywell. And we further state that that testimony, if elicited, would be relevant to the direct examination of this witness.

By Mr. Gilpatric:

Q. You were asked, Mr. Rockwell, about the two types of oil burners which your company manufactured in 1936, the wall flame or rotary type, and gun type. It is a
543 fact, is it not, that the rotary type of burner uses the intermittent type of primary control, the intermittent ignition type of control?

A. By intermittent do you mean recycling?

Q. Yes.

A. That is right.

Q. The gun type uses what is known as the constant ignition type of control?

A. That is right.

Q. Do you know how many controls for your gun type of burner were bought during 1936 from Minneapolis-Honeywell?

A. No, I could not say, except that I would infer from the correspondence that we bought at least 7,500 sets.

Q. For the gun type burner?

A. Yes.

Mr. Freeman: For the purpose of the record, do I understand, Mr. Haycraft, that you will not let me see Commission's Exhibit No. 91, for identification, at this time,

although this witness has testified to having it made in accordance with a subpoena received from the Commission?

Mr. Haycraft: Not unless the Examiner will direct me to do so. Under the ordinary procedure of the Commission and of the Courts that I am familiar with, opposing counsel cannot see exhibits until they are offered in evidence.

544 Mr. Freeman: We are entitled to see them before they are offered in evidence, so that we can determine whether or not they are relevant, whether or not we want to object to them.

Mr. Haycraft: You can determine that when I offer it.

Mr. Freeman: I still ask you, Mr. Examiner, to direct counsel for the Commission to let us see Commission's Exhibit No. 91 for identification.

Trial Examiner Sheppard: I don't see why you gentlemen should fight over whether you should see an exhibit or not. It is something that you ought to get along nicely and pleasantly about.

Mr. Gilpatric: Mr. Examiner, we are not trying to prove our case during the Commission's case; but we do realize that we are dealing with men like Mr. Rockwell who are associated with and engaged in war production; and to call them back a month and a half from now, when we come back on our side of the case, seems to be an imposition on men of this type. That is all we are trying to do, is to save their time, and Mr. Haycraft is raising technical objections because certain things were not asked on direct examination.

Mr. Haycraft: I want to get the witness off the stand as soon as possible and put on a man who is familiar with the details, and then they can cross-examine him to

545 their heart's content.

Mr. Freeman: There is only one question before the Examiner now, and that is whether or not we can see Commission's Exhibit No. 91 for identification at this time.

Mr. Haycraft: You can see it in just a moment, just as soon as I can put a witness on who can identify it. Then I will be glad to let them see it. I don't want to part with it at this time.

Trial Examiner Sheppard: Gentlemen, I don't want to see you gentlemen fighting back and forth about exhibits. But you raised something interesting, Mr. Gilpatric. I am perfectly willing, if your side and Mr. Haycraft can get

totgether on the matter, I am perfectly willing and would be glad to have these gentlemen answer your questions now so that they will not have to come back again.

Mr. Gilpatric: That is our principal point, we are not trying to broaden the scope.

Trial Examiner Sheppard: Can't we let him answer these few questions?

Mr. Haycraft: I don't know what few questions he is going to ask. I certainly don't want them to put in their side of the case at this time. That is not orderly procedure.

Trial Examiner Sheppard: No, if that is what you
546 are trying to do, I don't think it is fair.

Mr. Freeman: We are not trying to do that.

Mr. Gilpatric: All we are trying to do is to look at the paper which Mr. Haycraft for reasons of his own has asked the witness about, but which he now refuses to let us see.

Mr. Haycraft: I asked him about it simply because Mr. Rockwell was the man who produced it.

Mr. Freeman: If he was the one who produced it, then it is proper that we see it in connection with his testimony.

Mr. Haycraft: This exhibit will be further identified by the man who actually prepared it, and you can cross-examine him as to the method of preparation, and as to the document itself. This man did not prepare, but at the time the other witness is on the stand, I will be glad to have Respondent's counsel have access to the exhibit; but I want to have it identified by the witness who can testify as to the details of it. I submit just because it was produced by this witness that does not entitle counsel for the Respondent to look at it now.

Trial Examiner Sheppard: Would it hurt anything if they looked at it?

Mr. Haycraft: No, but I want to get through with this witness and put a witness on the stand who does know
547 the details. One of my principal reasons that I don't want them to cross-examine this witness as to its contents is because I did not ask this witness any questions about the exhibit. If he had been asked about the contents of the exhibit, that would be different.

Mr. Gilpatric: You can object to any questions if they are improper. You always have.

Mr. Haycraft: I am trying to save time, to get the witness off the stand and put another witness on the stand who can testify to these things.

Mr. Gilpatric: Mr. Examiner, but to go back to the point you asked me what sort of questions I would ask if you gave me leeway, in order to save Mr. Rockwell from coming back at some future time. It is simply if he has knowledge, which I think he has, about this 1936 agreement.

Mr. Haycraft: To which I object, to any further cross-examination.

Trial Examiner Sheppard: I sustained the objection because Mr. Haycraft said he had gone into it on direct.

Mr. Haycraft: Further, this witness said he did not have anything to do with the execution of the document, and his name does not appear on it.

548 Trial Examiner Sheppard: To shorten it up, I am going to rule that Mr. Haycraft can withhold this exhibit until it is a part of the record, and then you can see it. Get through with this witness as soon as you possibly can, and put on a witness who knows about it, and then we can take that up, and then you gentlemen can see it.

All right, proceed.

549 Q. Mr. Rockwell, have you any knowledge concerning Commission's Exhibit No. 66, the agreement dated December 2, 1936, between your Company and the Minneapolis-Honeywell Regulator Company?

A. In a general way, yes.

Q. I hand it to you, and ask you to look at the clause appearing on the second page, and ask you whether in reading that, that recalls to mind any of the circumstances relating to the entering into of that so-called agreement with your Company?

(Handing document to the witness.)

Mr. Haycraft: Mr. Examiner, I object to that question and ask that if it is answered, that I be allowed to cross-examine this witness on this new matter.

Mr. Freeman: Call it cross-examination, call it redirect, whatever you want. Go ahead and examine.

Mr. Haycraft: We are going to get confused. We are putting in their side of the case with my witness, on matters which were not gone into on direct examination at all.

Mr. Gilpatric: It is one of the Commission's exhibits. We have heard other testimony elicited by Mr. Haycraft on that same subject. Here is a man who knows something about it. He is head of the company which signed the agreement, and I think it is proper for us to ask
550 him, particularly in order to save time in this proceeding.

Trial Examiner Sheppard: Was it brought out on direct?

Mr. Haycraft: No.

Mr. Gilpatric: The matter of 1936 purchases of controls from the Respondent Company was brought out. Here is the contract, the best evidence of what that business was. He did not choose to call it a contract.

Mr. Haycraft: I will put a man on who executed the contract. They are going entirely outside of this case, by bringing this to this witness' attention at this time. I have the witnesses here waiting.

Trial Examiner Sheppard: I think we can shorten things, Mr. Gilpatric, by getting the other witness, and going through with it in an orderly way.

By Mr. Gilpatric:

Q. Let me ask you, Mr. Rockwell, who is the better qualified, as between you and Mr. Crawford, to testify as to this agreement?

Mr. Haycraft: I object to that. That is for the Commission to determine.

Mr. Gilpatric: In his judgment.

Mr. Haycraft: I object.

Trial Examiner Sheppard: I will let you answer the question.

551 The Witness: Shall I answer?

Trial Examiner Sheppard: Yes.

The Witness: This paragraph reads as follows:

Mr. Haycraft: Now, I object to that, to reading the paragraph.

Trial Examiner Sheppard: Yes.

Mr. Haycraft: The question was,—and I will remind the witness he already said Mr. Crawford had the details of the purchase of this.

The Witness: I am only going to say this, that the paragraph referred to—

Mr. Haycraft: I object to reference to the paragraph.

Mr. Gilpatric: Let him finish.

Mr. Haycraft: This witness was asked one question, who is the best qualified to testify as to this agreement. He is not going to read into the record provisions of the agreement, about which you have already sustained an objection, Mr. Examiner.

Trial Examiner Sheppard: Just answer the question.

Mr. Freeman: I think this witness has a legal right to say what he wants to say. The Commission can move it be stricken. This man has already said he has control. He is trying to tell what he knows about it, and I think the Commission ought to hear it.

552 Trial Examiner Sheppard: Not unless it was brought out on direct. I do not want to hear your case before I hear Mr. Haycraft.

Are you or the other man better competent to testify as to the agreement?

The Witness: I think I am, in view of the fact that the policy of the company is involved.

Mr. Haycraft: May I cross-examine the witness now, Mr. Examiner?

Mr. Freeman: You will get your turn.

Mr. Haycraft: Wait a minute. They have taken this witness and made him their witness for the purpose of introducing testimony with respect to a clause in the contract about which he was not allowed to testify on direct examination. Am I going to put in my side or are they?

Trial Examiner Sheppard: I am going to put your side on.

Mr. Haycraft: Then I object, and move to strike this last question and answer.

Trial Examiner Sheppard: All right. That can go out. I do not want anything on your side until Mr. Haycraft puts on his.

Mr. Gilpatric: I want to very emphatically but respectfully except to that ruling as inconsistent with your ruling that you were going to let this man, while he is here,

553 tell what he knows about it. Mr. Haycraft is taking a very fine position here, and I hope he will observe the same rules when we are putting in our case.

Trial Examiner Sheppard: I am going to hear the Commission's side, and then the other. I am not going to hear your side before I hear the Commission.

Mr. Gilpatric: You will recall, Mr. Examiner, that this witness was asked on direct examination about the policy of this Company, and about purchases during this year.

I just cannot see that we are broadening the scope of the examination when we follow that line up to its logical conclusion.

Trial Examiner Sheppard: Mr. Haycraft said he did not go into that at all.

Mr. Haycraft: I have not. I asked him as to the foundation for calling Mr. Crawford, who has charge of the purchases, and he said Mr. Crawford had. He only had general supervision. Therefore, I am ready to call Mr. Crawford.

If I ask questions of Mr. Crawford, he can cross-examine. He is vice-president and an official of the organization.

Trial Examiner Sheppard: I suggest you let this witness stand aside until we finish with Mr. Crawford, and then you can put him back on.

554 Mr. Gilpatric: I do not want him to waste a whole afternoon here. That is the only point. He has told you now he is better qualified, and in view of that, you are going to stop the examination, I take it from your ruling, and not let me follow this line up.

Trial Examiner Sheppard: If it was not brought out on direct, I am going to stop it, yes.

Mr. Gilpatric: We say it was opened up on direct.

Mr. Freeman: Mr. Examiner, I just want to call your attention to the fact that Mr. Haycraft asked him whether or not he did not govern the policy of the company, and I think we are entitled to find out whether this agreement for the year 1936, which is the year that Mr. Haycraft is making inquiry about, whether this agreement was not signed or executed by someone in his organization in accordance with the policy dictated by this gentleman here, Mr. Rockwell, and I think we are entitled to find that out, and entitled to find out what his policy was.

Trial Examiner Sheppard: The ruling has been made, gentlemen. You can go on and proceed.

Mr. Gilpatric: In view of that ruling, as far as we know, we have no further questions to ask.

Trial Examiner Sheppard: You are excused.

The Witness: Must I wait?

Trial Examiner Sheppard: Yes. Do you want to

555 call him again, or excuse him for good, Mr. Haycraft?

Mr. Haycraft: I haven't anything further at this time.

Trial Examiner Sheppard: All right. Sign your voucher, Mr. Rockwell, and I will let you go.

(Witness excused.)

Mr. Haycraft: I think I will call Mr. Shafer first, if you do not mind.

Mr. Freeman: We don't care who you call.

Mr. Haycraft: Mr. Shafer, will you take the stand.

Mr. Gilpatric: Off the record.

Trial Examiner Sheppard: Off the record.

(Discusion off the record.)

Trial Examiner Sheppard: On the record.

Miss Reporter, this is H. C. Shafer, 100 Clark Avenue, Detroit.

Is that right, Mr. Shafer?

Mr. Shafer: Yes, sir.

H. C. SHAFER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

556 *Direct Examination by Mr. Haycraft.*

Q. What is your occupation, Mr. Shafer?

A. Purchasing agent.

Q. What firm?

A. Timken Detroit Axle Company.

Q. How long have you been purchasing agent?

A. Since December 1, 1924.

Q. What are your duties as purchasing agent?

A. To buy the material from which axles, from which the production of the company is fabricated.

Q. Does that include temperature controls, automatic temperature controls?

A. It does.

Q. Do you recall when the Timken Company first engaged in the manufacture of oil burners?

A. About 1927 or '8.

Q. What type of oil burner did they manufacture at that time?

A. A gun type burner.

Q. When was it they first manufactured what Mr. Rockwell described as a wall type or rotary type burner?

A. I can't answer that definitely, probably three or four years later. It might possibly have been five years later.

We were experimenting, and as to when that went into
557 production, I don't remember.

Q. Do you recall from whom you purchased temperature controls in say, along 1934 and '35?

A. May I use this (indicating)?

Q. Surely. Go ahead. Refresh your recollection all you can.

A. Well, here is correspondence and memoranda in 1932, '3 and '4.

Q. During those years from whom did you buy automatic temperature controls?

A. This correspondence and data is all with Minneapolis-Honeywell. This memoranda is 1932. Here is one in 1933 and here are a couple in '34.

Q. From that memoranda can you tell us, or will you tell us as to the various items that went into the temperature controls that you bought from Minneapolis-Honeywell in those years, 1932, '33 and '34?

A. I am unable to do so from these records, as to exactly what we purchased, sir.

Q. The items are lumped together?

A. They are memoranda relative to what we might use and a few memoranda relative to prices, but what we actually purchased, I doubt if there is any record available for those years.

Q. Do you have any independent recollection?

558 A. To the best of my knowledge and belief, all of our buys were from Minneapolis-Honeywell.

Q. During those years?

A. During those years.

Trial Examiner Sheppard: What years were they?

Mr. Haycraft: 1932 to '34.

The Witness: '2, '3 and '4, 1932, '33 and '34.

By Mr. Haycraft:

Q. Do you recall whether they consisted of thermostats, limit controls or primary controls?

Mr. Gilpatric: I object to this line of questioning, Mr. Examiner, on the ground we are now going back ten or twelve years. Our stipulation, our examination to date has been conducted with regard to 1936 and following. Now we are going back to 1932.

Trial Examiner Sheppard: Unless you have some reason; I am surprised too. That is the reason I asked you the years.

Mr. Haycraft: It is simply a historical background. I haven't anything further.

Mr. Freeman: It clutters the record.

Trial Examiner Sheppard: I do not think we want to go back that far, Mr. Haycraft, for the background on this case. I am going to sustain the objection there. I do not see any reason for going back too far on this matter.

559 I think 1935 on up to 1939 is the time.

Mr. Haycraft: Mr. Examiner, may I join with counsel for the Respondent, or may we stipulate with you it is understood we have exceptions to all rulings?

Mr. Freeman: We started that originally.

Trial Examiner Sheppard: Yes, they are automatically taken care of.

By Mr. Haycraft:

Q. Begininng in 1935, what items of temperature controls did you purchase, and from whom did you purchase them?

A. We purchased from Minneapolis-Honeywell in 1935. Whether we purchased from others I am unable,—yes, we purchased also from Penn-Electric in 1935.

Q. Do you remember what items you purchased from Penn Electric during that year?

A. I have copies of my purchase orders in '35, sir.

Q. What do they indicate?

Mr. Freeman: Do you want quantity, Mr. Haycraft, or items?

Mr. Haycraft: Quantity and price, yes, and the items.

The Witness: Here is a purchase order. This is faint, dated 5/23/35. This order covers 1,000 sets of controls, consisting of 1 No. 600 Safetrol, 1 No. 852-C-50 Temtrol and limit controls as required.

560 By Mr. Haycraft:

Q. The Safetrol, is that a primary control?

A. That, I believe, would be a limit control.

Q. What about the Temtrol?

A. Temperature control.

Q. Are these all limit controls that you have just referred to?

A. Well, they are controls which are used on the governing of the burner, the operation of the burner.

Q. You do not know whether they are primary or limit controls?

A. I wouldn't identify this over this long period of time. However, there is a clause in here which may be interesting:

"This order is predicated on our receipt of satisfactory letter from you covering your guarantee and liability in connection with our purchase and use of your instruments. Furthermore, this order does not become effective until you receive written notice from us that all conditions outlined in said letter are acceptable to us."

Mr. Gilpatric: Does the record show these are Penn Electric orders?

Mr. Haycraft: Yes.

561 By Mr. Haycraft:

Q. Do you know how much of that order was filled?

A. I don't know how much was filled. It was not filled completely.

Q. You do not know whether they were used on the gun type or rotary type burner?

A. Not from these records, no, sir.

Q. Do you have any recollection about it yourself?

A. I do not, because there are copies of two purchase orders here, a lot of copies; copies of one purchase order only. We have copies of that.

Q. Did you make any purchases from the Minneapolis-Honeywell Regulator Company during that same year?

A. Yes, sir.

Q. What did you purchase during that year from Minneapolis-Honeywell?

A. I do not have a record of our purchases for Minneapolis-Honeywell during 1935. Those records were not available.

Q. Take the year 1936. What were your purchases of temperature controls that year? From whom did you purchase and what were the items?

A. We purchased from Minneapolis-Honeywell and Perfex in 1936.

Q. You did not purchase from Penn Electric during the year 1936?

562 A. To the best of my knowledge and belief and from my records, no, sir.

Q. Do you have any recollection of why you did not continue your purchases from Penn Electric during 1936?

A. The instruments gave too much trouble, sir.

Q. What did you buy from Perfex during 1936?

A. I do not have a record. Those records were unavailable.

Q. You do not even know the items that were purchased?

A. No, I do not know the definite items that we purchased.

Q. You do not know whether they were limit controls?

A. No, sir.

Q. Or other types?

A. No, sir.

Q. The year 1937, what controls did you buy during that year and from whom?

A. Here is a record of 1937, Minneapolis-Honeywell control purchases.

Q. Does that show the volume and the general types and the price?

A. Yes, sir.

Q. Did you prepare that yourself?

A. I did not. This was prepared back in 1937, by some of my clerks. I do not know who.

Q. What does it indicate?

A. It indicates our part number, the quantity and
563 the price, the total number purchased, or the total price.

Q. Will you tell us as to your purchases of thermostats, limit controls and primary controls from the Minneapolis-Honeywell, and the price during that year?

A. I submit the exhibit, but I am unable to tell just the various controls.

Q. Do they have a number?

A. They have our part number, which does not identfiy them with Minneapolis part numbers, or Perfex.

Q. I show you Commission's Exhibit No. 91-A, B, C and D, for identification, and ask you if you prepared that?

(Handing exhibit to the witness.)

A. My clerks prepared this, sir.

Q. Under your supervision?

A. Under my supervision and direction.

Q. And you are satisfied it is correct?

A. To the best of my knowledge and belief, yes, sir.

Mr. Hayeraft: I offer it in evidence, Mr. Examiner.

Trial Examiner Sheppard: Any objection?

By Mr. Haycraft:

Q. Do you have an extra copy they can have?

A. I have, yes, sir.

Q. Could you get it for them?

A. Yes.

564 Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Freeman: There are a large number of figures with respect to the years 1938, '39, '40 and '41, which we have no way of checking. Even with all of our facilities, it might take a day or two or three, and we want the opportunity to object to any portion of this document, should we discover on checking, that it is incorrect and improper.

Trial Examiner Sheppard: I think I will suspend acceptance or rejection of the exhibit. What is the number, 91?

Mr. Haycraft: 91-A, B, C, and D. I want to examine the witness on it. I won't be able to if you do not rule on it.

Trial Examiner Sheppard: I thought possibly we could—

Mr. Haycraft: It can be stricken. I will make this stipulation, if it is determined later any of this information is in error, you can either move to strike the whole exhibit, or have the exhibit corrected.

Trial Examiner Sheppard: I see the importance of going on with this witness, so I think I will accept it
565 with that reservation. You can take all the time you need to check it, and anything you object to, we can strike it out if it is not pertinent to the issue.

All right, then, we will accept Exhibit 91-A, B, C, and D.

We have not done anything with 90 here, have we?

Mr. Haycraft: No.

Trial Examiner Sheppard: All right, let the record show the acceptance of Exhibit No. 91-A, B, C and D, with the express understanding the Respondent shall have the opportunity at a later time to check, on each item, and make whatever further objection they wish.

(The document referred to heretofore marked for identification COMMISSION'S EXHIBIT NO. 91-A, 91-B, 91-C, 91-D, was received in evidence.)

By Mr. Haycraft:

Q. I notice in Commission's Exhibit No. 91-A, B, C, and D you have here the Minneapolis-Honeywell number and the Timken number?

A. Yes, sir.

566 Q. Now, from this Exhibit can you refer to your 1937 records and indicate the purchases of Minneapolis-Honeywell, and Perfex, and so on, for that year, using Exhibit 91 as a guide?

A. Some of these numbers are the same.

Q. Will you go ahead and testify as best you can, to the purchases for 1937?

A. That is very considerable of a job, to compare this part with that.

Mr. Freeman: That is, comparing Exhibit No. 91 with the papers which you have in your hand for the year 1937?

The Witness: Yes.

Mr. Freeman: Just so that the record will be clear.

Mr. Haycraft: Just do the best you can. We don't want to be too burdensome.

Mr. Gilpatric: I might point out, Mr. Examiner, that Commission's Exhibit No. 84 has this very information on it, and so we are just wasting time there. It is in evidence. It was put in evidence as Commission's Exhibit No. 84.

Mr. Haycraft: Exhibit No. 84 does not have the price.

Trial Examiner Sheppard: That is in evidence?

567 Mr. Gilpatric: Yes.

Mr. Haycraft: Exhibit No. 84 does not have the price.

Mr. Gilpatric: It has the type of control.

Mr. Haycraft: It does not have the price. Believe it or not, I know what I am doing.

The Witness: I find our Part No. A-1615-D-56 on the '37 record. It is also on the 1938 record, and is the same control.

By Mr. Haycraft:

Q. What does your record show as to the purchases and the price paid?

A. From Perfex, 2,748 at a price of $2.40 each.

Q. Do you have anything to show the purchases of that same item from Minneapolis-Honeywell?

A. For 1937?

Q. For 1937.

Mr. Freeman: You mean a comparable item, as distinguished from the same item?

Mr. Haycraft: I should say a comparable item. I stand corrected.

The Witness: A-1615-T-46 is the Minneapolis-Honeywell in 1937 which shows a purchase of 735.

By Mr. Haycraft:

Q. At what price?

568 A. 650 of them at $2.85 each, and 85 of them at $3.05 each.

Q. Now, are those the only comparable items that you find?

A. No, sir.

Q. Will you indicate some others? Take the thermostats and primary controls particularly. That is what I am interested in at this time.

A. They seem to have changed numbers—

Mr. Freeman: (Interposing.) Can I point them out to him? I happen to know these numbers.

Mr. Haycraft: Yes, go ahead and help him.

The Witness: Apparently we changed numbers. Here is U-21, that corresponds, $2.70.

By Mr. Haycraft:

Q. Get that in.

A. Let's wait until we find if we have a comparable item from Perfex.

(Examining papers.)

In the year 1937, Perfex, Timken Part No. A-2598-S-19; 400 bought at $2.95 each.

Q. That is a thermostat, is it?

A. That is a thermostat, sir. In 1937, from Minneapolis-Honeywell—that is U-21 in that year—my record says that we purchased 114 of the corresponding instrument

569 from Minneapolis-Honeywell at $2.70 each.

Q. Now, do you have the primary controls?

Trial Examiner Sheppard: For the same year, 1937?

Mr. Haycraft: Yes.

Trial Examiner Sheppard: All right, run through that and see what you have got on that.

The Witness: What is confusing is the fact that from year to year we change part numbers; and what I am trying to do is to match this with this, with this.

Mr. Haycraft: I know it is a job.

The Witness: In 1937 we purchased 237, our part number A-3550-F-58 from Minneapolis, 112 of them being at $8.45 each, and 125 at $8.50 each.

By Mr. Haycraft:

Q. What is their number on that; does your record show?

A. I do not know, sir.

Q. All right, go ahead.

A. In the corresponding year we purchased 150 from Perfex, our part number A-3550-M-65, at $7.90 each. Here is this 59—that is apparently a different number.

Q. Those were primary switches?

A. Those were relays. 59 does not appear on here, so I don't know what the corresponding number is on these.

Q. Have you covered all of your thermostats in your testimony a moment ago, or is there another one which
570 you did not cover?

A. There probably would be another one.

(Examining papers.)

Well, for all practical purposes this probably would be a comparison: From Minneapolis-Honeywell in 1937, a total of 5,137, our part No. A-1-2598-U-21; also our Part A-2598-U-21. Now, the difference between the 2598, A-2598 and A-1-2598 would be some infinitesimal difference, a different color, or something of that kind; the price being the same, at $2.70 each.

Over the same period we purchased from Perfex 400, our Part No. A-2598-S-19 at $2.95 each.

Q. And those are the principal items, are they?

A. Yes, sir.

Q. Now, do you recall whether you executed any agreements with the Minneapolis-Honeywell Regulator Company for the purchase of these items during the years 1935, '36 and '37, along in there?

Mr. Gilpatric: May we have that question, Mr. Examiner, please?

Trial Examiner Sheppard: Read it.

(The question referred to was read by the Reporter.)

The Witness: There is a copy of a purchase agreement dated January 15, 1937 with Perfex—with Minneapolis-
571 Honeywell, I mean, I am sorry, sir.

By Mr. Haycraft:

Q. What is the date on that?

A. January 15, 1937 there is a letter—

Q. (Interposing.) I show you Commission's Exhibit No. 87, and see if that is a photostatic copy of the document that you just referred to.

(Handing document to the witness.)

A. It is, sir.

Q. Now, what about the year 1936?

A. I have a purchase agreement with Minneapolis-Honeywell dated December 2, 1935, covering 1936.

Q. I show you Commission's Exhibits 11-A, B, C, and D, and 12-A, B, C, and D, and call your particular attention to 11-A, B, and C and 12-D, and ask you whether or not those exhibits, or those portions of exhibits are photostatic copies of the agreement which you have before you?

(Handing exhibits to the witness.)

A. This—

Q. Will you refer to it by number? That is 12-D?

A. 12-D should be a part of 11-A, B, and C. This should be—

Q. (Interposing.) In other words, what is now 12-D, should be 11-D, is that correct?

A. Yes, sir.

572 Q. I show you Commission's Exhibits 66-A, B, C and D, and see if that is a correct photostatic copy of the agreement which you just referred to, and which you entered into in February, 1936?

A. Yes.

Q. On the second page of this agreement I notice a typewritten provision as follows:

"In view of the special prices listed in this agreement it is understood that the purchaser will standardize on and use the company's products exclusively," and in smaller type there appears:—

"except for field tests or when other makes are specified by dealer."

Are you familiar with the clause, that clause in the original agreement that you have before you?

A. I am not sure that I understand what you mean by being familiar with it.

Q. Can you explain the difference in type in that paragraph?

A. Apparently—

Mr. Gilpatric: I am going to ask that this witness be confined to testifying of his own knowledge. We don't want any "apparently". We have the best evidence, and we don't want something secondary.

573 Mr. Haycraft: I move to strike that part about the best evidence. I am willing to agree that the witness should testify of his own knowledge.

Trial Examiner Sheppard: Yes, that is what we want.

The Witness: The two are written on different typewriters; that is very apparent.

By Mr. Haycraft:

Q. Did you sign this agreement?

A. I did, sir.

Q. Did you have anything to do with negotiating it?

A. Yes.

Q. What did you have to do with it?

A. A general discussion in our plant with our management.

Q. With whom did you discuss it?

A. May I ask somebody off the record?

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: Mr. Roberts, Mr. Rockwell, Mr. Crawford.

Mr. Gilpatric: Is that Walter Rockwell, the man who testified here before you?

The Witness: Yes, sir. And Mr. Powers, to the best of my knowledge and belief.

574 By Mr. Haycraft:

Q. Who authorized you to sign the agreement?

A. I would not know. I assume Mr. Rockwell, but that is memory.

Q. Do you have any recollection on it?

A. Agreements of that kind were discussed with Mr. Rockwell, and I would not sign a contract of that magnitude in dollars and cents without his full knowledge.

Q. Do you have any recollection of discussing this with Mr. Rockwell or Mr. Crawford or Mr. Roberts?

A. Not definitely, except that such agreements were discussed between the four of us in all instances as far as possible.

Q. Now, referring back again to this typewritten clause on the second page, do you have any recollection of the use of the two different types, the two different typewriters, and if so, what is your explanation?

A. My explanation, sir, would be, I hate to say it, but a good guess.

Q. Why do you say that it is a guess?

A. Because I can't remember definitely back to this date in 1935.

Q. Do you remember whether or not this clause was discussed at the discussions that you had with the other—with your superiors?

A. Yes, sir.

575 Q. Do you recall anything that was said with respect to it at that time?

A. Not anything that I could repeat in words.

Q. I will ask you whether or not as this agreement was presented to you, that matter in small type was in the agreement?

A. I doubt if it was.

Q. Do you have any recollection of it?

A. I am quite sure that it was not, but I am not one hundred per cent sure.

Trial Examiner Sheppard: You say it was not a part of the agreement?

The Witness: As presented to us originally, sir.

By Mr. Haycraft:

Q. Then is it your recollection that the part in small type was inserted by you or someone else in your office?

A. Yes, sir; that is my opinion.

Mr. Freeman: Is that your recollection?

By Mr. Haycraft:

Q. Is that your recollection?

A. To the best of my knowledge and belief. It is difficult to make a definite statement, yes, or no, about that.

Trial Examiner Sheppard: Let me get this straight, Mr. Shafer. Do you mean to tell me it was put in there after the agreement was executed by you?

576 The Witness: No.

Trial Examiner Sheppard: You don't mean that?

The Witness: No.

Trial Examiner Sheppard: What do you mean by that, exactly?

The Witness: Can we go off the record?

Mr. Haycraft: No, on the record.

Trial Examiner Sheppard: On the record. I just want to get it clear.

The Witness: My recollection is that the contract was presented to us for signature without the last clause—

Trial Examiner Shepard: (Interposing) Beginning "In view of the special prices"?

The Witness: No, sir; the last clause "except for field tests or when other makes are specified by dealer."

Trial Examiner Sheppard: I see, the very last part there.

The Witness: The last clause. The original contract did not carry that. After discussion in our office that was typed, probably in my own office, and afterwards signed by me.

Trial Examiner Shepaprd: You knew it was there then when you signed it?

The Witness: Yes.

577 By Mr. Haycraft:

Q. Now, do you remember the reason for the insertion of that language?

A. So that we would be free to purchase other controls as we required in reasonable quantities for tests or otherwise.

Trial Examiner Sheppard: You mean from other parties?

The Witness: Yes, sir.

By Mr. Haycraft:

Q. Now, do you recall with whom you discussed this agreement, representing the Minneapolis-Honeywell Regulator Company?

A. If it was any one it would be Mr. Pauling.

Q. Do you remember whether you handed this to him at the time you executed it or whether you mailed it to him?

A. I do not remember.

Q. Is your copy that you have there—does that bear the signature of Charles E. Kingsland, vice-president?

A. Yes, sir.

Q. Dated 2-24-36?

A. Yes, sir.

Q. Was the date of February 19, 1936 the date that you signed the agreement?

A. Yes, sir.

578 Q. Now, is it your testimony then that when you sent this agreement to the Minneapolis-Honeywell Company it carried this small typed portion of the clause on the second page?

A. To the best of my recollection and belief, yes, sir.

Q. You signed it, of course, before you sent it to them?

A. Yes, sir.

Q. Then you received the copy that you have there with Mr. Kingsland's signature, later?

A. Yes, sir.

Q. Now, did Minneapolis-Honeywell present you with a similar agreement for 1937, dated December 2, 1936? When I say "similar agreement", I mean in general form; I don't mean as to the exact language.

A. Yes, sir, dated December 2, 1936.

Q. I show you Commission's Exhibit 12-A, B and C, and 11-D, and ask you whether or not Commission's Exhibit 12-A, B and C and 11-D constitutes the form of the agreement that was submitted to you on or about December 2, 1936?

A. Yes, they are.

Q. They are?

A. Yes.

Q. Do you recall what happened to that draft which was given you on December 2, 1936?

A. There was considerable discussion about it. I 579 definitely remember that.

Q. With whom?

A. With our management.

Q. The same men that you have already mentioned?

A. Except probably Mr. Roberts was dead by that time.

Trial Examiner Sheppard: Let me inquire. Do any of you gentlemen know the date of Mr. Roberts' death? That may be important.

By Mr. Haycraft:

Q. When did Mr. Roberts die?

A. June 15th, 1936.

Q. Do you recall what the objection was to this as submitted in December, 1936?

A. No, sir; I do not. There was too much conversation to remember.

Q. But it was not acceptable any way?

A. It was not acceptable.

Q. And later you executed this agreement on January 15, 1937, which is Commission's Exhibit No. 87. That is the one that you identified a moment ago.

(Handing document to the witness.)

A. Yes, sir.

Q. Now, do you have any agreement for the years 1938, 1939, or 1940 or 1941?

A. No, sir.
580 Q. No written agreement?
A. No, sir.

Trial Examiner Sheppard: Do you mean with the Respondent?

Mr. Haycraft: With the Minneapolis-Honeywell Regulator Company.

By Mr. Haycraft:

Q. Do you know why that was?
A. We did not want to sign one.
Mr. Haycraft: That is all, Mr. Examiner.
Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Gilpatric.

Q. Why didn't you want to sign one?
A. We did not want to be tied down; also we were about that time marketing our burners, advertising Timken controls, regardless who made them. They were sold and guaranteed to the dealers by Timken. Mr. Crawford can explain that better than I.
Q. And those controls were manufactured by other companies than Minneapolis-Honeywell?
A. Yes, sir.
Q. By Perfex?
A. By Perfex.
Q. Any by Penn Electric Switch Company?
581 A. Not at that time.
Q. Now, Mr. Shafer, you testified in connection with this 1936 contract, that is, Commission's Exhibit No. 66, dated December 2, 1935, that there was a discussion by your management, and you included in that term Mr. Roberts, Mr. Rockwell, who was here earlier, and yourself and Mr. Powers.

Mr. Haycraft: And Mr. Crawford.
Mr. Gilpatric: And Mr. Crawford.

By Mr. Gilpatric:

Q. Which one of those gentlemen would be the one in your organization to make a decision as to whether or not the contract would be acceptable at all?
A. Obviously Mr. Rockwell would be the last word.
Q. In connection with this clause that has been referred to on the second page of Commission's Exhibit No.

66, and beginning with the words, "in view of" and so forth, which one of your executives did determine whether or not that would be acceptable as submitted and without that language that was attached to it?

A. As I said, Mr. Rockwell would have the last word, and quite possibly Mr. Powers would be the suggestor, if I may use that word.

Q. Did this particular language involve what you would call a question of policy on the part of the Timken Company.

582 A. We would not want to definitely sign an agreement knowing that we did not intend to live up to it, and therefore it was put in there so that we could purchase from other than Minneapolis.

Q. By that you mean that you had no intention of buying all your controls from Minneapolis-Honeywell during the year of 1936?

A. That is very true.

Q. Having bought Penn and Perfex controls before and afterwards?

A. Yes, sir.

Q. Now, Mr. Shafer, in connection with your testimony as to the purchases made by your company of comparable items in 1937, you testified that the thermostats sold to your Company by Perfex, costing $2.95, that is, your No. A-2598—

Trial Examiner Sheppard: (Interposing.) What is the Commission's Exhibit Number?

Mr. Gilpatric: I am reading from Commission's Exhibit No. 91.

Trial Examiner Sheppard: 91. All right.

By Mr. Gilpatric:

Q. (Continuing.) —S-19; comparable to the thermostat manufactured by the Minneapolis-Honeywell Company for which the price paid by you was $2.70. Now, isn't it a fact that the $2.95 thermostat came equipped

583 with a screen or a cover which was not on the Minneapolis-Honeywell item for the lower price?

A. I would not know that without examining our engineering records.

Q. Can you do that?

A. Sure. They would be in our plant, in our drawings, and so forth.

Mr. Gilpatric: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record. We will take a short recess while they are checking that.

(A short recess was taken.)

584 Trial Examiner Sheppard: We will proceed, gentlemen.

By Mr. Gilpatric:

Q. Mr. Shafer, you were asked to investigate and find out if you could, the explanation for this $2.95 price on the Perfex thermostat?

A. That was a special screen.

Q. That was a special screen?

A. Yes, sir, or cover.

Q. What was the standard price for a Perfex thermostat without that screen? It was $2.65, wasn't it?

A. $2.65, yes.

Q. So that the comparable item I am referring now to is a regular thermostat with the special screen, in the case of the Minneapolis-Honeywell controls, would be the item for $2.70 you just referred to?

A. Yes, sir.

Mr. Gilpatric: That is all we have.

Mr. Haycraft: I forgot to ask the witness a question.

Redirect Examination by Mr. Haycraft.

Q. Can you identify the handwriting of this note that Mr. Rockwell handed me?

Mr. Freeman: We object.

Mr. Haycraft: No. 90.

585 Mr. Freeman: (Continuing.) It not having been referred to on direct examination or cross-examination.

Mr. Haycraft: All right. I recall the witness for that purpose.

Trial Examiner Sheppard: Wait a minute, gentlemen. It is too small a matter to fool with. Do you know the handwriting there?

The Witness: I do not, sir.

Trial Examiner Sheppard: That settles that.

Mr. Haycraft: All right. Witness excused.

Trial Examiner Sheppard: You may be excused, sir.

(Witness excused.)

Trial Examiner Sheppard: All right, the next witness.

Mr. Haycraft: Mr. Crawford is the next witness.

Trial Examiner Sheppard: Miss Reporter, this is Mr. T. A. Crawford, 100 Clark Avenue, Detroit, Michigan; general sales manager of the Timken Detroit Axle Company. Hold up your right hand, Mr. Crawford.

586 T. A. CRAWFORD was thereupon called as a witness for the Commission and, having been first duly sworn testified as follows:

Direct Examination by Mr. Haycraft.

Q. What is your position with the Timken Company?

A. General Sales Manager of the Timken Silent Automatic Division.

Q. As such what are your duties?

Trial Examiner Sheppard: Is that T. A. or T. G., please?

The Witness: T. A. In charge of sales matters, principally.

By Mr. Haycraft:

Q. What types of burners do you manufacture and sell?

A. Wall flame and wall flame rotary and pressure type or gun type.

Q. How long have you manufactured and sold wall flame rotary type burners?

A. Approximately 1928 or '9.

Q. How long have you manufactured the pressure or gun type?

A. We started with it in 1925.

Q. Beginning in 1935, were you selling both types that year?

587 A. Yes, sir.

Q. Where did you buy your temperature controls during that year?

A. Principally from Minneapolis-Honeywell, some from Penn Electric Switch.

Q. Do you recall the type that you bought from Penn Electric Switch and the use that was made of them?

A. By part number, no. By name, yes. By use, yes.

Q. All right. Give us the name and the use.

A. I should say Safetrol was their trade name, and that was the primary control. We used it on the pressure

type burners. Temtrol. Temtrol is the principal thermostat. We used it in combination with Safetrols on pressure type burners.

Q. Where did you obtain their limit controls, or did you put them on the burners?

A. We supplied them with burners, but I cannot tell you for certain whether we used any Penn limit controls, other than those that went on our gun type, pressure type burners. We may have.

Q. Do you remember where you bought the limit controls, other than Penn, of the gun type, in 1935?

A. I should say Minneapolis-Honeywell. I don't know of any bought from Perfex during that period.

Q. Do you have any recollection as to the quantity
588 of primary controls, and thermostats you bought from the Penn Electric in 1935?

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: I don't believe I could tell you that with any degree of accuracy.

By Mr. Haycraft:

Q. In June, 1935, what was your position with your firm?

A. I was in charge of sales.

Q. You did not have anything to do with the purchase of temperature controls that year?

A. If so, it only would have been in the advisory capacity, as the influenced sales procedure.

Q. Do you have any recollection of the quantity of rotary burners and gun type burners you sold during 1935?

A. Off the record. I have a record that starts just after that.

Q. Do you recall when it was you began to buy temperature controls from the Penn Electric?

A. I believe it was 1935.

Q. Do you know whether or not you had been purchasing from Minneapolis-Honeywell in what is known as their highest bracket, or bracket 5 during that time?

589 A. I doubt it very much, whether we knew there was such a thing as a bracket 5 in 1935.

Q. Had you been given to understand you were getting their lowest price on controls?

A. I was seldom involved in purchase negotiations at that time, except as to the type of controls, and so on. The prices were not in my direct province.

Q. What is the function of a pressuretrol as put out by the Minneapolis-Honeywell Company?

Mr. Gilpatric: I object to this as cumulative evidence. We have had the functions of these instruments several times in this hearing to date.

Trial Examiner Sheppard: Are you familiar with what the Respondent puts out, Mr. Crawford?

The Witness: Generally. If he wishes a technical answer, my answer will be I don't know.

Trial Examiner Sheppard: I will let you testify to what you know.

Mr. Freeman: It has already been answered, it is already in the record. This instrument has already been defined. We do not have any objection to this man telling what this instrument is, but there is no use of cluttering up the record.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

590 (Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: Do you wish me to answer, sir?

Trial Examiner Sheppard: Yes, go ahead.

The Witness: My understanding of a pressuretrol is that it is a device used to stop the operation of the oil burner when the pressure of the heating plant exceeds the predetermined amount.

By Mr. Haycraft:

Q. Were you buying a similar device from Penn Electric in 1935?

A. I presume so.

Q. Is that your recollection?

A. Yes, a device to perform a similar function.

Q. That is what I meant.

A. Yes.

Q. I show you Commission's Exhibits 85 and 86, and ask you whether or not you identify that as a photostat copy of correspondence between yourself and I think it is Mr. Pauling, of the Minneapolis-Honeywell Regulator Company?

(Handing exhibits to the witness.)

A. Yes, sir.

Q. The Mueller Company, what business are they engaged in?

A. I know they make furnaces. I believe they make gas fired furnaces. I believe at that time they were negotiating for the purchase of oil burners, to install in their furnaces, concerning a complete oil burning furnace.

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Q. And you were bidding on that business, were you?

A. We were bidding on oil burners to be installed in their furnaces.

Q. That was the reason for your negotiations with—

A. (Interposing.) Yes, sir.

Q. (Continuing.) The Minneapolis-Honeywell?

A. Yes.

Q. Did anything come out of that? Did you get the Mueller business?

A. I don't think we sold them more than half a dozen samples, or maybe a dozen, no volume at all.

Q. I show you Commission's Exhibit No. 66, and ask you if you had anything to do with the negotiation of that agreement?

(Handing document to the witness.)

A. I doubt it very much, as to any of the business end of the deal. I probably was in on the conversations, as to how many we should purchase, and what kind.

Q. What was your position at that time?

A. In charge of sales.

Q. Who was in charge of purchases?

A. Mr. Shafer. Purchases?

Q. Yes.

592

A. Mr. Shafer.

Q. What was Mr. Roberts' position?

A. Mr. Roberts was general manager.

Q. Was he alive at that time, that the contract was negotiated?

A. On December 2, 1935, yes, sir.

Q. Did you have anything to do with the negotiation of this agreement, Commission's Exhibit No. 87?

(Handing document to the witness.)

A. I think I was undoubtedly involved in the conversations that were collateral.

Q. What do you recall of those conversations?

A. Well, I know that we were at that time well into negotiations with Perfex Corporation. We had used some of their controls the year before. We were trying to expand

the use of their controls, to develop a second source of supply. I know there were a lot of arguments about the price before we finally made this arrangement with Mr. Pauling. I know that as a solution to the problem, it was probably somewhat unsatisfactory to him, we made that arrangement to buy one-half of our prospective year's requirements from him. I think it also, at that time, involved the question of having our controls fully identified as Timken, and made distinctly different from the controls supplied to others.

Q. Do you remember the submission of an agree-
593 ment similar to Commission's Exhibit No. 12-A, B, C, and 11-D, about which Mr. Shafer testified, about the first of the year 1937?

(Handing exhibits to the witness.)

A. I presume there was one.

Q. Do you remember seeing it?

A. I have seen copies of it recently.

Q. But you don't have any recollection of it at that time?

A. Not particularly. I probably saw it at that time.

Q. Do you recall any discussion as to whether that agreement was acceptable?

A. A good deal of discussion.

Q. In that discussion do you recall what objections were raised to that agreement?

A. Well, I know Mr. Rockwell had a basic objection to signing anything other than a purchase order. I know that all of these other negotiations were going on at the same time with Perfex and the others. Can you ask me a specific question?

Q. Did you have any objection to the agreement submitted in December, 1936, which was in discussion, before Exhibit No. 87 was signed?

A. I objected to any arrangement which would require us to buy all of our controls from Minneapolis-Honeywell, if that is your question. I would think that would be the objective of the agreement.

594 Q. I notice in this agreement No. 87 that you did place an order, or did agree to place an order for 51 per cent of your requirements. What was the reason for making such an agreement as that?

A. That is a purchase order that is freed from any collateral terms and conditions, I would say. We were then getting under way with a program to buy a substantial part of our controls from Perfex.

Q. I notice in the fourth paragraph the agreement provides it will not be necessary to order the controls in sets. What was the reason for that?

A. Probably because there was a reference to purchase in sets in the standard form of agreement offered by Minneapolis-Honeywell.

Q. Did you object to that?

A. Yes.

Q. Why did you object to that?

A. I believe I would stand for correction on dates. I believe in the preceding year we had bought some 2,500 or 3,000 limit controls from Perfex of one type, and that they were at that time preparing to put on the market another type that we wanted to use.

Q. What were those types of limit controls you had bought from Perfex and those you were going to buy?

A. The one we bought in quantity in the preceding year was a steam pressure control, the approximate equivalent of the one you described as a pressuretrol, and we prepared to buy a complete line of controls from Perfex, as soon as they had them acceptably available.

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Q. Referring to Commission's Exhibit No. 91-A, B, C, and D, will you indicate whether or not the controls are described on that exhibit?

(Handing documents to the witness.)

A. The controls which we purchased in 1936, Mr. Haycraft?

Q. 1937 or 1936, if they are referred to. Are they described in this exhibit, beginning in 1938? I just want to see whether or not they are there, what type of controls. I am confining myself to this steam control you are talking about.

A. The steam control, I said we purchased in 1936, according to my recollection. That is the Perfex No. 700-D.

Q. 700-D?

A. D.

Q. And that is described on that exhibit, also, as a steam control?

A. A steam control, yes.

Q. What was the new control they were bringing out in the way of a limit control?

A. What is the date we are in now?

Q. 1937, I think you said, January, 1937, this contract or agreement was made. You said something about some new limit control that was coming out.

596

A. According to my recollection during 1936 we purchased not only that 2,500 to 3,000 steam controls, but also samples of various other controls needed to give us a complete line, and we were expecting, during that period, they were going to have these other controls available.

I don't think it referred to any specific one, but to a complete line of them.

Q. Did you charge any different price to your customers for the controls they were manufacturing, that were manufactured by Perfex and those that were manufactured by Minneapolis-Honeywell?

A. During the entire period?

Q. During 1937 and '38. I will ask you the same question as to 1936. From the time you brought that control out, that you bought from Perfex, was there any difference in price you quoted to the trade?

A. If I can answer off the record, by the way of explanation, while we did quote prices on controls separately from our burners, actually we sold very few separate from burners. They were included in the prices of the burner.

Q. Make your answer, and whatever explanation you wish.

A. These records are in 1937, unfortunately.

Q. Did you follow the same policy in 1936, do you think, that you did in 1937?

597 A. I find the Perfex control lisited here, so I will be able to quote it to you in a moment. Yes. I find on May 21, 1937 we quoted Minneapolis-Honeywell L-409-1, water control at $5.10, and on the same date, the 500-D-6 Perfex water control at $5.10; steam control, Minneapolis, L-404-2 at $5.10, and Perfex 700-D at $5.10. Vapor control, Minneapolis-Honeywell, L-408-2 at $7.95, and the Perfex vapor control 700-D-10 at $5.40, a quite substantial difference in that case. Air control L-415-2 at $6.65. That is a Minneapolis-Honeywell Number, and Perfex No. 400-D-6 at $5.00.

Q. Are those all the comparable items that you have there of those two companies?

A. Those are all that I identified, Mr. Haycraft. I find thermostats on here. The nearest comparable item is the same price, $5.10; for T-11 or 151-A.

Q. Do you sell a substantial quantity of these controls separate from the burners?

A. For service replacements and for a fourth control,

along with an oil burner installation to control domestic water supply. Other than that, practically none.

Q. To whom do you sell these separate items?

A. To our same dealers, who purchase burners from us.

Q. The same dealers that buy the burners?

A. Yes.

598 Q. Do you have any idea as to the quantity compared with your total number of burners that you sell for service?

A. For service, I do not have any such record, Mr. Haycraft. I do have an approximation of the way control usage is divided up, in the study we made in 1941, if that would be of any value.

599 Q. All right. Do you have it there?

A. I have an analysis here that was compiled partly from estimates and partly from records for two years, showing that if we sold 1,000 burners we would expect to sell burners to be equipped with controls as shown here, and we would expect their usage to be as shown across there; which shows that if we expect to sell 1,000 burners that we would expect to sell 1,000 thermostats, 755 intermittent master controls, 30 constant ignition master controls, 283 steam limit controls, 294 air limit controls, 225 combination air and fan controls, 191 water limit controls, 7 vapor controls, and 306 domestic water controls. Those are the fourth units.

Q. That was in 1941. Were there any changes in the preceding years in that proportion or ratio?

A. I think that would be quite obvious. In 1935 and '36 I don't believe that we had any combination air and fan controls, so that we would have had to have used two controls for that purpose. Of course, during the period that you are talking about there we were not selling very many completely coordinated air furnace units.

Q. I notice you drew a distinction between the constant and intermittent type of controls there. Would that proportion remain the same, or did that vary?

A. During the period that you are talking about we were selling more pressure type burners than we were
600 during this period. We changed to the use of constant ignition primary controls on our pressure type burners, except for some certain customers who specified that they wanted the ignition—the intermittent ignition control. I would say that the usage of constant ignition controls would be considerably higher in those earlier years.

Q. Where did you buy them principally?
A. In which year?
Q. In 1936, '37 and 1938?
A. In 1936, '37 and '38, my recollection would be that we bought the majority of them from Perfex.
Q. Did you buy any intermittent?
A. Yes, the record, I believe, will show that.
Q. Referring to Commission's Exhibit No. 91-A, B, C, and D, will you tell us which of those are the constant and which are the intermittent types?

(Handing exhibit to the witness.)

A. The intermittent type is R-117-A.
Q. Timken?
A. No, I mean the Minneapolis-Honeywell, R-117-A. The constant ignition type is R-116-A. Perfex 5520-D-1 is the intermittent ignition; and Perfex 5200-D-3—that is an earlier year—that is Perfex constant ignition type.
Q. Can you tell from that exhibit the years that you bought the constant ignition type from Perfex and
601 the year that you bought the intermittent type from Perfex?
A. I don't see any identification on this sheet, I don't find it—it was in 1938 that we bought, according to this record, seven hundred constant ignition controls from Perfex.
Q. During that same year you did buy constant ignition controls from Minneapolis?
A. Mr. Shafer's record shows 150 Minneapolis-Honeywell constant ignition controls.
Q. Did you buy any intermittent type controls that year from Minneapolis-Honeywell?
A. A great many.
Q. How many?
A. Mr. Shafer's record shows 5,976; two different types.
Q. That is the large figure?
A. Yes, sir.
Q. Now, in 1939 and subsequent years you began to buy intermittent types from Perfex, is that right?
A. We began to buy more intermittent types from Perfex, yes; but in 1938 the purchases appeared to be sampling quantities, getting them out in field tests.
Q. I show you Commission's Exhibit No. 90 for identification. Do you recognize the handwriting on it?

(Handing document to the witness.)

A. I cannot for certain, but from the notation that
602 is at the bottom I find that appears to be in Mr. Rockwell's handwriting. The other probably may be Mr. Goldie's.

Q. And what is his position with your firm?

A. Vice-president.

Q. In any particular capacity?

A. He is in charge of manufacturing now, although several years ago he took more active interest in some of these other matters.

Q. Do you recall having any discussion with Mr. Pauling, with Mr. Goldie, with respect to the purchase of temperature controls in 1936, and to the effect that Minneapolis-Honeywell will allow you a dollar on each set of controls purchased on your G. C. burners up to a total of 7,500 burners?

A. Answering that specifically, no. I have a recollection of some brief mention of that to me by Mr. Roberts, something suggested like "We have worked out a deal."

Q. Is Mr. Goldie still with your firm?

A. Yes, sir.

Q. Is he in the city?

A. I don't know. He was not during the last week, but I don't know whether he is now or not.

Mr. Haycraft: That is all.

Mr. Gilpatric: Mr. Examiner, before Mr. Freeman cross-examines I want the record to show that it now appears
603 from the testimony of Mr. Crawford and Mr. Shafer that Mr. Rockwell was the man who knew all about this 1936 contract, and the policies that entered into these changes, and I think when we come to apply for a subpoena to have Mr. Rockwell back to tell us about the provisions of that contract, we don't want to be met with opposition to a subpoena by Mr. Haycraft. If Mr. Haycraft wanted to get the facts about it, he had the man here this morning to give the facts, and instead of putting in the sort of testimony that he did.

Mr. Haycraft: I think that should be stricken out. That has no place in this record.

Mr. Gilpatric: But we don't want any opposition to a subpoena coming from you.

Mr. Haycraft: Wait until you get it, before you object. I don't think that counsel for the Respondent should be the judge and jury of how I should try my case.

Mr. Gilpatric: You told us you were going to bring this

out from Mr. Shafer and Mr. Crawford after Mr. Rockwell was excused. These two men have already been on the stand and you have not brought it out.

Mr. Haycraft: I still say that they identified it, but that does not give you the right to cross-examine Mr. Rockwell because I did not offer it in evidence through him.

604 Mr. Freeman: You told us as a lawyer that you would have these other men testify to it.

Trial Examiner Sheppard: I don't see anything to fight about.

Mr. Freeman: Your Honor will recall that when Mr. Rockwell was here we asked some questions about this 1936 agreement and the policies of the Timken Company in 1936, and we were told by Mr. Haycraft that he was going to have a witness who would tell us about it. Mr. Rockwell was excused, and then Mr. Shafer testified that Mr. Rockwell was the executive who passed upon questions of policy, and Mr. Crawford testified with respect to the 1936 agreement that Mr. Rockwell had the last word. In other words, we now find that Mr. Rockwell has the last word, after Mr. Rockwell has gone off the stand.

Trial Examiner Sheppard: Haven't you got what you wanted on both sides?

Mr. Freeman: No, not at all.

Mr. Haycraft: It is just a case of trying to put in their case again with my witness while he is on the stand and I am putting in my case. That is the whole point of this thing. I don't care when they call Mr. Rockwell on their side of the case, but I am putting in my side of the case and I am doing it in my own way.

Mr. Freeman: Then don't tell us when we endeavor

605 to cross-examine Mr. Rockwell that you are going to have Mr. Crawford or Mr. Shafer testify all about it.

Mr. Haycraft: Certainly Mr. Crawford and Mr. Shafer both testified and they did identify the document.

Trial Examiner Sheppard: All right, gentlemen. There is nothing to be excited about on either side. We have had all three of these gentlemen here.

Mr. Haycraft: I don't like to be accused of sharp practices on the record.

Mr. Freeman: Don't tell us after this that you are going to have a witness testify to it if you don't mean it.

Mr. Haycraft: I had two witnesses testify to it.

Mr. Freeman: And they told us nothing at all with respect to that agreement, particularly that clause.

Mr. Haycraft: Because you don't like it, I can't help it. I am not putting on my case the way that counsel for the Respondent likes it.

Trial Examiner Sheppard: I think that the record already shows plenty from both sides. We will have no more of this discussion on the record. If you want to discuss it off the record, you can do so.

Mr. Freeman: I want the record to show these remarks. We don't want to be prejudiced in the presentation of our case.

606 Trial Examiner Sheppard: I am going to let the record stay just like it is now. All right, cross-examine.

Cross-Examination by Mr. Freeman.

Q. Mr. Crawford, you bought limit controls from the Penn Company in 1935, did you not?

A. I presume so.

Q. And you bought controls in sets, that is, the Safetrol, the Temtrol, and the limitrol from the Penn Company?

A. Yes, sir.

Q. And all instruments were used on the same burner in a set relationship with respect to the burner, is that correct?

A. I don't believe it is exclusively correct.

Q. You used the Penn thermostat, known as the Temtrol, and the primary control, known as the Safetrol, in connection with your oil burners in 1935?

A. My recollection on that, Mr. Freeman, would be that the Temtrol and the Safetrol were invariably used in combination.

Q. That is, the primary and thermostat were always used together?

A. That is right.

Q. And not used independently?

A. That is my recollection; yes, sir.

607 Q. And likewise no Penn Temtrol or thermostat was used with somebody else's primary?

A. Not to my knowledge.

Q. Was there any reason for not using one make of primary with another make of thermostat on the same oil burner?

Mr. Haycraft: That is objected as calling for a conclusion, and calling for an answer not based upon the witness' knowledge so far as this record goes.

Trial Examiner Sheppard: If he knows, he may answer.

The Witness: I know definitely that there were different electrical characteristics which would make it entirely impossible or impractical to use two different ones together.

By Mr. Freeman:

Q. You know that from the position you now hold and have held with the Timken Company for over a period of ten years, do you not?

A. I know it because of my association with the Timken Company of considerably more than ten years.

Q. So what you are testifying to is facts and knowledge, what you know?

A. That is right.

Q. And your company purchased Perfex controls in 1936 from Perfex, did it not?

A. Yes, sir.

608 Q. And I believe that you said that the 1937 letter agreement with Minneapolis-Honeywell included the last paragraph because you were buying controls, not in sets, is that correct?

A. We had not been buying controls in sets, and we did not wish to be bound to buy them in sets.

Q. Although your 1936 agreement, Commission's Exhibit No. 66, does specify the purchase of controls in sets, does it not?

A. I couldn't tell you.

(Examining documents.)

The language says "10,000 or more sets, each set consisting of three controls, one limit control, one thermostat, and one primary control."

Q. Nothwithstanding your 1936 agreement, which provides for purchase in sets, your Company actually did go out and buy controls from Minneapolis-Honeywell competitors; is that not so?

A. That is correct.

Q. And I believe that you said that in the early days you used more constant ignition controls, that is, primary controls, than of the intermittent type, is that correct?

A. May I correct your statement?

Q. Go ahead and correct it. All we want are the facts.

A. My statement to Mr. Haycraft was that we used
609 more constant ignition controls in those days that you are reviewing than we are using now.

Q. Then, as a matter of fact, constant controls can be

bought for a little less money than the intermittent controls, is that correct?

A. That is correct.

Q. I wonder if I might see that tabulation that you made for the year 1941 with respect to the use of controls for use on your thousand oil burners. You talked about a fourth control. That is, some control over and above what we referred to as the standard three controls, the thermostat, the primary and limit controls. Will you point out on the figures, that you have prepared for 1941—

Mr. Haycraft: I object to that unless it is an exhibit in evidence.

Mr. Freeman: I can put it in evidence. But you kept referring to things for identification, and we want to ask him about this.

Mr. Haycraft: I object to the interrogation of the witness on a paper not in evidence.

Mr. Freeman: Will that go for all from now on?

Trial Examiner Sheppard: We will mark that Respondent's Exhibit No. 2.

Mr. Haycraft: I am willing to make that my exhibit, if you want.

610 Trial Examiner Sheppard: Mark it Respondent's Exhibit No. 2.

(The document referred to was marked Respondent's Exhibit No. 2, for identification.)

By Mr. Freeman:

Q. The last paper I referred to, Mr. Crawford, is now Respondent's Exhibit No. 2 for identification—

Mr. Haycraft: (Interposing.) I agree that it may go in evidence, Mr. Examiner.

Trial Examiner Sheppard: It may go in.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT NO. 2 was received in evidence.)

By Mr. Freeman:

Q. Just tell us what are the so-called fourth controls.

A. Those which are in the last column to the right, marked "domestic water control".

Q. How are the thermostats or any of the controls used on the domestic water—as domestic water controls, compared with the controls used on the domestic oil burners; are they different controls or are they the same?

A. I am afraid I don't understand your question.

Q. Will you tell us what controls are used on the domestic water devices, that is, for heating water for domestic use?

A. Immersion Aquastat.

611 Q. That is a limit control?

A. That was somewhat similar, but not normally used for a limit control.

Q. How does it differ from the immersion aquastat used in connection with domestic heating?

A. The limit control that we use for domestic heating is a surface type of aquastat, because it costs less money and is easier to install than the immersion type of aquastat. It performs the same function. The immersion type of aquastat used for this purpose may be used for a limit control if the contacts are arranged differently, or the circuit wires are arranged a little bit differently.

Q. In both cases they serve as a limiting control for making and breaking the circuit depending upon temperature?

A. It is used for making and breaking the circuit, depending upon temperature, yes, sir.

Q. The settings might be different?

A. Yes, sir.

Q. The limit controls might have different settings even for oil burner use, isn't that correct?

A. Yes, sir.

Q. And the instruments are provided for such settings, are they not?

A. Yes, sir.

Q. Now, Mr. Haycraft asked you as to the number 612 of relays purchased from Minneapolis-Honeywell and from Perfex for the years 1938 and 1939, and I am wondering if you have like information for the years 1940 and 1941; and you can refer to Commission's Exhibit No. 91.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: May I answer?

Trial Examiner Sheppard: Yes, go ahead.

The Witness: In the year 1940 the exhibit you have given me shows that we bought from Minneapolis-Honeywell 1,895 RA-117-A intermittent primary controls, and

51 R-116-A constant ignition primary controls; and in that same year it shows that we obtained 10,450 5520-D-1 Perfex primary controls and 575 5200-D-4 Perfex constant ignition primary controls. That is for the year 1940. Is that what you wish?

By Mr. Freeman:

Q. Yes, and 1941, Mr. Crawford, please?

A. In 1941 the same exhibit shows that we purchased from Minneapolis-Honeywell 3,778 RA-117-A intermittent ignition primary controls, and 158 R-116-A constant ignition primary controls. During that year, 1941, it shows that we purchased from the Perfex Corporation 17,290 613 of their No. 5520-D-1 intermittent ignition primary controls, and 872 Perfex 5200-D-4 constant ignition primary controls.

Q. It is true that in the years 1938 to 1941 the comparable controls that you have referred to were selling for less money; that is, you could buy for less money from Perfex than you could from Minneapolis-Honeywell, is that correct?

A. My recollection is that that is the case.

Q. And that likewise is true in connection with the thermostat, is it not?

A. My recollection is not so clear on that. I believe there was a difference of a few pennies, about five cents.

Q. That difference meant that Perfex cost less money than Minneapolis by that slight difference?

A. That would be correct.

Q. How about the limit controls.

A. I believe on the limit controls the price was 10 cents difference.

Q. That is, Perfex sold for 10 cents less?

A. The price on the Perfex controls, I believe, was 10 cents less.

Q. Mr. Haycraft asked you about your prices, how your prices compared when you sold controls for replacement purposes, and so forth, during the year 1937, and I now ask you what the relationship is in the price of controls with the oil burner. Does it materially affect your 614 selling price of the oil burner?

A. Within reasonable limits a difference in the price controls would not affect our price on the oil burner.

Q. Did it in fact, in the year 1937, change your price on the oil burner?

A. I doubt if that would be an important factor in price.

Q. So that whether you purchased from Minneapolis-Honeywell or from Perfex, even though there was a difference in price, it did not have any effect on your ultimate selling price of the oil burner, complete with controls; is that correct?

A. That is hard to say, Mr. Freeman. I can't say that the saving of one penny does not make any difference, because ultimately it does, but it in itself would not be an important factor.

Q. So far as your company is concerned, when you sold your oil burners with Minneapolis-Honeywell controls you did not charge more for them than when you sold the same burner equipped with the Perfex control?

A. Yes, during certain periods we did.

Q. And when was that?

A. I can tell you by the circumstances rather than the time.

Q. Go ahead.

A. When we had them packed with the burners and had them as standard equipment, and a man said he
615 wanted to change to Minneapolis-Honeywell, we said that cost extra money. I might be able to find it on one of my records here.

(Examining papers.)

I find a price sheet here that shows that if an R-116-A master control was wanted instead of the 5200-3 master control which was specified as standard equipment, an additional charge was made.

Q. That is, where you substituted Minneapolis-Honeywell controls for your then standard Perfex controls you charged more money?

A. That is correct.

Q. How about 1937 when you had Minneapolis-Honeywell as standard, did you make any allowance or give your customers any difference in price on your burners if your burners were shipped out equipped with Perfex controls?

A. I find a price sheet here current in April, charging 50 cents extra, where an extra charge of 50 cents was made if a customer demanded an LA-404-A or a LA-409-A limit control instead of the standard.

Q. Back in 1936 when you began to use Perfex primaries and at the same time used Minneapolis-Honeywell primaries, was there any difference in price when the

burner went out with a set of controls made by Perfex and when the same burner went out with a set of controls made by Honeywell?

A. I have no reference data, but my recollection is
616 definitely no.

Trial Examiner Sheppard: What is that?

The Witness: I have no reference data, but my recollection is definitely no.

Trial Examiner Sheppard: In other words, a burner that you sold with the Respondent's control on it at that time, there was no difference in price from a burner equipped with Perfex?

The Witness: That is my recollection, sir.

Trial Examiner Sheppard: I understand it now.

By Mr. Freeman:

Q. And then later when you began to standardize on Perfex controls, when a customer orders an oil burner and wanted a set of Minneapolis-Honeywell controls, there was an additional charge?

A. That is correct.

Trial Examiner Sheppard: Did that difference in charge represent the difference in price? You said that the Perfex sold at a lower price than the Respondent's controls. Did that make a differential there, that you just talked about?

The Witness: I don't believe so, sir. My recollection is that this differential in price to our dealers, during the period Mr. Haycraft and Mr. Freeman are asking about is made up almost entirely of the cost and inconven-
617 ience and the trouble of making a special control selection and special packaging and so on, and special inventorying.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. So that the actual charge that you made to your customer or dealer who wanted the Minneapolis controls was an amount in excess of the actual difference in cost of the Perfex controls and the Minneapolis-Honeywell controls?

Mr. Haycraft: I object to that question. It is not in accordance with the witness' testimony.

Trial Examiner Sheppard: If he understands it, I will let him answer it. I think it is already answered.

Mr. Freeman: I think part of it was answered in response to your Honor's question, but I wanted him to clarify it.

Trial Examiner Sheppard: Mr. Crawford, you just go on and state anything in addition to that that you want to.

The Witness: Will you restate the question?

By Mr. Freeman:

Q. Let me ask you another question.

You actually charged the dealer who wanted a Minneapolis-Honeywell control an amount in excess of the amount that you paid for Minneapolis-Honeywell controls over and above what you could have purchased controls for
618 from Perfex, is that correct?

A. Yes, sir.

Q. So that the differential in price between the Perfex controls and Minneapolis-Honeywell controls was not alone the factor as to what difference you would obtain by way of additional money from the purchaser?

A. Not the sole factor, no.

Q. Of course, when you paid more money you wanted more money?

A. Obviously.

Q. Did you find that the differential deterred certain of your customers from asking for Minneapolis-Honeywell controls?

A. I probably tried pretty hard not to find that out, Mr. Freeman.

Q. As a matter of fact, what is your experience? What actually happened in the field? That is what we want to know.

A. What happened in the field is, of course, a composite result of hundreds of people's reactions, which will be different from time to time. I think undoubtedly that difference in price did influence them to take the one that we had selected as standard.

Q. Of course, when Timken selects something as standard, that means that it is just as good, is that not so?
619 A. In our opinion it was good, and we stand back of it, without reference to just as or better than.

Q. By the way, how does your price on an oil burner with controls all included compare with other oil burners—oil burners manufacturers selling oil burners of substantially the same type?

A. It is higher.

Q. Can you give us just rather briefly how your price structure in 1936 compared with the companies that you were directly competing with?

A. Practically we didn't have any direct competition with the wall flame burner, because it is a different type of burner, and there were only two other manufacturers of it. The Model C sold from $135.00 down to $107.50, depending on the quantity. The Model G. C., which was our standard pressure type burner in those days—

Q. (Interposing.) Gun type?

A. Gun type, $105.00 to $87.50 in the year 1936.

Q. You had more competition on the gun type than you did on the other type?

A. The competition was on the gun type directly.

Q. Do you have any data here which might show what your competition was, that is what you had to meet competitively?

A. It was considerably below that. I think I did put in my file one memorandum that referred to it, if I can find it.

620 (Examining papers.)

This is dated March 2, 1937. Will that serve your purpose?

Q. Go right ahead.

A. Mr. Holman, the manager of our Boston branch at that time, wrote me saying N. S. Oil Burner Corporation, Hartford, Connecticut, quoted him a price of $60.00, including Minneapolis controls, for their new pressure type burner.

Mr. Kirby also had a quotation of $66.50 for Williams Oil-O-Matic on their new pressure burner, including Minneapolis controls.

I could quote you our price for 1937.

Q. Would you do that, as long as we are talking of 1937, so we have it all complete?

A. I find no change in the 1937 schedule.

Q. So that your 1937 price was about the same as your 1936 price?

A. The record I have here as to those two models, shows it exactly the same.

Q. I believe you said something about wanting a second source of supply for controls. Was that a matter of policy of the Company?

A. Quite definitely.

Q. Who was instrumental in putting into effect such a policy, as to a second source of supply of controls?

621 A. Initiated that policy?

Q. Yes.

A. Or executed it?

Q. Well, give us both, if you can.

A. Such policy would be initiated by Mr. Rockwell. It would be executed by a man like Mr. Shafer, myself, or Mr. Powers, our chief engineer.

Q. Can you tell us now whether or not, when Mr. Rockwell came with the Timken Company in 1933, he then put into effect the policy of obtaining for Timken a second source of supply for controls?

A. Well, I know that it was not long after that that we has a second source of supply.

Q. You know that Mr. Rockwell was responsible for putting into effect the obtaining of a second source of supply?

A. I don't think I could testify to that from my knowledge, Mr. Freeman. I would assume that to be the case.

Q. All I want of you are the facts. Do you know whether or not your company was, in the years 1935 and '36 and '37, negotiating with companies other than Minneapolis-Honeywell for supplying your company with oil burner controls?

A. Yes.

Q. And you know that in 1935 negotiations were carried on with the Penn Electric Switch Company, do you not?

A. Yes.

622 Q. Did M-H, that is, Minneapolis-Honeywell know then that you were negotiating with Penn for the purchase of controls?

Mr. Haycraft: I am objecting to that, what Minneapolis-Honeywell may have known, Mr. Examiner.

Mr. Freeman: I will withdraw that question.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Did you let Minneapolis-Honeywell know that you were dealing with competitors for the purchase of controls in 1935, 1936 and 1937?

A. Definitely, within that period. I cannot tell you this in 1935. I can tell you we delivered a lot of burners in 1935 equipped with Penn controls, and I feel they would have found out about it even if we didn't tell them.

Q. And likewise you delivered oil burners in 1936, with controls made by someone else, other than the Minneapolis-Honeywell, is that correct?

A. Yes, sir.

Q. Of course, the same is true for the year 1937?

A. Yes, sir.

Q. Mr. Crawford, Mr. Haycraft asked you with reference to the types of oil burners manufactured by your company, and I am correct in my understanding that you make a small rotary type of burner that is sold in the
623 domestic oil heating market, where the primary safety is not of the heating responsive type, is that right?

A. Yes, sir.

Q. And is that burner of the rotary type which you have just identified, used in the domestic heating field, that is, for heating homes?

A. Yes, within its capacity limits.

Q. That is, it is a small—

A. (Interposing.) It is a small burner.

Q. And it will work efficiently for heating a small space, that is, a small home, is that correct?

A. Yes.

Q. You have sold such oil burners, complete with a furnace, is that correct?

A. Yes.

Q. And have you sold such type of oil burners for use with a complete boiler?

A. Yes.

Q. And in both cases of those units, that is, the boiler type heater and the furnace type heater, for use in connection with heating small domestic homes?

A. Yes.

Q. In each of those cases there is provided a primary control, is that correct, a safety control?

A. If you do not give any special significance to
624 primary control, the answer is yes.

Q. Is it true that in such type of oil burner, three different controls are used, in order to bring about the proper operation of the burner?

A. Yes.

Q. One of those controls is a thermostat?

A. Yes, sir.

Q. And another is—another of such controls is a limit control?

A. Yes.

Q. There is still a third control that serves as a safety device, is that correct?

A. That is one of the functions, yes.

Q. That likewise is one of the functions of the primary control, known as the R-116-A, manufactured by Minneapolis-Honeywell, is that correct?

A. Yes.

Q. So that in the type of device that we are now referring to, you have three controls?

A. Yes.

Q. The control, other than the thermostat, and the limit control, serves the same function as the primary or control that you purchased from Perfex, or the control that you purchased from Minneapolis-Honeywell, its type R-116-A, is that correct?

625 Mr. Haycraft: Read that question again.

(The question above referred to was read by the Reporter.)

The Witness: If you mean by the "function", that it is designed to stop, prevent the burner from being unsafe, in the event of abnormal operation, the answer is yes.

By Mr. Freeman:

Q. In other words, the R-116 prevents the abnormal discharge of oil if something goes wrong, is that correct, shuts down the burner?

A. Shuts down the burner.

Q. And likewise in this type we are now referring to, the burner is shut down in the event that something goes wrong. In other words, it too prevents the abnormal discharge of fuel or oil?

Mr. Haycraft: I object to that, unless it is made a little more clear what he is talking about. I want to know, and I think the record should know what we are talking about. I do not understand the question. I don't think the record is clear what we are talking about.

Mr. Freeman: I will reframe the question.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. What is the function of the control that we are
626 now referring to, which you use in connection with your rotary type burner, of the kind that we are now discussing?

Mr. Haycraft: What is the type we are now discussing? What is the burner we are now discussing? What is the control we are now discussing? I think he should be definite in this question.

Mr. Freeman: This witness already said the rotary type burner.

Mr. Haycraft: But what control is it we are talking about?

Mr. Freeman: The primary control or trip bucket control.

Mr. Haycraft: The record does not show that.

Trial Examiner Sheppard: All right, Mr. Crawford, if you understand the question.

The Witness: I do.

By Mr. Freeman:

Q. What are its functions?

Trial Examiner Sheppard: Go ahead.

The Witness: In general terms, as long as I don't have to be too technical about it.

Trial Examiner Sheppard: All right.

The Witness: It opens the oil valves and permits oil to flow when the burner is starting. If the oil fails to ignite, the oil is drained down through a channel, 627 conveyed to a trip bucket. The trip bucket folds and stops the flow of oil. That control also regulates the amount of oil fed to the burner, and if any obstruction prevents the needles valve controlling the flow of oil from seating properly, the oil will overflow to the same trip bucket and close the valve completely.

Trial Examiner Sheppard: Is all that automatic?

The Witness: That is all automatic.

Mr. Haycraft: What is the name of this control we are talking about?

Trial Examiner Sheppard: That is the primary control, represented by the patent you gentlemen sell, isn't it?

The Witness: We call it an oil control valve. They call it a trip bucket control. We buy them from Detroit Lubricator Company, and Automatic Products Company, and can I ask Mr. Shafer? I think that is correct.

Mr. Haycraft: Do you buy any from Respondent?

The Witness: No.

Mr. Haycraft: I object to it as not relevant or material.

Mr. Freeman: I think it is. He is asked on direct examination what type of oil burners they sold.

Mr. Haycraft: On my direct examination it was all directed against the thing involved in this case.

628 Trial Examiner Sheppard: I though you had some special question.

Mr. Freeman: It certainly is involved. We are trying to find out what type of oil burner this company sells, and he asked for that.

Trial Examiner Sheppard: I do not care what kind of oil burners they sold, insofar as they sell the same general type that is in competition.

Mr. Freeman: The whole case is predicated, your Honor, upon domestic oil heating, and if this company makes a domestic oil burner and sells it to the trade in competition with other domestic oil burners, we are entitled to bring that out.

Trial Examiner Sheppard: That is all I want to know.

Mr. Freeman: That is all I want to know.

Mr. Haycraft: Mr. Examiner, the reason for my motion is that in the operation of this oil burner it has been developed now this witness does not buy the controls from either the Respondent or the Perfex Company. They manufacture it themselves.

Mr. Freeman: I do not think it makes any difference.

Mr. Haycraft: It has nothing to do with this case, then. We are determining the question of competition be-

629 tween Minneapolis-Honeywell and its competitors. Certainly this is not a competitor of the Respondent. I move to strike it.

Trial Examiner Sheppard: I will let it stay in for what it is worth.

Mr. Freeman: All right.

By Mr. Freeman:

Q. Who do you buy your thermostats from that are used in connection with the type of oil burner we are now discussing?

Mr. Haycraft: What is that type of oil burner we are now discussing?

Mr. Gilpatric: The rotary type, for use in domestic heating plants, ours.

Mr. Haycraft: Is that the type, this special oil burner?

Mr. Gilpatric: Yes, sir.

Mr. Haycraft: I object to the question.

Trial Examiner Sheppard: I presume it is the type this gentleman has been talking about, that they make themselves.

Mr. Freeman: They buy the controls from somebody else. It is a rotary type burner.

Trial Examiner Sheppard: Yes.

Mr. Haycraft: I object to the question.

Trial Examiner Sheppard: I will let you answer,
630 if you know.

By Mr. Freeman:

Q. Who do you buy your thermostats from?

A. The specification sheet that I have here specifies on P. A. Air Model Oil Boiler, the use of Perfex Model 101-D thermostat, and Perfex Model 700-D steam control, 500-D-10 rotary control, or 700-D-10 vapor control.

Q. Manufactured by Perfex?

A. Yes.

Mr. Freeman: That certainly shows all of this is competent, because those are the very items we are in competition with, and I think it is absolutely material.

Trial Examiner Sheppard: For that purpose I will leave it in.

The Witness: It shows on our Model F. E. R. oil furnace we use Perfex Model 101-D thermostat, and Perfex Model 475-D combination fan limit control.

Model F. C. R. oil furnace we use Perfex 151-A thermostat, and Perfex No. 5000-D-4 relay, and Perfex No. 475-D combination fan limit control.

Trial Examiner Sheppard: That will be enough on that question.

The Witness: Those are the types of burners Mr. Haycraft, you asked for.

631 By Mr. Freeman:

Q. Mr. Crawford, I have just another question or two; and when you sell such an oil burner, equipped with some of the Perfex controls and some of the controls purchased from Detroit Lubricator, or Automatic Products, that oil burner that you then make and sell is in direct competition with other rotary type burners manufactured and sold by others for domestic oil heating, is that correct?

A. Yes, sir, or any other oil burners of like capacity.

Mr. Freeman: That is all.

Trial Examiner Sheppard: Anything else, Mr. Haycraft?

Mr. Haycraft: Yes.

Redirect Examination by Mr. Haycraft.

Q. Did the Minneapolis-Honeywell Regulator Company ever attempt to sell you other controls for use on this particular type of burner you have been asked about, that you manufacture yourself?

A. Oh, I don't doubt that they did, Mr. Haycraft. I don't find, on these specification sheets, we ever specified their controls for them. I know we have used some of their controls when the special type was required, such as a chronotherm or acratherm, a special type thermostat.

Q. Did they make any attempt to sell you thermo-
632 stats and limit controls and primary controls?

A. Not primary controls, because the control is designed right in the burner. It would be pretty hard to use a primary control with it.

Q. The thermostats or the limit controls?

A. No doubt they did.

Q. You say "No doubt they did". I want a positive answer on that. Do you know that they did?

A. No, I can't say specifically.

Q. Do you know what their policy is with respect to selling less than sets? By "sets" I mean of primary controls, limit controls and thermostats?

Trial Examiner Sheppard: All three of them. He understands that.

The Witness: Yes, I understand, but I don't believe that would be pertinent in this case.

By Mr. Haycraft:

Q. I am asking you whether or not you got any bids, or whether or not there was any negotiation for the purchase, or they offered to sell you a limit control and a thermostat separate from your sets, for use on this particular burner? I want an accurate answer on that. I do not want any guesswork or assumption.

A. I cannot answer.

Mr. Haycraft: All right.

633 By Mr. Haycraft:

Q. What proportion of your business now consists of this special type of burner you referred to?

A. I think, sir, with reference to this chart you have, I believe it is what you have before you.

Respondent's Exhibit No. 2, will indicate the difference

between 785 master controls, and 1,000 burners is made up of these types which do not use the conventional type primary control we have been talking about. You find them identified here as Model B. A. R., F. E. R., F. C. R., which show blank, on the master control.

By Mr. Haycraft:

Q. When did you start manufacturing those?

A. I can tell you from the price record, when we started quoting a price, which will give it to you fairly accurately by years. Will that suffice?

Q. Yes.

A. I find F. C. R. furnace on here appearing in 1938, October 1st, 1938.

I find F. E. R. appearing in March, 1940.

I find B. A. R. appearing in October, 1938.

Q. Now then, of the models that do not include that type of burner, do you know what proportion used Minneapolis-Honeywell controls, and what proportion used Perfex controls?

634 A. That was at our election, sir.

Q. How did they run? What was the proportion subsequent to 1937? Do you have any way of knowing that?

A. Only as these purchase records indicate it, because we regulated that by the number we had in inventory in a given time, the number we elected to buy.

Q. What determined the number that you would elect to buy from one or the other?

A. Well, one, the question of price would be quite an important factor. Two, we were attempting to get enough business in Perfex so they would be a good competitor, and a good second source of supply, in case anything happened to our Minneapolis source.

Q. Was any other factor taken into consideration?

A. Well, I think this might be a little bit distasteful to Mr. Pauling, but I think it was Perfex who first cooperated with us by putting our name on our thermostats, and identifying them distinctly as Timken equipment, and making a distinctive Timken design, and I thought they were entitled to a little compensation for that.

Q. Were the Minneapolis-Honeywell Regulator people willing to do that for you, too?

A. Reluctantly willing.

Q. They have done it since that time?

A. Since that time, yes.

635 Mr. Haycraft: I think that is all.

Recross Examination by Mr. Freeman.

Q. These thermostats that you say you bought from Perfex and used on the last mentioned type of domestic oil burner, could likewise be used on an oil burner employing a primary of the kind you bought from Perfex, or the kind you bought from Minneapolis-Honeywell, is that correct?

A. Can I refer to my schedule and find out which kind we are talking about? You mean the Perfex 101-B?

Q. Yes.

A. Perfex 151-A?

Q. Yes.

A. Yes.

Q. Likewise, I take it, the Minneapolis-Honeywell thermostat, which has here been pointed out as comparable to Perfex as No. 151-A, it too could have been used in the last type, domestic oil burner, is that correct?

A. Just as well, equally well.

Q. You bought from Perfex, at a little less money than you bought from Minneapolis-Honeywell, is that correct?

A. I believe that would be the case.

Q. That would be applicable to the controls that you bought from Perfex and used in this last type of oil burner?

A. I think that would be true.

636 Mr. Freeman: That is all.

Redirect Examination by Mr. Haycraft.

Q. By "last type of oil burner", you refer to what? What do you mean by the last type of oil burner?

A. Models B. A. R. oil boiler, F. E. R. oil furnace, F. C. R. oil furnace.

Q. Is it your testimony that the thermostat, and I want to get this clear so there is no misunderstanding, which you could have bought from Minneapolis-Honeywell, would work equally as well with the Perfex primary?

A. No, sir.

Q. Or the primary that you bought from Detroit Lubricator, or, what was this other one, your B. A. R. boiler, and F. E. R. and F. C. R. furnaces?

A. The Minneapolis-Honeywell T-11 thermostat which we were currently buying, could have been used where we used the 151-A Perfex thermostat.

Q. Where was that?

A. It was on the F. C. R. furnace.

Q. What primary did you use on the F. C. R. furnace?

A. It was the oil valve control which was purchased from either Detroit Lubricator Company, or Automatic Products, I don't know which.

Q. Could you have used the T-11 thermostat on your
637 B. A. R. furnace or F. C. R. furnace?

A. No. You could use another model of Minneapolis-Honeywell thermostat, designed to carry high voltage. I can't tell you the number, but another model to carry that line voltage.

Q. Have you used them?

A. Yes.

Q. When did you buy those?

A. Your exhibit may show.

Q. Look at 91-A, B, C, and D.

(Handing document to the witness.)

A. T-44-A, Minneapolis-Honeywell is one of the types which could have been used. We bought some of those in 1938. We bought some in 1939. We bought some in '40. I don't find any in '41.

Q. Do you know that they were used? You say they could have been used.

A. No, I do not.

Q. What was the Perfex type of thermostat that was used on B. A. R. and FCR?

A. On B. A. R. I have just detailed it all. On B. A. R. we used Perfex 101-D. On F. E. R. we used Perfex 101-B. On F. C. R. we used Perfex 151-A. Previously we used 101-B on F. C. R.

Q. But the only one you could use Minneapolis-
638 Honeywell thermostat on, T-11, was F. E. R., is that right?

A. We used the Perfex 151-A in combination with intermediate thermostat,— with an intermediate relay. That relay made it possible for us to use a low voltage thermostat. With that relay we could use Minneapolis-Honeywell T-11 thermostat with equal ease and equal results.

Q. That is F.E.R.

A. F.C.R. We put that on standard equipment. We could have used that relay, that intermediate relay, which is not the primary control we have been talking about, on any of those models, and then we could have used any Minneapolis-Honeywell low voltage thermostat, or any Perfex low voltage thermostat.

Q. Did you do that? You say you could have done it.

A. We did not do it as standard equipment. I know we did do it in isolated cases.

Q. What is this relay you have referred to that you put on there, that reduced it from high voltage to low voltage?

A. The 151-A and T-11 thermostats carrying low voltage circuit. The low voltage circuit to the relay closed the circuit. The relay closed, then we thereby closed the line voltage circuit, which carried the burner.

Q. What was the model of this relay that you are talking about, Perfex?

A. The particular one we had specified here was
639 Perfex No. 5000-D-4.

Q. That is called a primary control?

A. No.

Q. What is the name for it?

A. We just called them intermediate relays, or auxiliary relays.

Q. But without that auxiliary relay, the thermostat on the Minneapolis-Honeywell could not have been used?

A. The T-11 Minneapolis could not have been used, nor could the Perfex 151-A.

Q. You would have used 101?

A. We had to use a 110 volt thermostat.

Mr. Haycraft: That is all.

Recross Examination by Mr. Freeman.

Q. Likewise, if you used a Perfex high voltage thermostat, you could have used, in connection with the oil burner of the type we are now discussing, a Minneapolis-Honeywell line voltage thermostat, is that correct?

A. Yes, sir.

Q. And if you used a low voltage Perfex thermostat, by using a relay, you likewise could have used a Minneapolis-Honeywell low voltage thermostat with the relay, in place of the Perfex thermostat, is that correct?

A. Yes, sir.

640 Mr. Freeman: That is all.

Trial Examiner Sheppard: Thank you, Mr. Crawford.

(Witness excused.)

Trial Examiner Sheppard: Miss Reporter, take an adjournment until ten o'clock in the morning in this room.

(Whereupon, at 5:45 o'clock p. m. of Monday, August 23, 1943, the hearing in the above-entitled matter was adjourned.)

641

Room 715,
United States Post Office,
Detroit, Michigan,
Tuesday, August 24, 1945.

Met, pursuant to adjournment at 10:00 a. m. E. W. T.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and B. R. Shute, Esq., 15 Broad Street, New York, N. Y., and Bair & Freeman, by Will Freeman, Esq., 135 South La Salle Street, Chicago, Illinois, appeared for the Respondent.

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Proceedings.

Trial Examiner Sheppard: All right, gentlemen, we will proceed.

Mr. Reporter, this gentleman is Charles H. Hodges, Jr., president of Detroit Lubricator Company, 5900 Trumbull Avenue, Detroit, Michigan.

CHARLES H. HODGES, JR., was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Hodges?

A. My occupation, president of the Detroit Lubricator Company, sir.

Q. In what business is the Detroit Lubricator Company engaged?

A. Its general business is the making of controls for the heating industry, including gas and oil; and under oil, both vaporizing and pressure type of burners, and stokers, coal fired stokers; also refrigeration controls for the refrig-

eration industry; expansion valves for the air conditioning and refrigeration industry; mechanical forced feed lubricators for railroads; air valves and radiator valves, both packless and packed, for the heating industry; the old
643 line of stationary lubricators for steam engines, both while they are still used on railroads and stationary engines. I think, sir, that covers our general line.

Q. How long have you been engaged in the manufacture and sale of automatic temperature controls for use on oil burners?

Mr. Freeman: Of the domestic type.

Mr. Haycraft: Of the domestic type.

The Witness: I should say for the past two years.

By Mr. Haycraft:

Q. How are your temperature controls sold? That is, what is your method of sale; and who are your principal customers?

A. We sell them to manufacturers, and jobbers. Those are our two main outlets.

Q. Oil burner manufacturers?

A. Yes, sir.

Q. Who are your principal customers in the way of oil burner manufacturers?

A. Well, the American Radiator and Standard Sanitary Corporation, Timken, Anchor Post Fence, Gilbert and Barker, American Gas Machine. I think there is a concern —you gentlemen are more familiar with the names of these companies than I am, the Silent—

644 Q. (Interposing. I show you Commission's Exhibit No. 1, beginning on page 10, and ask you to look over a list of manufacturers there and see if you have made sales of temperature controls to any of those manufacturers, and if so, when?

(Handing document to the witness.)

A. I believe, and this would have to be checked up, so I am going by my memory, because I am not in charge of our selling; I believe we sold to Gar Wood. We have sold to Lynn Products. We have made some sales to Hart, I believe. We have made some sales to the Petroleum Heat and Power. We have made sales to York Oil Burner. And then, of course, we have made sales to a number of companies that are not listed here.

Q. What type of temperature controls do you sell for use on an oil burner?

A. What type?

Q. Yes. Do you sell primary controls and thermostats?

A. We sell a primary control, a room thermostat, both low and high voltage, a room thermostat with what is known as night turn-down. We sell both pressure and temperature operated limit switches. We sell the immersion type of switch for use in certain combinations where they hook up a burner in connection with domestic water. We sell a primary. Well, I don't know whether I have covered the
645 complete line, but those are the main items offhand; and we think we have a complete line to offer.

Q. What percentage of your sales would you say were made to your principal accounts, American Radiator and Standard Sanitary; is that it?

A. Yes, sir.

Q. And your other accounts?

A. Well, I should say that we made—in 1941, probably in 1940, the sales ran, I believe, about 50 per cent to the corporation and 50 per cent outside the corporation. Prior to 1940 the percentage would probably be a little higher; it might run in 1937 and 1938 a little higher than 50 per cent.

Q. Higher than 50 per cent which way?

A. Higher outside.

646 Q. How about 1937?

A. I don't remember, sir. I don't know.

Q. On the outside, that would include sales to oil burner manufacturers, and jobbers as well?

A. Yes, that is our total sales.

Q. Do you travel salesmen all over the country?

A. Yes, sir, we have territory men, and we travel men all over the country.

Q. What class of trade do they call on?

A. They call on both the manufacturer and the jobber.

Q. Could you give us the volume of sales for the years 1937, 1938 and 1939, of thermostats, limit switches and operating switches?

Mr. Freeman: Operating switches?

Mr. Haycraft: Or primary switches.

The Witness: You say, could I?

Mr. Haycraft: Yes.

The Witness: I don't remember those sales offhand.

Mr. Haycraft: I will let you refresh your recollection from this paper which I hand you.

(Handing document to the witness.)

Mr. Freeman: May we look at that paper?

Mr. Haycraft: If it refreshes his recollection, you may.

647 By Mr. Haycraft:

Q. Does that refresh your recollection?

A. I can simply quote from this letter which was apparently accurate at that time.

Q. You may let Mr. Freeman see the latter if you wish.

A. Yes.

(Handing document to counsel.)

Q. Will you tell us now, after looking at it?

A. We sold in thermostats, in 1937, 31,252; limit switches the same year, 4,585, operating switches, 32,123.

Q. What do you mean by "operating switches"?

A. I should say those were all kinds of switches. In other words, that was a catch-all.

Q. Includes primary, as well?

A. Including primary and switches of various character.

Q. Go ahead. 1938?

A. 1938, 20,675, limit switches, 2,620.

Q. What is that first figure?

A. 20,675.

Q. What, thermostats?

A. Thermostats. I beg your pardon. Limit switches, 2,620; operating switches, 14,560.

1939, thermostats, 29,131; limit switches, 13,004; operating switches, 25,455.

Q. How do you account for the fact you sold so

648 many more thermostats than you did limit switches during those years?

A. For the reason, a very good reason, that it was not until 1939 that we had ingenuity at our place to design an immersion type of limit switch, that would meet the general competition, both as to performance and as to size. Our history of our development shows that for some reason or other we started out with controls that were too big. In other words, we made them too roomy, and we immediately found in most every case that we were off on the wrong foot, because when we tried to sell them, they wouldn't go in the space the manufacturer had made available, or they looked too big, and we had to draw in our horns and start over again.

Q. What did your customers do for limit switches, that bought your thermostats?

A. What did they do?

Q. Yes.
A. I don't know.
Q. You don't know?
A. I don't know what they did.
Q. Do you know what the American Radiator Company did?
A. The American Radiator Company business, sir, we got mainly in 1940.
Q. Did you sell them thermostats in 1937, 1938 and 1939?
A. Yes, sir, we did.
649 Q. Do you know what they did for limit switches during those years?
A. I believe they bought limit switches on the open market.
Q. Do you know where they got their primaries?
A. They got their primaries, I believe, from Minneapolis-Honeywell Company.
Mr. Gilpatric: In what year was that?
The Witness: I think that was in 1939.

By Mr. Hayeraft:

Q. What about the preceding years, 1937 and 1938?
A. They were not in the oil burner business.
Q. They were not?
A. No.
Q. Was the Fox Furnace in the oil burner business in 1937 and '38?
A. Fox Furnace was in the oil burner business, from the furnace angle, yes.
Q. Did you sell them thermostats?
A. We sold them thermostats at the time they started.
Q. Do you remember when that was?
A. I don't know, sir.
Q. Do you remember whether you sold them during 1937 or '38?
A. I believe it was because they were in that type of
650 furnace business, before the corporation went into a general line of steam and water jobs, fired by oil.
Q. Do you remember where the Fox Furnace Company bought their limit switches and primary switches?
A. They bought them from us on a special design.
Q. All during that time?
A. They didn't work, so they dropped us.
Q. Who else did they buy from?

A. I don't know who they bought from. In other words, you are touching on a very touchy engineering history of our company, gentlemen, and I don't like to recall it, frankly.

Q. What did you sell Timken, and when?

A. We sold Timken a safety or a primary control, which is of special design, which controlled mechanically, the level of the fuel in their rotary burner. We sold that to Timken for a number of years.

Q. Is that that special type burner they put out?

A. Well, I wouldn't know. I know it was a rotary type burner.

Q. A small burner?

A. It had a pretty good capacity.

Q. Was it controlled through the fuel?

A. Well, I am no engineer, but it is my understanding it required a float mechanism in there as an additional safety factor.

651 Q. When was it you say you sold that to Timken?

A. We sold that to Timken for a number of years. I don't recollect exactly when we started.

Q. Do you remember what you sold to the York Oil Burner Company?

A. I don't know. I don't remember, sir.

Q. Do you know what you sold to Lynn Products?

A. Lynn Products, we sold a float safety trip device which, for gravity fed burners, takes the place of the primary control.

Q. Do you remember when it was you made those sales?

A. I don't remember. Lynn Products has been on our product list for quite a while, on our customers list.

Q. What did you sell Petroleum Heat and Power?

A. We sold Petroleum Heat and Power a few sets of primaries, limit switches and float valves in 1941.

Q. What did you sell Gar Wood Industries?

A. Gar Wood Industries, we have sold a number of miscellaneous controls, too.

Q. Do you manufacture, or have you manufactured what is known as a combustion fan and limit control?

A. Yes, sir.

Q. What use is made of that control? How was that used? What function does it perform?

A. Well, it performs the function of acting as a
652 high temperature limit, as one part of its functions, and the other is a control on the fan.

Q. What type furnace is that used on, what burner?

A. I imagine it can be used on any type furnace where you need mechanical draft.

Q. Is it used for a warm air furnace principally?

A. That is the usual type furnace that has mechanical drafts.

Q. How long have you been manufacturing and selling such a type of temperature control?

A. I don't know that I am very accurate on when we started, but it was along in 1933 that we started, and perhaps prior to that.

Q. Have you continued to manufacture and sell that control down to 1941?

A. Various designs, all incorporating the same features or use.

Q. At what price did you sell that control when you first brought it on the market?

A. I have gone back to 1936, and we started at a price that was sold at $6.70. That was on a two switch, or a combination switch in our 243 and 253 series. We identified these controls by series numbers, and that price went down, the last price that I have a record of, is $6.20 on that control. It was much too expensive, and in 1939,
653 the latter part of 1939, we redesigned the job and eventually came out with what is known as our CA-815, which is the combination fan and limit switch, and that we sold at $5.25 when we had it ready for the market.

654 Q. That was beginning in 1939?

A. That was beginning in—it did not go on the market until 1940.

Q. And you continued selling at that price during 1940 and 1941?

A. Yes, sir.

Q. Were you ever told or advised by the Minneapolis-Honeywell Regulator Company that your device was infringing a device which they made covered by a patent known as the Freeman patent?

A. Yes, sir.

Q. When were you first advised to that effect?

A. I believe there was some early correspondence in 1933. That did not involve the CA-815, but involved a control which we started to make for Fox Furnace. Then it did not work, and we took it off the market. We went into the general market at a later date, and I believe in 1938 we received information from the Minneapolis-Honey-

well Company that we were infringing the Freeman patent.

Q. Was that by word of mouth or did you have a letter?

A. A letter.

Q. A letter to that effect?

A. Yes, sir.

Q. Do you have that with you?

A. Yes, sir, a letter dated February 24, 1938.

655 Q. Have you produced this pile of correspondence pursuant to a subpoena served upon you by the Federal Trade Commission?

A. I have, sir.

Mr. Haycraft: Mark that for identification.

(The document referred to was marked Commission's Exhibit No. 92, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 92 for identification, which is a letter from the Minneapolis-Honeywell Regulator Company, signed by Harold Sweatt, and addressed to Mr. C. J. Swan, dated February 24, 1938, and ask you if that is the letter that you referred to?

(Handing document to the witness.)

A. Yes, sir.

Mr. Haycraft: I offer it in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: Let us take a look at it.

(Document handed to counsel.)

Mr. Freeman: In fact, you can put in anything that bears the signature of the Minneapolis-Honeywell Regulator Company. There is no question about that.

Trial Examiner Sheppard: It may be admitted as Commission's Exhibit No. 92.

656 (The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 92 was received in evidence.)

By Mr. Haycraft:

Q. Who is the Harold who signed this letter?

A. Harold Sweatt.

Q. Who is Mr. C. J. Swan?

A. Mr. C. J. Swan was our sales manager. He died in the early part of 1941.

Q. Did Mr. Swan bring this matter to your attention about that time?

A. Yes.

Q. And what happened as a result of that letter?

A. We started a patent investigation, and decided the patent was not any good. That was number one—

Trial Examiner Sheppard: (Interposing.) What patent do you refer to?

The Witness: The Freeman patent. And we so advised the Minneapolis-Honeywell Regulator Company; and there was correspondence in the file between our patent counsel arguing between themselves.

By Mr. Haycraft:

Q. Well, did there ever come a time when they submitted to you a license?

A. I believe they submitted a form of a license
657 agreement.

Q. A form of a license agreement?

A. Yes.

Q. Have you that there?

A. I believe that is it.

(Handing document to counsel.)

Mr. Haycraft: Mark this the next number.

(The document referred to was marked Commission's Exhibit No. 93, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 93 for identification, and ask you whether or not that is the license agreement, the form of which was submitted to you by the Minneapolis-Honeywell Regulator Company?

(Handing document to the witness.)

A. Yes, sir.

Q. What date was that submitted to you?

A. The only date that I have is a pencil memorandum, which is not my handwriting, but I believe it is Mr. Swan's, which indicates it was received on May 3, 1940.

Q. In the meantime, Mr. Hodges, had you had some correspondence with the officials of the Minneapolis-Honeywell Regulator Company with reference to this patent?

A. In the meantime, sir, what do you mean?

Q. Between 1938 and May, 1940?

658 A. Yes, sir.

Q. And had you also had some discussion from time to time with the officials of the Minneapolis-Honeywell Regulator Company with respect to the provisions of this proposed agreement, or the patent?

A. When I say, "Yes, sir", I mean that the Detroit Lubricator Company, our people in it, had conversations; not myself personally.

Mr. Haycraft: Mark that the next number.

(The document referred to was marked Commission's Exhibit No. 94, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 94, which purports to be an original letter from Mr. Harold Sweatt to Mr. C. J. Swan, under date of May 26, 1939, and ask you if that is a letter which your firm received?

(Handing exhibit to the witness.)

A. Yes, sir.

Mr. Haycraft: I offer that in evidence.

Mr. Freeman: No objection.

Trial Examiner Sheppard: It may be received; and also 93.

(The documents referred to heretofore marked for identification COMMISSION'S EXHIBITS NOS. 93, and 94, were received in evidence.)

659 Mr. Haycraft: Mark this the next number.

(The document referred to was marked Commission's Exhibit No. 95 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 95 for identification, which purports to be a carbon copy of a letter from your Mr. C. J. Swan to Mr. Harold Sweatt, dated June 14th, 1939, and purports to be a reply to Mr. Sweatt's letter of May 26, 1939, which has just been received in evidence, and ask you whether or not that carbon copy was taken from your files and you are satisfied that the original letter was sent to Mr. Sweatt?

A. I am, sir.

Mr. Haycraft: I offer that in evidence.

Mr. Freeman: No objection.

Trial Examiner Sheppard: It may be accepted as Commission's Exhibit No. 95.

(The document referred to heretofore marked for identification COMMISSION'S EXHIBIT NO. 95, was received in evidence.)

Mr. Haycraft: Mark this the next number.

(The document referred to was marked Commission's Exhibit No. 96, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 96 for
660 identification, which is an original letter from Mr. Sweatt to Mr. Swan under date of June 30, 1939, and ask if that was received by your firm?

(Handing document to the witness.)

A. Yes, sir.

Mr. Haycraft: I offer that in evidence.

Mr. Freeman: No objection.

Trial Examiner Sheppard: It may be received.

(The document referred to heretofore marked for identification COMMISSION'S EXHIBIT NO. 96, was received in evidence.)

Mr. Haycraft: Mark this the next number.

(The document referred to was marked Commission's Exhibit No. 97, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 97 for identification, which purports to be a carbon copy of a letter from Mr. Swan to Mr. W. L. Huff, of the Minneapolis-Honeywell Regulator Company, under date of June 23, 1939, and ask you whether or not this was taken from your files and you are satisfied that in the ordinary course of business the original was sent to Mr. Huff?

(Handing exhibit to the witness.)

A. I am.

Mr. Haycraft: I offer that in evidence.

661 Mr. Freeman: No objection.

Trial Examiner Sheppard: It may be accepted.

(The document referred to heretofore marked for identification COMMISSION'S EXHIBIT NO. 97, was received in evidence.)

By Mr. Haycraft:

Q. I notice in the upper right-hand corner it says: "Copy to A. K. Folds." Who is Mr. A. K. Folds?

A. Mr. A. K. Folds is our patent counsel, sir. You will find in that file his opinion at various times.

Mr. Freeman: With respect to the Freeman patent?

The Witness: With respect to the Freeman patent.

Mr. Haycraft: Mark this.

(The document referred to was marked Commission's Exhibit No. 98, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 98, which is an original letter from Mr. Huff to Mr. Swan under date of June 26, 1939, and ask you if that was received by your office?

(Handing document to the witness.)

A. Yes, sir.

Mr. Haycraft: I offer that in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: No.

662 Trial Examiner Sheppard: It may be accepted.

(The document referred to heretofore marked for identification COMMISSION'S EXHIBIT NO. 98, was received in evidence.)

By Mr. Haycraft:

Q. Did you ever attend any meetings in Chicago with Mr. Huff or Mr. Sweatt where you discussed this matter, in 1939 or early in 1940?

A. I believe I was present in Chicago—I know I was in Chicago and I believe I was present for a very short time with those gentlemen, but I don't remember specifically discussing the matter of the Freeman patent. That is, myself personally.

Mr. Haycraft: Mark this.

(The document referred to was marked Commission's Exhibit No. 99-A, 99-B and 99-C, for identification.)

By Mr. Haycraft:

Q. Referring to Commission's Exhibit No. 95, which is a carbon copy of a letter from Mr. Swan to Mr. Sweatt, dated June 14, 1939, it is stated, "You are correct, of course, that our New York people will not take out a license with a price maintenance clause therein. On the other hand we don't want to be an outsider or take any action that might 'mess up' the situation. Perhaps,

663 if we could get together, we might work out something that might satisfy everybody."

Who do you refer to as "our New York people"? (Handing exhibit to the witness.)

A. That was our New York patent counsel, Mr. C. J. Heilman, to whom we referred patent matters, in addition to our own counsel in our plant.

Q. And he is the one that advised you not to take out a license with a price maintenance clause, is that it?

A. They both told us that the patent was not valid, and that was the reason that we objected to the license.

Q. When this license was submitted to you, this form in May, 1940, Commission's Exhibit No. 93, in Paragraph 7 on page 5, reference is made to the "Prices, terms and conditions of sale set forth in a schedule to be known as price schedule to be issued from time to time from the licensor and made a part of this agreement."

I will ask you whether or not Commission's Exhibit No. 99-A, B and C for identification constitutes the price schedule attached to the license agreement, Commission's Exhibit No. 93?

(Handing document to the witness.)

A. There is a price schedule—

Q. (Interposing) Perhaps this will refresh your recollection?

664 A. Excuse me. This is a price schedule talking about the heat controls that came under the Freeman patent. Whether it is the exact price schedule referred to in that printed agreement, I don't know. I believe that it is, sir, but I am not absolutely certain.

Q. Did your Mr. Swan tell you that that is what it was at the time that he gave you the paper?

A. I believe that is what it is.

Mr. Haycraft: I offer the document in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: No objection. It is already in the printed record.

Trial Examiner Sheppard: All right, it may be accepted.

(The document referred to heretofore marked for identification COMMISSION'S EXHIBIT 99-A, 99-B and 99-C was received in evidence.)

Mr. Haycraft: I think I will ask that these be marked as one Exhibit, numbered with letters, because it is all fastened together.

(The document referred to was marked Commission's Exhibit No. 100-A, 100-B, 100-C and 100-D for identification.)

By Mr. Haycraft:

Q. Showing you Commission's Exhibit No. 100-A,
665 B, C and D, for identification; 100-A being a carbon copy of a letter from Mr. Swan to Mr. Huff, vice-

president of the Minneapolis-Honeywell Regulator Company, dated May 6, 1940; 100-B being an original letter from Mr. Huff to Mr. Swan under date of May 1, 1940;— that is 100-B and C— and 100-D being an original letter from Mr. Huff, dated May 5, 1940; and ask you if that sheaf of papers was taken from your files?

(Handing exhibit to the witness.)

A. Yes, sir.

Mr. Haycraft: I offer it in evidence.

Mr. Freeman: No objection.

Trial Examiner Sheppard: It may be accepted.

(The document referred to heretofore marked for identification COMMISSION'S EXHIBIT NO. 100-A, 100-B, 100-C and 100-D, was received in evidence.)

Mr. Haycraft: Mark these.

(The document referred to was marked Commission's Exhibit No. 101-A, 101-B and 101-C for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 101-A, B and C, 101-A being an original letter from Mr. Huff to Mr. Swan, addressed to Mr. C. J. Swan of the Detroit Lubricator Company, and Mr. Ira E. McCabe of the Mercoid Corporation, dated May 7, 1940, 101-B, being a form of a letter referred to in 101-A; and 101-C, being a form of
666 a letter referred to in 101-A; and ask you whether or not you received this original letter and the attached forms?

(Handing document to the witness.)

A. Yes, sir; I did.

Mr. Haycraft: I offer it in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: No objection.

Trial Examiner Sheppard: Let Exhibit 101-A, B and C, be accepted.

(The document referred to heretofore marked for identification COMMISSION'S EXHIBIT 101-A, 101-B and 101-C, was received in evidence.)

667 Trial Examiner Sheppard: We will take a short recess.

(A short recess was taken.)

Trial Examiner Sheppard: All right, gentlemen, we will proceed.

All this is correspondence between you and the Respondent Company about that patent, isn't it?

Mr. Freeman: Between his Company and the Respondent.

The Witness: Between the Detroit Lubricator Company and Minneapolis-Honeywell.

Trial Examiner Sheppard: That is right.

Mr. Haycraft: Mark this Commission's Exhibit No. 102-A, B, C and D for identification.

(The document referred to was marked Commission's Exhibit No. 102-A, 102-B, 102-C and 102-D, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit No. 102-A, B, C and D for identification, 102-A being a carbon copy of a letter from Mr. Swan to Mr. Huff, dated May 17, 1940, and 102-B and C, being an original letter from Mr. Huff to Mr. Swan, dated May 15, 1940, and 102-D, being a carbon copy of a letter from Mr. Swan to Mr. Huff, dated May 13, 1940, and ask you whether or not that correspondence came from your files? (Handing exhibit to the witness.)

A. It did, sir.

Mr. Haycraft: I offer it in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: No objection.

Trial Examiner Sheppard: Let the exhibit be accepted, Commission's Exhibit No. 102-A, B, C and D.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 102-A, 102-B and 102-C and 102-D, were received in evidence.)

By Mr. Haycraft:

Q. Mr. Hodges, did Detroit Lubricator Company ever take out a license from the Minneapolis-Honeywell on the Freeman patent?

A. No, sir.

Q. Did you ever agree, at any time, to pay a royalty of 25 cents on each instrument sold by the Detroit Lubricator Company, that is known as your combination fan and limit control, which they claim to be an infringement of their Freeman patent?

A. I never agreed to anything.

Q. Do you know whether Mr. Swan ever did?

A. I don't believe so.

Q. To refresh your recollection on that, I hand you
669 this paper.

(Handing document to the witness.)

A. Yes, sir, I remember that letter.

Q. Does that refresh your recollection?

A. It does not change my previous statement, sir.

Q. Did Mr. Swan ever tell you he had agreed?

A. Not to my knowledge, sir. Of course, any statement Mr. Swan might have made at any time was subject to my final approval.

Q. I understand. That is the reason I asked if he ever told you he had made such an agreement and submitted it to you for your approval?

A. He never told me he made a final agreement that satisfied him, or any agreement at all. His discussions were simply talking about the subject, to see what could be arrived at.

Mr. Haycraft: That is all, Mr. Examiner.

Mr. Freeman: Might we have a recess for about four minutes?

Trial Examiner Sheppard: Yes, take a five minute recess.

Mr. Freeman: Before you leave, Mr. Examiner, I would like to ask Mr. Hodges if he has any objection, or whether Mr. Haycraft has any objection to our seeing the entire file from which these papers were taken, so we can
670 at least have the continuity.

Mr. Haycraft: I have no objection. It is up to the witness.

The Witness: I have no objection whatsoever.

Mr. Freeman: Thank you, sir.

Trial Examiner Sheppard: All right.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record. Then I am going to give you ten minutes. Take your time.

(A short recess was taken.)

Trial Examiner Sheppard: All right. On the record. You gentlemen can proceed whenever you get ready.

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

671 *Cross-Examination by Mr. Freeman.*

Q. Mr. Hodges, you stated on direct examination by Mr. Haycraft on behalf of the Commission that your Company made a complete line of oil burner controls. That is correct, is it not?

A. Yes, sir.

Q. And that your company made and sold—

A. (Interposing.) May I qualify that first statement, "made and sold", Mr. Freeman?

Q. Go ahead.

A. You said that we made a complete line of controls. We either manufacture, or have manufactured for us, so that we sell a complete line of controls.

Q. And in the complete line of controls which you sell, do you include a temperature responsive, or rather, a temperature operated primary control?

A. Yes, sir.

Q. Is that temperature responsive primary control competitive with the master or primary control sold by the Perfex Company?

A. Yes, sir.

Q. And is it competitive to the primary control made and sold by the Respondent here, Minneapolis-Honeywell Regulator Company?

672 A. Yes, sir.

Q. And it is likewise competitive to the primary controls made and sold by the Mercoid Corporation?

A. Yes, sir.

Q. And is it competitive to the primary controls made and sold by the Penn Electric Switch Company?

A. Yes, sir.

Q. How about your room thermostats and limit controls? Do you make a complete line for use in connection with your primaries, and sold, or offered for sale to the oil burner trade generally?

A. Yes, sir.

Q. And are you likewise in the sale of these items, that is the primaries, the thermostats and limit controls, in competition with the Respondent here?

A. Yes, sir.

Q. And likewise are you in competition with respect to these three last controls that I have mentioned with Penn Electric Switch Company?

A. Yes, sir.

Q. And is the same true in connection with the Mercoid Corporation?

A. Yes, sir.

Q. And likewise with respect to Perfex of Milwaukee?

A. Yes, sir.

673 Q. And I believe that you said that your company is a rather old company, well established?

A. Yes, sir.

Q. You are a division or subsidiary of the American Radiator and Standard Sanitary Corporation?

A. That is correct.

Q. How long have you been a division or subsidiary of that corporation?

A. Since 1922.

Q. I don't recall whether Mr. Haycraft asked you, but how long have you been with the Detroit Lubricator Company?

A. I started with the Detroit Lubricator Company in 1919.

Q. So you are rather well versed in the products made and sold or which your company has made for it and sells generally?

A. I believe so.

Q. I take it that you are rather generally familiar with respect to domestic oil heating?

A. I think so. I am no engineer, however.

Q. No, but you know generally what your sales problems are and what your competition is?

A. Yes, sir.

Q. In the years, I take it, that you have considered Minneapolis-Honeywell one of your competitors?

674 A. It is.

Q. And since Penn Electric Switch came along in business in 1929 and 1930, and made oil burner controls, you considered the Penn Company as competition?

A. Yes, sir.

Trial Examiner Sheppard: Where are they located?

Mr. Freeman: The Penn Electric Switch Company of Goshen, Indiana.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. And I take it back in 1931 and '32 you considered the Mercoid Corporation competition?

A. Yes, sir.

Q. And when Perfex came on the market with limit controls, primary controls and thermostats in 1935, 1936 and 1937, you likewise considered that company as competition?

A. Yes, sir.

Q. And I take it that you consider the same companies, to-wit, Penn Electric Switch Company, Perfex, Mercoid and the Respondent here, as competition today?

A. Yes, sir.

Q. And I take it that your salesmen call generally upon the oil burner trade throughout the United States?

A. They do.

Q. Do you maintain any branch offices or distribut-
675 ing points throughout the country?

A. Yes, sir. We have branch offices in New York, Chicago, and we have a connection in Canada. On the west coast we have a large distributor or a large representative outfit who has handled our product; and have offices; and those are the four places I believe where we have offices.

Q. Mr. Haycraft asked you particularly with respect to the type of controls made by your Company, made or which you may have made for you, and which you sold and offered for sale to the oil burner trade generally. Do you have a catalogue which might illustrate the various controls which your company makes or has made for it and sold under the name of Detroit Lubricator Company to the oil burner trade generally?

A. Yes, sir; we have such a catalogue. This is it; and they are all sold under the name of "Genuine Detroit".

Q. Upon any products which are made for you, who guarantees the products when sold?

A. We do.

Q. And whose name appears on them?

A. Ours.

Q. And the name of "Genuine Detroit" appears upon such products?

A. Yes, sir.

Q. By the way, "Genuine Detroit" I note is quoted
676 in the catalogue. Is that a sort of an identifying characteristic employed by your firm?

A. That is, sir.

Q. That is, a sort of a trade mark or trade name?

A. That appears on all of our name plates and with our advertising, that insignia, if you want to call it that.

Q. In other words, that is the identifying characteristic of any product manufactured by the Detroit Lubricator Company?

A. That is its purpose; yes, sir.

Mr. Freeman: We ask that the catalogue just referred to by the Witness Hodges be marked for identification Respondent's Exhibit No. 3.

Trial Examiner Sheppard: It may be so marked.

(The document referred to was marked Respondent's Exhibit No. 3, for identification.)

By Mr. Freeman:

Q. May I ask whether or not the catalogue is one of general circulation, one carried by your salesmen and one delivered by your salesmen to customers and prospective customers?

A. That is right.

Trial Examiner Sheppard: What year is it; can you tell us that, Mr. Hodges?

The Witness: I don't know that I can tell you that. 677 This is gotten out in loose leaf form, and it is the most recent catalogue.

Trial Examiner Sheppard: That is enough.

The Witness: But from time to time it is added to as new things may be developed; so its origin may be several years ago, but it is constantly kept up to date.

By Mr. Freeman:

Q. I notice that particular catalogue which has been marked for identification Respondent's Exhibit No. 3 does not illustrate any limit controls or thermostats. Do you actually make and sell and advertise limit controls and thermostats for use in connection with domestic oil burners?

A. We do.

Q. I now hand you another large catalogue and ask you to turn to the loose leaf bulletins therein, and refer by bulletin number to the thermostats and limit controls which your company makes and offers for sale to the oil burner trade generally.

(Handing document to the witness.)

A. Well, we have here our bulletin number—do you want me to read the bulletin numbers?

Q. Yes, give the bulletin numbers, please.

A. Bulletin Number 193, covering "Genuine Detroit No.

411 Series Thermostat With or Without Heat Compensation."

678 In that same bulletin is the 456 Time Switch, which is a box.

That is also covered by Bulletin No. 98, the Time Switch.

Also No. 411-TD, which is the Night Turn Down. And also in here is the C. A.-411, which is the high voltage Heat Compensated Room Thermostat.

Q. Your company then makes and sells thermostats of both the low voltage type as well as the high voltage type?

A. That is right, sir.

679 Q. Will you go on and refer to the pages or bulletins that illustrate your limit controls for use in connection with domestic oil heating?

A. In each one of these cases, Mr. Freeman, I can't give you the bulletin numbers, but they are all in the book here. Some of these are not numbered, because some are instructions for installing and adjusting.

Q. Might you give us your type number, then?

A. Yes, sir. There is a 655 immersion limit, CA-655, the purpose of which is to limit the boiler water temperature.

Q. That is to be used with a hot water heating system?

A. Oil fired hot water heating system.

Q. Oil fired hot water heating system?

A. Yes.

Q. Proceed.

A. The No. CA-655-R, which is a reverse acting control, the same as the 655, but you turn the switch around so it operates in the other direction. In other words, it will operate and shut off on a decreasing temperature, rather than acting as a high limit.

Q. In other words, it is a low limit control, as distinguished from a high limit control?

A. Yes. Here is 653 emergent control, which is an instrument that fits into the picture from the standpoint
680 of domestic summer and winter hot water hook up on oil-fired equipment.

Here is a No. 251 clamp on control.

Q. By "clamp on", is that sometimes referred to as a surface contact switch?

A. That is, you clamp it on to whatever heating surface you want to control. It is not immersion. It is the CA-805 and 806 warm air limit controls. They are made for either line or low voltage. They are immersion switches, bi-metal operated, also as differential adjustment. Those are used

as a safety device, as I understand it, in preventing the developing of a dangerous temperature in the plenum chambers of automatic oil fired heating equipment.

Q. In other words, it is put in the bonnet, or above?

A. That is right.

Q. In the outside shell of the furnace?

A. Above the combustion chamber.

Q. Above the combustion chamber?

A. There is another one which performs the same function, but has another number, the CAA-807. We have also the CA-810 and 811 blower controls, which are bi-metal operated. The purpose of those is to control the operation of the blower on your mechanical draft oil fired heating unit.

Here is another control, No. 269 stack fan switch. That is in there to regulate the operation of an air circulating fan.

681 Q. Of a furnace?

A. Yes, sir. Then we have the CA-815 combination blower and limit controls, and that is an instrument where in one instance it acts as a high temperature limit switch, and the other operating switch in the same housing and operating from the same power element, controls the fan.

Q. Is that the one Minneapolis-Honeywell charged you with infringement of its Freeman Patent No. 1813732?

A. That is the control that was developed, put on the market and developed in 1940. Prior to that we made another one, but that was obsolete, because as I mentioned in earlier testimony, it was too expensive to build, and this is the one we developed, came out and sold, and when we brought it out, our price came down over what the previous ones had been sold for.

Q. What was the lowest price you ever sold one of these controls at, that is, the combination fan and limit control?

A. $5.25.

Q. What brought about this price of $5.25?

A. Competition.

Q. All companies?

A. Of general competition.

Q. Was Minneapolis-Honeywell a part of that competition?

A. I should think so, yes.

Q. Penn Electric Switch?

682 A. Yes.

Q. Perfex?

A. Yes, sir.
Q. Mercoid?
A. Yes, sir.
Q. Do you know what Mercoid's price was on its combination fan and limit control, that is, an instrument doing a comparable job?
A. I believe—
Trial Examiner Sheppard: (Interposing.) The question is in reference to the Penn control?
Mr. Freeman: Yes, the combination.
Trial Examiner Sheppard: All right.
The Witness: I believe that they sold the fan and limit switches at $4.75.

By Mr. Freeman:

Q. How come that you came down in price, as you have just testified, in order to meet competition, and you stopped at $5.25 and did not go down to meet Mercoid's competition of $4.75?
A. For two reasons. Mercoid never hurt us, and the second reason was, being in probably the highest labor market in the country, our margin at $5.25 was a very small margin.
Q. So that you could not have sold at $4.75, unless you wanted to sell the product at a loss?
683 A. That is right.
Q. And your price prior to coming down to $5.25, I understand, was around $6.00, and some cents?
A. The lowest one I can find a record of was $6.20.
Q. When Minneapolis-Honeywell first began negotiating with your company for the purpose of taking out a license, your price was higher than the $5.25 price, is that correct?
A. That is right.
Q. While we are on this Freeman patent, I was correct in my understanding that your Company refused to take a license because of the opinions of the patent counsel, that the Freeman patent was invalid?
A. That is right.
Q. You knew, did you not, that there was certain litigation pending against Mercoid, involving the issue of the validity of the Freeman patent?
A. We did.
Q. By the way, did your Company follow that litigation, that is, keep itself informed as to what was taking place in the Courts in Chicago?

Mr. Haycraft: That is objected to as irrelevant and immaterial. I have refrained from objecting, Mr. Examiner, but it seems to me we have gone pretty far afield. We better get back to the issues in the case.

Mr. Freeman: I think what his opinion was, what
684 they were doing, is important, if they were charged with infringement.

Mr. Haycraft: What has that to do with this case, whether this witness followed it or not?

Trial Examiner Sheppard: I do not know, Mr. Haycraft. I don't know myself. I am trying to follow, but I think I will let this examination proceed. It may serve some purpose to you gentlemen, or to the Commission, or somebody.

Mr. Haycraft: I understood counsel for the Respondent was very anxious about the size of the record. The Commission is too, and we would like to keep the record down within some reasonable scope, so I am objecting on that ground as well.

Trial Examiner Sheppard: We want to keep the record as low as we can, but if you want to pursue this line, I think I will let you.

By Mr. Freeman:

Q. Will you answer?

A. Will you repeat it, please?

Mr. Freeman: Will you read the question?

(The question above referred to was read by the Reporter.)

The Witness: Yes.

685 By Mr. Freeman:

Q. Did you ever have occasion to see or read the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Marcoid *vs.* Minneapolis-Honeywell, involving the Freeman Patent, No. 1813732?

Mr. Haycraft: That is objected to.

The Witness: I have read it.

Mr. Haycraft: (Continuing.) On the same ground. I wish to have a general objection.

Trial Examiner Sheppard: Yes, a general objection.

Mr. Haycraft: (Continuing.) To all this form of examination.

The Witness: I have read it.

By Mr. Freeman:

Q. Did the decision of the United States Circuit Court of Appeals coincide with the decision, or with the opinion of the invalidity rendered to your Company by its patent counsel?

Mr. Haycraft: That certainly is going very far afield, particularly in view of the fact that that decision is now on appeal to the United States Supreme Court, and it may possibly be that the Supreme Court will agree with the opinion of counsel for this witness.

Mr. Freeman: Will the Commission agree with the
686 opinion of the Supreme Court?

Mr. Haycraft: It does not seem to me we are going to get anywhere. What difference does it make whether this witness believes the opinion of the Circuit Court agreed with his counsel on it?

This case is not settled by a long ways.

Mr. Freeman: I can agree with that last statement, but Mr. Haycraft is the one who is bringing out the matters with respect to the Freeman patent, and if the Commission is going to check as to the Respondent's activities in connection with the Freeman patent, I think the way to get the information to the Commission is to give it all the information.

Trial Examiner Sheppard: I think so.

Mr. Freeman: And that is all I want to do.

Mr. Haycraft: This is not information, Mr. Examiner. This is merely an opinion upon an opinion.

Mr. Freeman: I am asking him whether or not his opinion, or their counsel's opinion of validity, which was the reason this witness expressed for his company not taking a license, including the price control,—and I am now asking him whether or not the decision of the Circuit Court of Appeals coincided with his counsel's opinion.

Mr. Haycraft: Isn't that an opinion upon an opinion? What difference does it make?

687 Mr. Freeman: I am asking for facts.

Mr. Haycraft: It is not a fact. It is an opinion.

Trial Examiner Sheppard: We will clear it up by letting the witness answer, and I will give it whatever value I think it is worth.

It just occurred to me, Mr. Freeman, while this gentleman was talking with Mr. Haycraft, that whatever the opinion of his attorney may have been, it may have preceded the decision of the Court in this case.

Mr. Freeman: That is correct.

Trial Examiner Sheppard: Yes.

Mr. Freeman: It did precede it, frankly. I do not think his attorneys would have rendered the same kind of opinion had they had the weight and authority of the opinion of the United States Court of Appeals.

Trial Examiner Sheppard: In view of that fact, and in view of the fact further that the Supreme Court may or may not, as the case may be, allow the matter to stay in status quo in reference to the decision of the Court of Appeals, or they may change it, but the opinion of this gentleman does not amount to anything.

Mr. Freeman: This gentleman has testified the reason his company refused to take a license under the Minneapolis-Honeywell Freeman patent was because their attorneys thought the patent was invalid.

688 Trial Examiner Sheppard: That is right.

Mr. Freeman: And obviously, if it was invalid, then you cannot hang a price control upon an invalid patent. On the other hand, if the patent was valid, a different picture might be brought about.

Trial Examiner Sheppard: That is true.

Mr. Freeman: And I just want to bring out clearly what this man's opinion was, whether or not it coincided with that which was later determined by the Seventh Circuit Court of Appeals. It is just one more question.

The Witness: It did not coincide.

Trial Examiner Sheppard: It did not?

The Witness: No.

Trial Examiner Sheppard: All right.

689 By Mr. Freeman:

Q. You speak about primary controls or safety devices for oil burners of a pot type, on direct examination by Mr. Haycraft. Your company makes quite a line of such controls, does it not?

A. We do.

Q. How long have you been making primaries for use in connection with the pot type burners?

A. Ten or twelve years.

Q. Is your Company a substantial factor in that field?

A. Yes, sir.

Q. And you sell that type of control, or at least a primary that is not temperature responsive, for use in connection with rotary burners, and if so, to what company?

A. We sell for use on a rotary burner, to the Timken Company.

Q. The control that you sell to Timken for use on its rotary burner is to prevent operation of the burner when an abnormal condition arises, is that correct?

A. That is right. It is a safety control.

Q. And prevents the abnormal flow of oil when something goes wrong?

A. Yes.

Q. And it is automatic in that respect?

A. Yes, sir.

690 Q. And likewise, the primary controls of the temperature responsive type made, sold and offered for sale by your company,—when I say made, made for you,—likewise operates to prevent an abnormal flow of oil when something abnormal happens to the burner system?

A. That is right, sir.

Q. In both cases they are safety devices?

A. Yes.

Q. And in both cases, I take it, limit controls are used upon the installations?

A. That is correct.

Q. Now, tell us whether or not the devices wherein you control the level of the oil that is for use in connection with the pot type burner, are actually in competition with the other type of primary controls?

Mr. Haycraft: That is objected to, Mr. Examiner, as irrelevant and immaterial, in view of the stipulation which we entered into, Commission's Exhibit No. 1, which restricts this proceeding to the other type of controls, controls that refer,—or control, the pressure and rotary type, and exclude the so-called pot type.

Mr. Gilpatric: Your Honor, the stipulation does not restrict the proceeding. It restricts except where otherwise indicated.

Mr. Haycraft: That was the reason we put that
691 language in there, and I have been very careful in my examination of witnesses and restricted it to that type of controls, controls used on the pressure type and the gun type, and excluding the pot type.

692 Mr. Freeman: You will recall, Mr. Haycraft, that there is a certain portion of that stipulation which you objected to as immaterial. We did not agree with your objection, and we certainly have a right to bring it out with this witness.

Trial Examiner Sheppard: If you want, I will let you go into that.

Mr. Haycraft: I am certainly entitled to object.

The Witness: I wonder if I could have that question repeated.

Trial Examiner Sheppard: Yes.

Mr. Freeman: Let me reframe it.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. The oil burners employing the oil level control device or primary which your company makes and offers for sale are in competition with the other types of burners; that is, oil burners equipped with different types of controls are competing with each other.

A. Vey definitely.

Q. Have you any idea from your personal contact with this line of business about how many of such pot type burner controls, that is, the primary controls for pot type burners, are sold annually in the United States?

Mr. Haycraft: I object to that, Mr. Examiner, for 693 the reason stated, that we are going into a subject matter that is beyond the testimony that I expect to take and am taking in this case.

Trial Examiner Sheppard: I understand. You may go into that if you care to.

Mr. Freeman: It is not very much longer.

Trial Examiner Sheppard: All right.

The Witness: That is, for automatic oil fired jobs?

By Mr. Freeman:

Q. That is right.

A. Well—

Q. (Interposing.) For domestic house heating.

A. I should say 200 to 250 thousand.

Q. And while you are at it, do you know about how many of the oil burners of the rotary or gun type are sold annually?

Trial Examiner Sheppard: That is, by all the companies?

Mr. Freeman: Yes.

Trial Examiner Sheppard: That would be an etsimate, Mr. Hodges. You may do the best you can and I will take it as an estimate, unless you have some definite figures on it.

The Witness: I have no definite figures. I know
694 it would be more than the figure I gave for this other type of equipment, but how much more I don't know.

Trial Examiner Sheppard: All right. Didn't we have some definite figures on that the other day? I may have something else in mind.

Mr. Gilpatric: I don't think we had them, no.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Now, your catalogue lists both temperature responsive type of primary controls and the float valve type of primary control—

Mr. Haycraft: (Interposing.) The same objection.

By Mr. Freeman:

Q. (Continuing.) —and I now ask you whether or not both devices serve the same purpose, to comply with the underwriter's requirements to prevent an abnormal or hazardous discharge of unburned oil?

A. That is correct; they do.

Q. They both meet the underwriter's requirements?

A. Yes.

Q. And they both serve the purpose of preventing a hazardous condition occurring in a domestic oil heating plant?

A. That is correct.

Mr. Haycraft: Mr. Examiner, I think perhaps I at this point should point out the reason for my objection
695 on that. If you would rather hear me off the record, that is all right with me.

Trial Examiner Sheppard: I think it is a very good idea to have it on the record.

Mr. Haycraft: The evidence, so far as we have been able to obtain it as to the contracts that are involved in this case, or agreements, as some people call them, containing either the restrictive agreements, or the brackets under the Robinson-Patman Act, are all on the gun type or rotary type burners; that is, for devices used in connection with that type of burner. So that is the reason I haven't gone into the market or into the other phase of the industry; so that if we get into that now, you can see that it is going to be a matter which has no bearing upon the issues in this case.

If these agreements were entered into in connection with

the sale of temperature controls for this pot type burner, to the manufacturers using those, then that would be a matter that would be relevant and material; but inasmuch as it not, it is just fanning windmills, or putting up a straw man and knocking him down.

Mr. Gilpatric: I want to answer that point, as long as it has been raised at this time, by saying that the complaint charges the Minneapolis-Honeywell Regulator Company restricted competition, and we want to show the entire
696 competitive picture in the domestic oil heating field; whether or not the Respondent has used contract which Mr. Haycraft calls restrictive, or which have restrictive provisions as to certain types. That is the reason we are going into this at this time.

Trial Examiner Sheppard: Does the complaint limit the question to the point you contend for, Mr. Haycraft?

Mr. Haycraft: The complaint definitely limits it.

Mr. Gilpatric: No, it does not.

Mr. Freeman: One of the questions is whether we do restrict competition, or lessen competition, or do away with competition, in the language of the Act. This complaint in Paragraph 7 talks about us having prevented competition in the sale of automatic temperature controls for us in domestic heating plants. It does not say anything about the pot type, the rotary type, or the vaporizing type; but it covers all domestic heating plants.

Mr. Haycraft: The allegations in the complaint which I referred to, Mr. Freeman, are on pages 3 and 4.

Mr. Freeman: Take them in their entirety. Mr. Gilpatric just talked about one paragraph from the complaint; and you don't take that into consideration apparently.

Mr. Gilpatric: It is not a question of selecting
697 certain portions of the complaint.

Mr. Haycraft: I submit that Paragraph 7 cannot be any broader than Paragraphs 2 and 3, and cannot be interpreted any broader, where the Commission has deliberately and specifically in its complaint confined its allegations to a certain phase of an industry; and so it seems to me that it is only fair to assume that the Order will go to that same thing.

Mr. Gilpatric: We cannot rely on Mr. Haycraft's interpretation of the Commission's complaint and order. How can we?

Trial Examiner Sheppard: I think this, gentlemen, if Mr. Haycraft will definitely say on this record that he just

intends to ask the Commission for action upon those two points, it would relieve you there of going into any things beyond those two.

Mr. Haycraft: I am not going beyond Paragraphs 2 and 3.

Mr. Gilpatric: Can you bind the Commission on that?

Trial Examiner Sheppard: I think he can.

Mr. Gilpatric: This is the Commission's complaint, not his.

Mr. Freeman: He is only attorney for the Commission. If we can get a statement from the Commission
698 to that effect, that will be o. k.

Mr. Haycraft: All I can do is to bind myself and the chief counsel as to what we will urge upon the Commission. I have no way of binding the Commission myself.

Trial Examiner Sheppard: I understand that.

Mr. Haycraft: All I can say to counsel is this; this complaint is very specific in Paragraphs 2 and 3, and the other allegations in the Paragraphs with respect to the practices, and that paragraph 7 which he refers to, is necessarily narrowed to the allegations in Paragraphs 2 and 3.

Mr. Gilpatric: We sa that the competition in this business is not so narrowed; and for that reason we wanted to take in the entire field. To make the interpretation that Mr. Haycraft wants to make, is to make Minneapolis-Honeywell more of a dominating factor than it is if you use the whole picture. If we want to get at the real status of the Minneapolis-Honeywell Company, we have to look at the whole field.

Trial Examiner Sheppard: I am inclined to think, gentlemen, Mr. Haycraft is right about that, but inasmuch as there is a difference of opinion, I will let him answer the quesfion.

Mr. Gilpatric: I think in justice to our client we have to put our case in according to our lights.

699 Trial Examiner Sheppard: I will certainly let you go on as you desire.

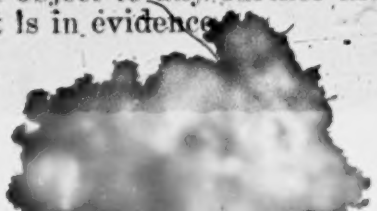
Mr. Gilpatric: Unless the Commission wants to amend the complaint as to the meaning it gives to Paragraph 7.

Trial Examiner Sheppard: Proceed, gentlemen.

By Mr. Freeman:

Q. I notice in your catalogue, Respondent's Exhibit No. 3 for identification that you illustrate—

Mr. Haycraft: I object to any further interrogation on that exhibit until it is in evidence.



Trial Examiner Sheppard: Until it is what?

Mr. Haycraft: Until it is in evidence.

Mr. Freeman: We offer it in evidence, then.

Trial Examiner Sheppard: I meant to call your attention to that a while ago. That is Respondent's Exhibit No. 3, is it?

Mr. Freeman: Yes.

Trial Examiner Sheppard: Mr. Haycraft, do you have any objection to that?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let it be accepted as Respondent's Exhibit No. 3.

(The document referred to heretofore marked for identification RESPONDENT'S EXHIBIT NO. 3 was received in evidence.)

700 Mr. Haycraft: I think probably I should object—

Mr. Freeman: Make the standard objection.

Mr. Haycraft: I do object to that portion of the exhibit which refers to the type of devices to be used on pot type burners, in order to be consistent with my position in that matter. I haven't seen the catalogue, but I assume from the question now being propounded that is what he is going to ask about.

Trial Examiner Sheppard: Do you want to look at it?

Mr. Haycraft: No, that is all right. I offer no objection to that portion of the exhibit which refers to the type of controls which can be used on gun type or rotary type, excluding the pot type. I do object to that portion which does refer to the other type of burners, which we consider not involved in this case.

Trial Examiner Sheppard: The record may show your objection.

Mr. Freeman: Your objection is going to go to all cross examination I am making with respect to that?

Mr. Haycraft: Yes, sir.

Mr. Freeman: Without necessarily being repeated each time.

Trial Examiner Sheppard: That is right.

701 By Mr. Freeman:

Q. Now, Mr. Hodges, I notice in your catalogue a device marked Type CRC-239, and that can be used as a control to make a manual safety control device into an automatic control, is that correct?

A. That is correct.

Q. And then you have an automatic burner operation, that is, an automatic safety device, which will operate automatically, without any human manipulation for bringing about a safe condition, should a hazardous condition arise?

A. That is correct.

Q. And that is designed, is it not, to convert it into an automatic oil burner control for domestic house heating?

A. That is correct.

Q. And there is a thermostat, I believe, also shown on that sheet?

A. Yes, sir.

Q. And that is for use with the primary there shown?

A. That is right.

Q. I note in your catalogue that the float valve type of primary safety control may be used up to 2½ gallons of fuel oil. That is correct, is it not, 2½ gallons of fuel oil an hour?

A. That is correct.

Q. About how large a residence will two and one-
702 half gallons of fuel oil an hour heat?

A. I should say about an eight room residence, depending on the size of the rooms, the cubical contents; but it would heat an average eight room house.

Q. And do a good job?

A. Yes, sir.

Mr. Haycraft: I object to that question and move to strike it, Mr. Examiner, as the witness has said that he was not an engineer. I think it does call for a scientific answer, and I move to strike it.

Trial Examiner Sheppard: You are asking him about his own knowledge?

Mr. Freeman: Yes.

By Mr. Freeman:

Q. I am asking, from your own knowledge in the use of these controls, as sold by your company, by your more than ten years' experience, whether or not you know the 2½ gallon capacity type, that is, burning 2½ gallons an hour, will heat an ordinary home of four, five or six rooms and do a good job?

A. Yes, sir.

Mr. Haycraft: The same objection for the reason that I previously stated, and no foundation for it.

Trial Examiner Sheppard: Note the objection and let the witness answer.

703 By Mr. Freeman:

Q. You know that from your personal knowledge?

A. Yes, sir.

Q. And I take it you have seen the devices in actual operation?

A. Yes.

Q. And you have been in homes heated by these devices?

A. Yes, sir.

Q. Many times?

A. Yes, sir.

Q. I don't know whether I asked you this question, so it may be repetition, but oil burners using the float valve type primary are in direct competition, are they not, with the other type of oil burners using primaries?

A. They are.

Q. And has that been true for the last several years?

A. Yes, sir.

Q. It has been true since 1935 and 1936?

A. Yes, sir.

Q. And true up to 1941?

A. Yes, sir.

Q. Your company is not now engaged in selling oil burner controls in any substantial volume, is it?

A. No, sir.

Q. And is that because of war restrictions?

704 A. War restrictions.

Q. And I take it that your company is likewise now engaged in the manufacture of items for the prosecution of the war effort?

A. We are.

Q. And that has been true since about 1942?

A. Since about the end of 1941.

Q. And when that started in 1941 the oil burner control end of your business immediately dwindled down?

A. That is correct.

Q. So all of your oil burner business now, whatever it may be, is for service or for other than civilian use?

A. That is correct.

Q. The thermostats and limit controls which you referred to a few minutes ago, are for use in connection with domestic oil heating?

A. That is correct.

Q. And do you sell or offer for sale the "Genuine Detroit" thermostats, limit controls and primaries of the temperature operated type for use in connection with either gun type burners or rotary type burners in complete sets?

A. We do, yes.

Q. Is there any reason for offering them in sets as distinguished from talking about these controls individually?

A. Yes, I think there is, particularly in connection
705 with the thermostat and the primary. As far as the three controls are concerned, there is a talking point, and that is, one responsibility. When you get down to the primary and the thermostat, it is my opinion that they go together, they are more or less designed together, they are tested together, and because the primary is the watch dog in the house to provide against an explosion or fire, and the operation of the thermostat can make or break the operation of the primary, I think that there is a very definite reason why those two controls should go together.

Q. And in connection with the service responsibility you mean the control makers' responsibility when the instruments get out in your home and my home and in the homes of the general public; is that correct?

A. That is right.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Haycraft: I think the record should contain at this point my objection to the line of testimony just gone into with respect to the service and the workability of these various primary controls and thermostats. That is beyond the direct examination, and it goes to an issue about which
I haven't taken testimony, and have not examined this
706 witness on certainty; and it is improper cross examination and I move to strike it.

Trial Examiner Sheppard: Do you gentlemen insist upon going along that line?

Mr. Gilpatric: We are through with that. We certainly by our silence do not acquiesce in Mr. Haycraft's interpretation of what we have done.

Trial Examiner Sheppard: You mean you consider it important and a necessary part of your case?

Mr. Freeman: Yes.

Mr. Gilpatric: The issue raised by the complaint, and

our answer, together with the stipulation, contains certain facts bearing upon that.

Mr. Haycraft: I haven't made any mention of the stipulation in my remarks to the Examiner. I am putting my objection solely on the question of improper cross-examination. I did not enter into it at all on direct, and it is not proper cross-examination. Certainly it is an issue in this case, but there are a lot of issues in this case that I haven't examined this witness upon. For instance, the Robinson-Patman Act feature of this case. If you want to go into that, it would not be proper cross-examination. I move to strike the last two questions and answers with respect to the serviceability of primary controls and thermostats on the ground that it is not proper cross-
707 examination, and going into an issue not gone into on direct examination.

Mr. Gilpatric: Mr. Examiner, may I say in answer to that in the direct examination the products which this witness' company sold were gone into.

Furthermore, we are trying to achieve the very salutary objective we spoke of yesterday, to avoid calling back the president of this company, or coming back to Detroit for a further hearing. I think this is a tempest in a teapot, and I ask that the record stand as it is and given whatever weight it deserves.

Trial Examiner Sheppard: Yes.

Mr. Haycraft: The difficulty with that situation today and yesterday is that the Respondent is trying to put in their case before I have put in mine. That is exactly the situation here. I haven't put in any evidence on that issue. If that is going to be followed all the way around, we might as well tear up the stipulation.

Mr. Freeman: I just want to say in answer to that that my experience as to what constitutes proper cross-examination apparently differs from what Mr. Haycraft believes. When he asked this man with respect to those products on direct examination, and this man talked about primaries, thermostats and limit controls, we have a right to go into them. Mr. Haycraft asked whether or not they were used in connection with oil burners for domestic
708 heating, of the domestic heating type, and the witness said, "Yes." I think we are entitled to find out, therefore, how they work. I think it is proper cross-examination. Whether it happens that it may prove a point that Mr. Haycraft does not want us to make, or we may want to

make, or whether it disproves something which he wants to urge, is immaterial. We are entitled to know how they work. We can't throw a bunch of controls into the evidence and let Mr. Haycraft select what he wants.

Mr. Haycraft: We have stipulated on that point, and if this testimony is going in beyond the stipulation—

Mr. Freeman: We are about through on that score, anyway.

Mr. Haycraft: Let me say that you have some testimony in here which I think is improper, and I am moving to strike it.

Mr. Freeman: Do you mean improper or you don't like it?

Trial Examiner Sheppard: Well; gentlemen, I am going to let the record stay as it is. The Respondent believes it is an important part of their case. However, I do think that the examination of this gentleman with reference to the pot type, although you gentlemen seem to think it is a part of your case, it was not entered into on the direct examination.

709 Mr. Freeman: Oh, yes, it was. He asked with respect to what the Company made, and this witness testified to that. If Mr. Haycraft wanted to bring out the point that the answer was not responsive, he could have made that objection. You must remember that the objection that the answer is not responsive lies only in the mouth of examining counsel.

Mr. Haycraft said nothing, so when it goes in, it is a part of his case, whether he likes it or not, and we are entitled to cross-examine with reference to it.

Trial Examiner Sheppard: I don't remember anything about the pot type.

Mr. Haycraft: I did not say anything about that. He did go into his line of business, and said a lot of things about refrigeration, but I did not go into that.

Trial Examiner Sheppard: You did not follow it up.

Mr. Haycraft: I did not follow it up. I only directed my direct examination with reference to the things that I was talking about on direct. I can't prevent the witness from telling the nature of his business. It is only when I direct my direct examination to certain items, that I should be bound.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

710 Trial Examiner Sheppard: On the record.

By Mr. Freeman:

Q. Mr. Hodges, I understand that you produced this morning a file of correspondence, in response to a subpoena duces tecum issued to you by the Commission, and I have been given the liberty of looking through that file, with your consent, and I now ask you whether or not the letter of May 5th, 1939, that is, the carbon copy signed by Detroit Lubricator, its patent counsel, to Minneapolis-Honeywell Regulator Company, was mailed to the Minneapolis-Honeywell Regulator Company in the ordinary course of your Company's business?

A. I believe it was, sir.

Q. And the carbon copy that I have just handed you, which we will mark for identification Respondent's Exhibit No. 4-A and B, bears a notation thereon that a copy thereof was delivered to you?

A. I believe not, sir.

Q. I am sorry. That notation indicates that a copy was made or given to Mr. Swan?

A. That is right.

Q. You produced these from the files of your company?

A. That is correct.

Q. Kept in the ordinary course of the business of your company?

711 A. Yes.

Trial Examiner Sheppard: Do you want to offer that now?

Mr. Freeman: We offer in evidence, as Respondent's Exhibit No. 4-A and 4-B, the letter dated May 5, 1939, from Detroit Lubricator Company, its patent counsel, to Minneapolis-Honeywell Regulator Company, attention George H. Fisher, attorney, its patent counsel.

Trial Examiner Sheppard: All right. Any objection?

Mr. Haycraft: No objection, as long as the witness has no objection.

The Witness: I have no objection.

Trial Examiner Sheppard: Let it be accepted as Respondent's Exhibit No. 4-A and B.

(The document referred to was marked RESPONDENT'S EXHIBIT NO. 4-A and 4-B and received in evidence.)

By Mr. Freeman:

Q. I now hand you another letter dated May 15th, 1939, taken from the files which you have made available this

morning, from Detroit Lubricator Company, by its patent counsel, to C. G. Heylmun, patent counsel, American Radiator and Standard Sanitary Corporation, together with an attached copy of a letter from Minneapolis-Honey-
712 well Regulator Company, by its patent attorney, George H. Fisher, to Detroit Lubricator Company, dated May 11th, 1939; is that correct?

(Handing document to the witness.)

A. Yes, sir.

Mr. Freeman: We offer in evidence as Respondent's Exhibits 5-A and 5-B respectively, the letter dated May 15th, 1939 to C. G. Heylmun, and the letter of May 11th, 1939, to the Detroit Lubricator Company, by Minneapolis-Honeywell Company.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record. It may be admitted.

(The documents referred to marked RESPONDENT'S EXHIBITS 5-A and 5-B were received in evidence.)

By Mr. Freeman:

Q. Mr. Hodges, in your testimony this morning on direct examination, you stated it was the opinion of your patent counsel that the Freeman Patent was invalid, and you referred to some exchange of correspondence between your attorneys and Minneapolis-Honeywell Regulator
713 Company's attorney, and I now ask you whether or not the correspondence, Respondent's Exhibit 4-A and B and 5-A and B, refresh your recollection with respect to the statement that you made as to the invalidity of the Freeman patent.

A. Yes, sir.

Q. You mentioned a price of $6.20, at which you sold the combination fan and limit control, and I now call your attention to a notation made on a letter, and will ask you to state if that refreshes your recollection as to the price at which you sold combination fan and limit controls?

A. This refreshes my recollection. In checking through the work sheets, and inter-company work sheets at the plant, that is confirmed.

Q. So that you know definitely in 1938 or early 1939, you had a price of $6.20?

A. That is correct.

Trial Examiner Sheppard: Does that make any change in our record?

Mr. Freeman: No.

Trial Examiner Sheppard: I did not think so. That was his original testimony, isn't that right?

Mr. Haycraft: Yes.

By Mr. Freeman:

Q. I now call your attention to Commission's Exhibit No. 97 and I read from the letter:

714 "Our attorneys, both those here and Mr. Heylmun in New York, tell us that they are convinced that the Freeman patent will not stand up in Court."

Do you recall having received such information as to the invalidity of the Freeman patent from your local attorneys, as well as your New York counsel?

A. Yes, sir.

Q. Was that the reason that your company refused to enter into a license agreement with Minneapolis-Honeywell, that is, one of its license agreements in accordance with—

Trial Examiner Sheppard: (Interposing) 93.

By Mr. Freeman:

Q. (Continuing) Exhibit No. 93?

A. Yes, sir.

Mr. Freeman: That is all.

Trial Examiner Sheppard: Anything else?

Mr. Haycraft: Yes.

Redirect Examination by Mr. Haycraft.

Q. You testified in respect to these other items, other types of burners, for which you made temperature controls. Can you estimate as to the percentage of the sales of temperature controls that were used on pot type burners, as distinguished from the rotary and gun type?

A. That is a question. Can I estimate?

715 Q. Yes.

Trial Examiner Sheppard: In other words, was it a small percentage or large percentage or what? Was it something substantial? I mean, in comparison?

The Witness: Well, it was a substantial part of those sales.

By Mr. Haycraft:

Q. Was it a third or a fourth?

A. I should say it was better than a third.

Q. Better than a third?

A. Yes, sir.

Q. Would that be true all during the year 1937, '38 and '39, 1940 and '41?

A. Yes, sir.

Q. What did—or did it vary during that time?

A. If anything, it was increasing.

Q. As time went on?

A. Yes.

Q. Not so much in the earlier years?

A. No.

Q. What percentage of your total business, I mean, what is the temperature control? Is it a large or substantial portion of the business, or is it a minor part of your business?

A. You are talking in a normal year, sir?

716 Q. Yes, 1937 to 1941.

A. I should say it was between 25 and 30 per cent of our total business.

Q. What percentage, then, would you say, of the time of your salesmen that are calling on the trade, would be put in on calling on oil burner manufacturers or jobbers of oil burners?

A. My guess would be about the same percentage, sir. I wouldn't know.

Q. You gave an estimate of rather substantial quantities of pot type burners, as well as the gun type and rotary type burners and pressure type, compared with your total sales. You are not much of a factor in the industry, are you, in either industry, the pot type or the other type?

A. Oh, I believe we are.

Q. You testified here as to your volume of sales in 1938 and 1939, 1937, '38 and '39, as being around, or between twenty and thirty thousand thermostats, and one or two thousand to thirteen thousand limit switches, and fourteen to thirty thousand of other operating switches. Do you think that is a substantial portion of 250,000 or 500,000 units?

A. No, I don't think that that is.

Q. How do you, then, reconcile your estimate as being a substantial factor in the industry?

A. Well, we were a substantial factor in the indus-
717 try in 1941. In other words, picking out those three years, we got the redesign of our products, which I mentioned in early testimony, straightened out, and we were going to town. We were an increasing factor. Take our 1941 figures, and it would be an entirely different matter from that.

Q. Would that be particularly in the pot type burner?

A. In both fields.

Q. I say, did you make greater increases in the pot type, temperature controls for pot type burners than rotary and gun type?

A. I think the reverse was true. We made greater increases in the gun type business.

Q. Then your testimony is that during the year 1940 and 1941 you are much more of a factor than you were in 1937, 1938 and 1939?

A. That is right, sir.

Q. Did you know anything about the total sales of rotary and gun type burners, in 1937, 1938 and 1939?

A. In what years?

Q. 1937, '38 and '39.

A. I don't know.

Q. Well, who, in 1937, 1938 and 1939, was the principal manufacturer of thermostats, limit switches and primary switches for use on gun type and rotary type burners?

A. Automatic Products Corporation.

718 Q. Automatic Products Corporation?

A. Yes.

Q. I am talking now about for use on oil burners.

A. Maybe I misunderstood your question, sir.

Q. I said, what manufacturer of temperature controls was the principal factor, the largest manufacturer of thermostats, limit controls and primary controls for sale to oil burner manufacturers for domestic use, of the gun type or rotary type burner?

A. Why, Minneapolis-Honeywell was.

Q. There isn't any question about that?

A. No, sir.

Q. And who, in your opinion, was the second largest manufacturer?

A. I should say the Perfex Manufacturing Company and Penn Electric Switch Company.

Q. During 1937, 1938 and '39?

A. Yes, sir.

Q. And who was next?

A. I wouldn't know.

Q. During those years, do you think you sold more than Mercoid?

A. I think we sold more than Mercoid in 1939, or started in 1939. We passed them, I think.

Q. In 1937 and 1938, they may have been ahead of you?

719 A. We weren't right, from a design standpoint. Our product was not right.

Q. Do you have any opinion as to the proportion of the industry that the Minneapolis-Honeywell sold during those years 1937, 1938 and 1939?

A. I have no opinion, sir.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Anything else?

Mr. Freeman: Yes.

Recross Examination by Mr. Freeman.

Q. Mr. Hodges, you testified along about the end of 1939 and the beginning of 1940, you began going to town. That is correct, is it not?

A. Yes, sir.

Q. When you say "began going to town", does that have to do with thermostatic, primaries and limit controls for domestic oil burners of the rotary and gun type?

A. Yes, sir.

Q. And has Minneapolis-Honeywell in any way, in the conduct of its business, interfered with your going to town?

Mr. Haycraft: I object to that, Mr. Examiner.

Trial Examiner Sheppard: I think that is a question the Commission has to answer.

Mr. Haycraft: An opinion, pure and simple.

720 Trial Examiner Sheppard: I sustain the objection.

By Mr. Freeman:

Q. Do you know of any facts which in any way deterred your Company from going to town in the sale of automatic temperature controls for use in connection with gun type and rotary type burners, from 1939 on?

Mr. Haycraft: That is objected to for the same reason.
Mr. Freeman: I am asking for facts now.
Trial Examiner Sheppard: I will let you answer that one.
The Witness: No, sir.

By Mr. Freeman:
Q. And your business steadily increased from 1939 on up?
A. Through 1940.
Q. Is that correct?
A. Yes, sir.
Q. Was your 1941 business better than your 1939 business?
A. Yes, sir.
Q. Substantially?
A. Yes, sir.
Q. And in the sale of the controls that we are now talking about?
A. Yes.
721 Q. Mr. Hodges, when you were referring to your catalogue—
Mr. Haycraft: (Interposing) That catalogue is not in evidence. All that testimony will not look very illuminating.

By Mr. Freeman:
Q. I am going to ask you, Mr. Hodges, whether or not your company makes a stack control or stack primary safety device that it sells, or offers one for sale?
A. We offer one for sale.
Q. Will you refer to it by type number?
A. CA-701. I don't remember the other one. One is constant ignition and the other intermittent ignition. I know we have two.
Q. Will you look at your catalogue in order to refresh your memory?
A. Yes, it is the next number, 702.
Trial Examiner Sheppard: All right.

By Mr. Freeman:
Q. And does that primary control, sold by your company, that is, No. 701 and 702, serve to control the cycle of operation of the oil burner, so as to start and stop it when the heat is needed or no longer needed, as may be, governed by the thermostat, and to prevent a hazardous

condition from occurring when there is failure of combustion?

A. Yes, sir.

722 Mr. Freeman: That is all.

Trial Examiner Sheppard: Anything else, Mr. Haycraft?

Mr. Haycraft: I haven't anything further.

Trial Examiner Sheppard: All right. Thank you, Mr. Hodges.

Mr. Haycraft: I would like to ask Mr. Hodges this question with respect to the correspondence which he produced at the request of the Federal Trade Commission on the subpoena duces tecum.

By Mr. Haycraft:

Q. Do you wish the originals back, or will you be satisfied with photostatic copies of the originals?

Mr. Freeman: Why not give him the originals?

Mr. Haycraft: That is for the witness to decide, and what their attitude is, I don't know.

The Witness: We much prefer to have our originals, the original correspondence back.

By Mr. Haycraft:

Q. And have the photostatic copies substituted?

A. Yes, sir.

Mr. Haycraft: Mr. Examiner, I request that that be done, and if possible I understand the provision will be made for that.

Trial Examiner Sheppard: Yes, that can be done.

723 Mr. Hodges, we will see that you get your originals.

The Witness: O. K., sir.

(Witness excused.)

Trial Examiner Sheppard: Is there anything else?

Mr. Haycraft: I haven't anything further at this hearing, Mr. Examiner, and request that an adjournment be taken to reconvene in Cleveland on the morning of September 14th.

Trial Examiner Sheppard: All right, gentlemen. Mr. Haycraft says that is all he has to offer at this hearing, so I am going to adjourn the hearing at Detroit to reconvene in the city of Cleveland on the morning of the 14th of September, in a room which you will have notice of from me later.

(Whereupon, at 12:30 o'clock p. m. of Tuesday, August 24, 1943, the hearing in the above-entitled matter was adjourned.)

724

Room 432,
Federal Building,
Cleveland, Ohio.
Tuesday, September 14, 1943.

Met, pursuant to adjournment at 10:00 o'clock a. m. E. W. T.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and B. R. Shute, Esq., 15 Broad Street, New York, New York, and

Bair & Freeman, by Will Freeman, Esq., 135 South LaSalle Street, Chicago, Illinois, appeared for the Respondent.

725

Proceedings.

Trial Examiner Sheppard: All right, gentlemen, come to order. Let's proceed. Mr. Reporter, you can convene this hearing in the Minneapolis-Honeywell Regulator Company, Docket 4920, ordered by the Examiner to convene in the City of Cleveland, Ohio, this, the 14th day of September, 1943, at ten o'clock in the morning.

Let the record show the appearances in this case, Mr. Haycraft, for the Commission, and the following firms representatives of the Respondent, Bair and Freeman, 135 South LaSalle Street, Chicago, Illinois, by Will Freeman, and the firm of Cravath, de Gersdorff, Swaine & Wood, 15 Broad Street, New York City, for the Respondent. Now off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record. All right, Mr. Reporter, this gentleman is Mr. J. L. O'Brien, General Manager of the Cleveland Steel Products Corporation, 7306 Madison Avenue, Cleveland, Ohio. Is that right, Mr. O'Brien?

The Witness: Correct.

Trial Examiner Sheppard: All right, Mr. O'Brien, will you stand and be sworn.

726 J. L. O'BRIEN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Haycraft.

Q. How long have you been General Manager of the Cleveland Steel Products Corporation?

A. Since 1931, that is General Manager of the Heating Division.

Q. Known as The Toridheet Division?

A. Toridheet Division, that's right.

Q. 1931?

A. That's right.

Q. That's as long as you had been with the firm or had you been with the firm in some other capacity?

A. No, I came with the firm at that time.

Q. At that time was the Cleveland Steel Products Corporation engaged in the manufacture of oil burners?

A. They were.

Q. And did they use or utilize in connection with the oil burner automatic temperature controls?

A. We did.

Q. What type of oil burner did they manufacture at that time?

A. Rotary wall flame.

727 Q. And where did they obtain their automatic temperature controls that they installed on the oil burner?

Mr. Freeman: What time are you speaking of?

By Mr. Haycraft:

Q. 1931.

A. I believe we used nothing but Minneapolis at that time, I think there was no other suitable control on the market for rotary wall flame burner at that time.

Q. Now during the succeeding years did your bring out what is known as a gun or pressure type of oil burner?

A. Yes, we did.

Q. When was it that you did that?

A. I believe 1935.

Q. What is the difference between the rotary type and the gun or pressure type of oil burner?

Trial Examiner Sheppard: Go into that a little bit. I want to get a good idea of that.

By Mr. Haycraft:

Q. Just give us a general idea?

A. Well the rotary wall flame type burner sprays the oil across the hearth and burns at the wall of the heater.

Q. In a circular flame?

A. Circular or rectangular, it doesn't matter, it follows the contour of the heating plant. You build a hearth to the contour of the heater and your flame follows the
728 contour of your hearth. There is no flame from the head of the burner at all. The oil is thrown across the hearth and is gasified to some extent, across the hearth and burns in a gaseous flame.

Q. How is it thrown, by the rotary motion?

A. It's thrown by centrifugal force from what we call distributor tubes. The oil is delivered up through a hollow shaft and thrown out from a—well a lawn sprayer, just the same principle as you see one of these lawn sprayers, it's the same identical thing.

Q. Now then explain how the gun or pressure type operates?

A. Well the pressure type, the gun type burner operates by delivering the oil under pressure through a fine atomizing nozzle which breaks the oil down to a fine spray or mist but takes fire right at the nozzle. It burns in suspension right from the nozzle. In other words, you could set a gun burner right up on this table and burn it right out in the open here because the oil is broken down under pressure and sprayed out through this very fine orifice, so that it's just a fog or a mist that we use there and it lights or ignites right off the nozzle.

Q. How do you get—I mean, just explain how the burner then functions inside the furnace; is the burner built inside the furnace or is it outside?

A. You build a combustion chamber inside the
729 furnace but not to the wall. You build a combustion chamber for the size fire that you're going to have. If you have a one gallon nozzle we'll say, you have a fire-pot of approximately a foot square or twelve or fourteen inches in diameter, depending on whether you're building it round or square, that doesn't make any great difference. Some people do it one way and some another, some use rotund, pear-shaped combustion chambers. There is a big difference of opinion as to what is the right type.

Q. The nozzle end of the burner then is inside the furnace?

A. The nozzle end projects just through into the furnace just at the head of the opening of this built-up combustion chamber. In other words, the nozzle is almost flush with the front face of the combustion chamber.

Q. What are the important parts of an oil burner that you use, built up, what are the important parts that go into the making of an oil burner?

Mr. Freeman: What oil burner are you talking about, gun type or rotary?

Mr. Haycraft: I'm trying to get both types.

Mr. Freeman: Let's get one at a time.

By Mr. Haycraft:

Q. Take the rotary type first. Do you have a motor?

A. Yes.

Q. What else do you have besides a motor? You
730 have a motor and what else? I'm talking about the rotary type?

A. Well the rotary type burner—we'll start back at the tank. You have a constant level valve at the tank, the purpose of which is to maintain a uniform pressure to the burner, regardless of the depth of oil in the tank. Now that oil is fed by gravity to the burner. Now the burner, this centrifugal head we're talking about is driven by a small motor.

Q. Is that usually right under the centrifugal head?

A. Yes, it's right under. Now the oil is regulated to the burner through oil valves, solenoid oil valves. There's a pair of solenoid oil valves in series that when the burner or the thermostat calls for heat, it energizes the oil valves and the motor simultaneously. The oil valves open up, allow the oil to be delivered to the motor and the motor picks it up, picks it up and delivers it out by centrifugal force.

Q. Then what function does the primary control and the limit control have? You have described what the thermostat did, the thermostat turns it on. Now what do the other two controls do?

A. Well the thermostat energizes the starting relay. You're talking now about the rotary burner only, are you?

Q. Yes, that's what we're talking about now.

A. With the rotary burner the half, we have a pre-
731 ignition period. No, it's not a pre-ignition period, that's out now, isn't it? When the thermostat calls for heat, it closes the No. 1 relay which energizes the

transformer, the motor and the oil valves. That gives you your electric ignition and starts up the motor and delivers oil to the burner. Now that's timed for about a minute and a half. At the end of that time there's a heater or a warp switch in the circuit which will cut out the circuit unless, then you would shut down normally if you didn't get fire, you'd shut down.

Q. That would be a change of thermostat temperature in the thermostat to control that?

A. Yes. There's a bimetallic element which operates under the heat in the stack that turns over the second relay, the hold relay. Now as you get heat in the stack, so that that is turned over and the No. 2 relay or the hold relay energized before your warp switch cuts you out, then you stay in a running position. That's a very bad description for anybody that's been as long in the business as I have, but do I make it clear to you at all?

Q. Then the switch that does that, what do you call that? You said the relay, is the Minneapolis-Honeywell known as a protecto-relay?

A. Yes.

Q. Where then does the limit control come in?

732 A. Well the limit control is right in the line, in the main line itself. The limit control functions quite independently of the burner in itself, I mean of the operating control in its regular function. The limit control operates to cut off the burner when the temperature limits, either pressure or hot water or hot air, whatever it may be, when the pressure limit, temperature limit, gets beyond a certain point or you stop at a certain point, it cuts your circuit completely, that is right in your main line.

Q. In the line electrically?

A. Yes.

Q. Now what is the function of the relay? I mean, the primary control in the gun type burner?

A. Precisely the same thing except that you don't have the timing for cutting off the spark. In the gun burner you operate with a constant spark.

Q. Or constant ignition?

A. Constant ignition. When the burner is turned on your spark comes on and it stays on, it's right in the line and stays on until the burner is shut down.

Q. Well now then in the rotary type you have what they call intermittent ignition, do you not?

A. Yes, intermittent ignition.

Q. Or what is the recycling device we have had mentioned here, what does that do?

733 A. Well the recycling device, recycles the burner, if it fails; for instance, if you had failure of current that would shut the burner down, a non-recycling burner would shut down and stay down, a recycling burner, when the current came back on, would go back through its cycle.

Q. And start up again?

A. And start up again, it would recycle itself.

Q. Is that used principally in the rotary type, that recycling device?

A. No, no, it's used in both.

Q. Well is there the necessity for it in the gun type that there is in the rotary type?

A. Well—

Q. If we have constant ignition?

A. Well seeing the necessity—I don't know what you mean by necessity.

Q. By that, in the rotary type you have intermittent ignition and in the gun type constant ignition?

A. Yes there's a necessity for intermittent ignition with the rotary type burner that doesn't exist with the pressure type burner. There's one particular reason why you have to have intermittent ignition with a rotary and that's radio interference. If we could get away from radio interference with a rotary burner, there'd be no more reason for eliminating it; I mean, for using the

734 intermittent ignition. It might be sometimes a little more difficult to hold your flame just as you want to, but it wouldn't be an objectionable thing. It's radio interference that makes it necessity.

Q. What does radio interference do to it?

A. Well radio interference just makes it impossible to run a radio when your burner is on in many cases. You see the way you build in the rotary burner, it's almost impossible to shield out the interference.

Q. Now when you came out with your gun type or pressure type burner, what temperature controls did you use on it?

A. When we first—

Q. Brought it out?

A. Built a gun burner.

Q. Did you use all three, that is the thermostat, limit control, and primary control of the Mercoid?

A. Well generally yes, I think, however, that we probably used very few of some of their limit controls. For instance, I think we have used practically no warm limit controls of Mercoid and I think probably very few hot water, I think we used their steam limit control quite regularly.

Q. Where did you get the other limit controls?

A. Minneapolis mostly. We have also used other limit controls. We bought some from Spencer and bought
735 some one time from Bishop Babcock here.

Q. On the rotary type when you were using Minneapolis controls, did you use their limit controls exclusively on that or did you use other limit controls?

A. No, I wouldn't say that we ever used anybody's limit controls exclusively.

Q. They can be used interchangeably, can they?

A. Yes. Limit controls can be used, a limit control, it's just a line switch, that's all, just makes and breaks the line.

Q. Well now how long did you use the Mercoid switches or temperature controls on your gun type burner? That is that you manufactured yourself?

A. How long did we use it?

Q. Well first I'll ask you this question, when you came out with the gun type burner and used Mercoid controls, did that mean that you used them when you received an order for a burner equipped with controls, or were there times that if a dealer asked for Minneapolis-Honeywell control on a burner, did you put it on?

A. Oh yes.

Q. Well did you say you standardized on the Mercoid burner, on the gun type burner, in 1935?

A. Well yes, if you take to mean standardizing, when I'd say that we used a particular type of control as
736 the control that would go with a burner if no type control was asked for, that is standardizing.

Q. Well in 1935 if you sold a gun type burner and the customer didn't designate any particular control you'd put Mercoid controls on?

A. That's right.

Q. And you sold the rotary type burner if no one designated any particular type of control, you'd put Minneapolis-Honeywell control on?

A. That's right.

Q. Now how long did that situation continue in your organization, how long did you follow that policy?

A. We've always followed that policy.

Q. Well today—take it year by year in 1936?

A. You're speaking of a policy now?

Q. Well 1936, if a customer—and by the way, to whom did you sell these oil burners, what class of trade?

A. Well we've sold to our own distribution, our own dealers, and distributors, and we've also, for a good many years, had one or more manufacturers' accounts, burners, I mean companies for whom we built burners to be sold under their trade names.

Q. Well now unless I indicate otherwise, I want my questions to refer to your own line, the Toridheet line put out by the Cleveland Steel Products, and we'll take up
737 the others later. During 1936, did you continue during that year to supply Mercoid controls when a customer did not indicate what type of control he wanted?

A. Yes we did.

Q. And you continued, that is on the gun type burner?

A. That's right.

Q. But if he had bought a rotary type burner you'd equip it with Minneapolis-Honeywell?

A. We wouldn't sell it with anything else, even if we had it. That's one place we make an exception, we would not agree to sell a rotary burner to be used with any control except Minneapolis.

Q. That was in 1936?

A. That was always true.

Q. Was that true in 1941 and '42?

A. That was true up to probably in 1941 Mercoid came out with a rotary control that I think we might have agreed to, things kind of got in such shape that we didn't go on to do much testing with it, but from what we did test, I think it's a satisfactory control, but up to that I, you might say as long as we were doing business on the rotary, we would not permit, we would not sell the rotary burner with any other control than the Minneapolis-Honeywell.

Q. Have you produced at this hearing, under subpoena, duces tecum correspondence you had with Minne-
738 apolis and Mercoid, with respect to the oil burnings, the use of temperature controls of various makes?

A. Yes I have done the best I could to interpret what you wanted and I have taken out of our files, I have the

whole file available, but I have taken and combed out of it what I felt were pertinent matters. I have them all here.

Mr. Haycraft: May we have a five-minute recess?

Trial Examiner Sheppard: We will have a ten-minute recess.

(Whereupon a short recess was taken.)

Mr. Haycraft: I will ask the Reporter to mark these letters as Commission's Exhibits.

(The papers referred to were marked Commission's Exhibits 103-A, 103-B, 103-C, 103-D, 103-E, 104, 105, 106, 107-A, 107-B, 107-C, 108, 109-A, 109-B, 110-A, 110-B, 110-C, 110-D, 110-E, 111, 112-A, 112-B, 113, 114-A, 114-B, 115, 116-A, 116-B, 117, 118-A, 118-B, all for identification.)

Trial Examiner Sheppard: All right gentlemen, you may proceed.

By Mr. Haycraft:

Q. I will show you Commission's Exhibit 17, which is apparently a letter from—a carbon copy of a letter from Mr. Lockrae of the Minneapolis-Honeywell Regulator Company to the Cleveland Steel Products Company, 739 Attention Mr. J. L. O'Brien, dated September 16, 1936, and ask you if you received the original of that letter.

A. Why I think I recall that letter.

Q. Now then, I show you Commission's Exhibit 18, and also 103-D and 103-E, for identification, and ask you if that 103-D and E is the same letter as Exhibit 18, and if you received that original letter from the Minneapolis-Honeywell, dated October 19, 1936.

A. You are asking me?

Q. That is the same letter?

A. You are asking if this is the same letter?

Q. Yes.

A. I would say yes.

Q. And you received it?

A. Yes.

Q. And showing you Commission's Exhibit 19, apparently two sheets, and Commission's Exhibit 103-A and 103-B, I will ask you if those two are the same, 103-A and B for identification.

A. Yes, that is the same letter.

Q. And you received that?

A. Yes, sir.

Q. That is, you mailed that to Minneapolis?
A. That's right.
Q. That is your letter?
740 A. My letter to Minneapolis.
Q. Now in this letter, Commission's Exhibit 18, it states in the third paragraph:

"The last time I saw you we talked briefly with reference to the Mercoid control situation, and you advised you were still using a balance of the order which you placed that year, and which, if I remember correctly, represented a balance of between 500 and 1000 sets of controls.

Inasmuch as we have shipped you about 1200 sets thus far, and the gun type burner is running three to one against the rotary, this would mean you have used between three and four thousand gun type controls, and we have not enjoyed this business as we were led to believe."

Do you have any recollection of discussing with Mr. Lockrae prior to October, 1936 the matter of the quantity of Mercoid controls that you were expecting to use that year?

A. No, I have no definite recollection of discussing Mercoid controls with him.

Q. Well did you discuss with him the question whether you were going to give him any of the gun type control business during 1936, the Minneapolis-Honeywell?

A. Oh yes.

Q. What was said on that point with respect to that?

741 A. Well there were many conversations on that subject. Mr. Lockrae called on us quite frequently, as did other members of the Minneapolis-Honeywell Company, and of course the subject was always "Can't we sell you our controls?" Always trying to sell us their controls.

Q. Well what, if anything, did you say with respect to whether you were going to give him any business on the gun type which you at that time, prior to that time, you had been equipping with Mercoid controls?

A. Well I suppose we always kidded them along a little bit; made them think we were going to give them some business, whether we were or not.

Q. Well did you increase your use of Minneapolis-Honeywell controls on the gun type burner during 1936 over 1935?

A. No, I don't think so, not to any extent.

Q. Was there a difference in the price of your burner equipped with Minneapolis-Honeywell and equipped with Mercoid controls, during that year?

A. Yes there was, and of course that probably was a subject that we discussed many times. They always thought that we were unfair to them.

Mr. Freeman: By "them", you mean Minneapolis-Honeywell?

The Witness: Minneapolis-Honeywell representa-
742 tives, whether it was John Pauling or I think it might even be Charley Sweatt, that thought it might be unfair when we charged five dollars more for our burner equipped with Minneapolis controls than equipped with Mercoid, when they knew we weren't getting a five dollar advantage in the buying. Naturally they objected to that.

Q. Now what was the difference in the purchase price of the temperature controls you bought from Mercoid and put on your gun type burner, and the Minneapolis control?

A. I think possibly two or three dollars.

Q. Let's see if we can't be accurate on that. Have you any records there on that?

A. Yes, I think so. Now we'll have to be specific. When do you want it?

Q. Yes, I want during the year 1935 first.

A. I haven't got that.

Q. Do you have any invoices?

A. 1935 we didn't—

Q. (Interposing.) Well 1936.

A. 1936 is when we started.

Q. All right, 1936.

A. Well let's see, maybe I've got the invoices here.

Mr. Freeman: Let's be sure, Mr. O'Brien when you give these prices that you give comparable units—
743 Mr. Haycraft: Oh yes.

Mr. Freeman: Of each company.

Mr. Haycraft: I intended my question to cover that.

Mr. Freeman: So when we talk about intermittent controls, we are not talking about constant.

Mr. Haycraft: We are talking about gun type burners entirely now, as I understand. He didn't buy any of the other.

Trial Examiner Sheppard: Gun type burners?

The Witness: $15.95 for the Minneapolis, and $14.05 for the Mercoid, that is for the primary and the thermo-

stat; we go all over the lot with limit controls, so you can't take that into account. At that time we were probably using a half dozen different limit controls, but the primary and the thermostat were always used in combination.

By Mr. Haycraft:

Q. Well now can you break that down?

A. $3.75 for the thermostat and $10.30 for the primary control, Mercoid. Now if you want that—

Mr. Freeman: (Interposing.) That is for 1936?

The Witness: That is for 1936.

By Mr. Haycraft:

Q. And Minneapolis-Honeywell?

744 A. $12.00 for the primary control, and $3.95 for the thermostat.

Q. Now during the year 1936—

A. (Interposing.) That's a difference of a dollar and ninety cents, and we charged $5.00 more.

Trial Examiner Sheppard: That's in favor of what?

The Witness: A dollar and ninety cents lower on the Mercoid.

Trial Examiner Sheppard: On the Mercoid?

The Witness: Yes.

By Mr. Haycraft:

Q. And you charged the customer $5.00 more if you equipped with Minneapolis-Honeywell?

A. Yes, that is where the objection came from Minneapolis. They thought we were unfair in penalizing them.

Q. Now how long did that continue, that variance? What were the prices in '37?

Trial Examiner Sheppard: You want '38 too, and '39, don't you?

Mr. Haycraft: Yes.

Trial Examiner Sheppard: Get them all out Mr. O'Brien so you'll have the whole thing.

By Mr. Haycraft:

Q. I call your attention to Commission's Exhibit

745 23, which is the agreement between the Minneapolis-Honeywell and Cleveland Steel Products, dated December 2, 1936, which I assume would cover your 1937 business, and ask you to look at that and see if the prices

set forth in there for the various items, were the prices that you paid that year. You can check against your invoices and see. It's $3.80.

A. It's $3.80, and this invoice I have just checked was $3.90.

Q. Was that '36 or '37?

A. No, that's '37, no, '36.

Q. Well let's check '36. We have an agreement to go by and see if the prices correspond.

Trial Examiner Sheppard: Get the '37.

A. R 116, no, wait a minute, $11.90. Here's a bill in December of $11.60.

By Mr. Haycraft:

Q. December of what year?

A. December '37.

Q. Look back earlier in the year, perhaps the price was changed during the year.

A. Something wrong with our bookkeeping department I guess, they don't seem to be alike.

Q. Are those the invoices put out by the Minneapolis-Honeywell?

746 A. Yes. However they should be checked by our Purchasing Department. Here's an invoice in May '37, R 116, four, $12.60. That's $11.90 on that contract.

Q. Well what did you pay for the thermostats during that year? $3.80 I notice the contract calls for.

A. $3.80.

Q. What would be the total then of those two, $3.80 and $11.60 would be $15.40 wouldn't it?

A. $3.80 and $11.90 is what is shown there.

Q. Yes, but I'm talking about your invoices, what you actually paid for them.

A. Invoice was $12.60.

Q. $12.60?

A. Yes.

Q. Instead of $11.90.

Mr. Gilpatric: Depends on which one you take.

By Mr. Haycraft:

Q. Well the R 116 I thought you said was $11.60.

Mr. Freeman: $12.60.

The Witness: $12.60, we paid $12.60 according to this invoice. Now let me go back earlier in the year to see if we were paying that right from the start of the year.

Mr. Freeman: We can help you out if you want. The prices on April 1, 1937 were increased.

747 The Witness: Oh, all right. That's it. I can probably check that back. I don't seem to have any invoice back to the early part of the year. I guess probably we didn't get any because I don't know why we'd have two folders in one year.

By Mr. Haycraft:

Q. Well you were paying a total of $12.60 plus $3.80, would be $16.40, wouldn't it?

A. That's right.

Q. What were you paying for comparable devices from Mercoid during that year?

A. 1937?

Q. Yes.

A. $11.85.

Q. For the primary?

A. No, no, $11.85, $8.35 for the primary and $3.00 for the thermostat.

Q. Did that apply all through the year?

A. Well there's April, February, November.

Q. So that there was more of an advantage, in other words more of a difference then in the price in 1937?

A. Apparently so, yes.

Q. And did you continue in 1937 this five-dollar differential in the burners that were equipped with Minneapolis-Honeywell?

748 A. Yes, that was arbitrary, that was never based on any particular difference at the time. I mean it was just arbitrary.

Q. How many burners of the gun type did you sell in 1935, '36 and '37, those years? Have you got the figures on that? I think you had them out here a moment ago.

A. In 19—

Q. (Interposing) 35 if you have it.

A. Oh you want gun burners?

Q. Yes.

A. I haven't got them broken down there. 1935 you want?

Q. If you have it.

A. Well I would say probably about 800. I can't tell you accurately because there are some units in here that are in here as to the type of unit, an air conditioning unit or a boiler unit. I don't know whether it is gun or not.

Trial Examiner Sheppard: Well take it as approximate.

By Mr. Haycraft:

Q. Now how many rotary type?

Mr. Freeman: What year?

Mr. Haycraft: 1935.

The Witness: 1935 the rotary was 1200.

By Mr. Haycraft:

749 Q. 1936 how many gun type?

A. About 1500.

Q. How many rotary?

A. About the same, about 1200, the same as the year before.

Q. 1937?

Trial Examiner Sheppard: Gun type first.

The Witness: 1400.

By Mr. Haycraft:

Q. Rotary type?

A. 2400.

Q. 1938?

A. Gun, 1100; Rotary, a thousand.

Q. 1939?

A. Gun, 2400, no, 2500.

Q. Rotary type?

A. Rotary, 1100.

Q. 1940?

A. Now you're getting into some figures here. That's the year we got into a big volume with our units so this is balled up here.

Q. Well give me an estimate if you can.

A. A fair guess on this, I mean it wouldn't be just a wild guess, but I can't, it wouldn't be as accurate as the other years.

750 Trial Examiner Sheppard: Gun type first.

The Witness: Have you been thinking only of Torridheet direct sales all the way through here?

Mr. Haycraft: Yes, that was my question, but if you want to qualify it, you can do so. I was going to get into the other by itself.

The Witness: Well the volume I have given is inclusive, manufacturers sales.

By Mr. Haycraft:

Q. Do you have any way of separating it?

A. Not here.

Trial Examiner Sheppard: Well with that explanation, we'll take it that way. I'm glad you made that though.

The Witness: About 3800 gun, and 1700 rotary.

By Mr. Haycraft:

Q. Have you got the same figures for '41? Can you give us the same figures for '41? That's the last figure I'm going to ask you.

Trial Examiner Sheppard: That was for '40?

Mr. Haycraft: '41.

Mr. Freeman: That's what he gave.

Mr. Haycraft: That was for '40.

The Witness: Yes, that was '40.

Trial Examiner Sheppard: Off the record.

751 (Discussion off the record.)

Mr. Haycraft: May I ask for a short recess?

Trial Examiner Sheppard: Mr. Haycraft wants to use the telephone, we'll have a short recess.

(Whereupon a short recess was taken.)

Trial Examiner Sheppard: All right, proceed.

The Witness: In 1941, 4100 gun, 1600 rotary.

By Mr. Haycraft:

Q. Now of that 4100 gun, have they all been delivered?

A. Oh yes, I have thrown those out entirely.

Q. I show you Commission's Exhibit 105 for identification, which is an original letter from Minneapolis-Honeywell Company to Cleveland Steel Products, Attention Mr. J. L. O'Brien, dated January 20, 1937, and ask you if you received that letter.

(Handing paper to witness.)

A. Yes, I believe so, it looks like my check mark on it.

Mr. Haycraft: I offer that letter in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Gilpatric: No.

Trial Examiner Sheppard: It may be accepted.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT No. 105 was received in evidence.)

752 By Mr. Haycraft:

Q. Now calling your attention to Commission's Exhibit 23, I'll ask you whether or not that is the agreement or contract mentioned in the letter which you have just identified, Commission's Exhibit 105?

A. It would appear to be, the dates check up.

Q. Now in the third paragraph of this letter of January 20th—first I call your attention to the fact that in Commission's Exhibit 23, the agreement, the contract, the quantity specified is 1000 sets. It appears to be that there had been an erasure in the original there. Can you tell by looking at it what has been erased?

A. Yes.

Q. What was it?

A. "Season's requirements."

Q. Now in this letter of January 20, 1937, mention is made of the fact, in the "third bracket"; 1000 sets of controls puts you in the "third bracket", and then the letter states:

"Now that the proper credit for the controls can be given you, I hope you can see your way clear to accepting our 4000 set proposition, and if so, please advise us and we'll be glad to get in touch with you promptly."

What was the "4000 set proposition" mentioned there?

753 A. I would imagine it was the credit that we were to get for the controls purchased by the American Radiator Company, Fox Furnace Division, for their Toridheet burners. We started building burners for Fox Furnace that year, and we of course wanted to sell the controls with the burner. But they have different combinations in connection with their zone controls, and so forth. They wanted to buy their own controls. So following the regular practice in the industry, Minneapolis agreed to sell them the controls, but to credit the volume to us, of burners to be used, I mean the controls to be used on our burners. I think that's quite definitely what Mr. Lockrae had in mind in that letter.

Q. So that you were then agreeing to buy 1000 sets of controls which would put you in the third bracket, and then there was a proposition of getting your quantity increased by the 4000 sets that your customers might buy?

A. Yes, that we would get credit for them.

Q. Were the Fox Furnace buying 4000 sets or anything like that?

A. Oh I would say yes.

Q. At that time?

A. Oh yes, I would say so.

Q. So you're pretty sure that is what that refers to?

A. I feel quite positive that it does, yes.

754 Q. Now in January, 1938—I show you Commission's Exhibit 10 and ask you whether or not that is the agreement between Minneapolis-Honeywell Regulator Company and the Cleveland Steel Products Corporation for the year 1938?

A. You want me to check that against mine?

Q. Any way so you can tell.

A. Yes, that's it.

Q. Now in this contract, it has what prices there indicated for the thermostat and controls?

A. $3.75 for the thermostat and $10.40 for the gun burner and $11.75 for the rotary burner control.

Q. What would it make the total then for your gun burner type?

A. $14.15.

Q. Now I notice that this contract calls for "seasonable requirements estimated at 3000"; would that include gun type as well as rotary type?

A. Yes, it would include our estimated requirements from Minneapolis-Honeywell for both, what we thought we would buy from them for both.

Q. Now as a matter of fact you had bought in 1937 how many rotary type and how many gun type from Minneapolis-Honeywell?

A. How many controls had we bought?

755 Q. Yes.

A. I couldn't tell you, that would be quite a little job to go back and check up.

Q. Well do you know how many burners you manufactured and sold?

A. Yes, but that wouldn't mean a thing; it wouldn't mean a thing. Some years we might sell twice as many burners and buy half as many controls. That happens when you have a year like, what was it, '37 or '38 that took a nose dive. '37 was a very good year, way up, and '38 took a nose dive. Well when we estimated our requirements for '38, we estimated on increasing our '37 business.

Q. Well in 1937, according to Commission's Exhibit 84, which is in evidence here, you purchased 1164 thermostats and 1292 primaries from the Minneapolis-Honeywell Regulator Company. Now those were used on what burners?

A. I would say probably almost exclusively on rotary type.

Q. Rotary?

A. We had a few accounts that never would accept any control other than Mercoid. We had a few accounts, the Carroll Independent Fuel Company at Baltimore, Maryland; they never would accept anything but Minneapolis. Did I say "Mercoid"?

Mr. Gilpatric: You say "Mercoid" there.

756 The Witness: I'm sorry, never would accept anything but Minneapolis.

By Mr. Haycraft:

Q. Well when you made that estimate of 3000 in January 1938, as your season's requirements, did you intend to include controls for gun type burners as well as the rotary type during that year?

A. What gun type burners or controls we thought we'd buy from Minneapolis, yes.

Q. And did you have any idea as to how many of those there would be? What were your plans on that?

A. Oh we never, were never very particular about hitting that estimate closely. We knew that we'd get the price that we, that was coming to us on what we bought, so we never—

Q. (Interposing) What were you paying Mercoid in 1938 for the primary thermostat?

A. Wasn't it in 1938?

Q. No, you had 1937.

A. 1938 Mercoid; I should have brought our bookkeeper along with me.

Trial Examiner Sheppard: I think you're doing very well. Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

757 Mr. Freeman: Let the record show that the witness is referring to a Mercoid contract for the year 1938 with respect to prices of controls purchased by the Cleveland Steel Products Company from Mercoid in 1938.

By Mr. Haycraft:

Q. First I will ask the witness if he was able to find any invoices from Mercoid in 1938.

A. No, I am not.

Q. All right. What you had then on hand, what you were equipping your burners with, were those devices that you already had on hand purchased in 1937?

A. I would think so.
Q. All right, go ahead.
A. There are some thermostats here that I could check against the contract to see whether the prices agreed. Do you want me to read you the prices now from the contract?
Q. For 1938, yes.
A. For 1938?
Trial Examiner Sheppard: That is, the Mercoid contract. Off the record.
(Discussion off the record.)
Trial Examiner Sheppard: On the record.
The Witness: $8.70 and $3.20; $8.70 for the primary 758 control and $3.20 for the thermostat.

By Mr. Haycraft:

Q. That would make a total of what?
A. $11.90.
Q. As compared with $14.50, is that right?
A. $11.90, $2.60 difference.
Q. $2.60 difference?
A. Yes.
Q. But those you bought in 1937 were a little cheaper than that; they were $11.35 I believe, were they not?
A. Prices I believe did go up in 1938. Let me see if I have a '38 contract.
Mr. Freeman: $11.35.

By Mr. Haycraft:

Q. $11.35. Now do you have with you your 1939 agreement?
A. With Mercoid?
Q. With Minneapolis-Honeywell?
A. Yes, I believe so. December 15, 1938, that would be it, yes.
Q. What prices do you have in that agreement—first the number of sets, then the prices.
A. 1000 sets; price on the thermostat $3.30 and on the gun burner $9.35.
Q. Gun burner primary?
A. Yes, gun burner primary was $9.35, and rotary 759 burner $10.50.
Q. That made a price of $12.65 for the gun type and $13.80 for the rotary type, the two together, is that right?
A. $12.65, that's right, that $13.80, that's right.
Q. Now that contract did not call for a season's requirements, did it?—It was a fixed number of sets, 1000 sets?

A. Yes.

Q. And was that based on your sales or your purchases of sets from the Minneapolis-Honeywell during 1938?

A. I don't think it was based on anything. I think it is just—

Q. (Interposing) Well what bracket were you in on that 1000 sets, do you remember?

A. Probably in the year before we had bought in that bracket and—

Q. (Interposing) Stayed in that bracket?

A. And they gave us the contract in that bracket for the next year.

Q. Well to refresh your recollection, to call your attention to the fact that you bought 1031 thermostats and 951 primaries in 1938 from Minneapolis-Honeywell.

Mr. Freeman: That's about a thousand sets.

The Witness: Yes, that would put us in, that is probably the reason this was written on that basis, and if we exceeded it, then we'd get the better price.

760 Q. Now did you have another agreement during that year? How long was that agreement in effect?

A. 1938.

Q. No, this was '39.

A. Yes, this was written, I believe there was a new contract written in April of 1939.

Q. Will you find that?

A. Yes, there was a new contract written in April for 5000 sets.

Q. 5000 sets?

A. Yes.

Q. Now what price did you have on that?

A. $2.95 on the thermostat and $9.15 on the gun primary and $10.25 on the rotary primary.

Q. Making a total of $12.10 for the gun type, and $13.20 for the rotary type, is that right?

A. That's right.

Q. Now what business did you have in mind in writing that contract?

A. We had just brought out a new pressure type burner, a low, what we call low-price pressure type burner to compete with the low-price gun type and pot type burners on the market, and we had great hopes of a tremendous volume of business. We thought 5000 was putting it very low at that time.

761 Q. Had there been, had you had any competition with low price burners with Minneapolis-Honeywell controls on them during 1938?

A. Oh, sure, we had lots of competition with low price burners, with all kinds of controls.

Q. Well do you remember the Quietheet Corporation?

A. That's Mr. Lapidus.

Q. Yes.

A. Oh yes.

Q. Had he been one of the sources of competition in that category?

A. Yes, I'd say quite definitely.

Q. Now what price—did you buy any controls from Mercoid, primary or thermostat, during 1939?

A. Here's an invoice for two thermostats. I don't know why, just two, at $3.00 each.

Q. That was five cents more than you were paying Minneapolis-Honeywell, was it not?

A. Yes it was. From that I would say that we probably were not buying many controls from them. Well yes, here's a July invoice, $10.70, $2.70 for the thermostat or Sensatherm, and $8.00 for the primary.

Q. That would make it $10.70 for the set?

A. That's right.

Q. Did you have a contract with them that year,
762 with Mercoid?

A. Oh I think so; I think we have had a contract every year. Just a moment, if I have it with me.

Q. 1939.

A. That was 1939, what price did I say that was? There are some pencilled figures here; I don't know what they mean. The contract itself shows $8.00 for the primary, and $2.70 for the thermostat.

Q. That's what you gave me.

A. Is that what I gave you? There are some pencilled figures in here; that's what we probably were trying to chisel on, and couldn't do it.

Q. What date was that contract?

A. February 18, 1939. It was approved by Owens on the 28th of March, 1939.

Q. All right.

Mr. Haycraft: Mark this letter.

(The document referred to was marked Commission's Exhibit 119 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 119 for identification, supposed to be an original letter from Mr. Owens on the letterhead of the Mercoid Corporation to yourself, dated March 29, 1939, and ask you if you received that letter.

A. Yes, that letter is familiar.

763 Q. This is a letter you received with the contract which you just referred to in your testimony for 1000; did you ever give the Mercoid Corporation an order for 1000 Sensatherms during 1939 for use on Westinghouse burners, burners made for Westinghouse?

A. No we did not; there never was any such order placed. I don't know whether the Westinghouse crowd did a little kidding with Mercoid's representative or not. They talked to me, this man Fisher who was the eastern representative for Mercoid, talked to me about having had an agreement with Mr. Hildreth of the Westinghouse Company that they would give him an order for a thousand thermostats and Mercoid would absorb the cost of the die or the screen, or whatever it was, to put their name on the thermostat. But they never placed the order.

Q. It never came out?

A. No, they never—I spoke to Hildreth two or three times about it, and asked him if he was actually giving them the business, or was he just kidding them, and I could never get anything out of him.

Q. Well you manufactured burners for Westinghouse during 1939?

A. Yes we did.

Q. Were those included in your statement as to your quantity of gun type burners that were manufactured

764 and sold that year?

A. They were, yes.

Q. Well did you get credit for those controls in the 5000, in making up the 5000 sets in 1939 agreement?

A. We bought all of the Westinghouse controls directly. We handled them.

Q. You handled them?

A. Yes.

Q. Did you do that from the beginning?

A. Always, yes.

Q. And can you tell us when it was that you first started burners for Westinghouse?

A. In December 1937.

Q. Do you know how many you manufactured during 1938 for Westinghouse?

A. Well I have what we made for the three or four years, but I haven't got it broken down. I would say in 1938 —if you care to accept a reasonably good guess—

Q. Yes.

A. I would say that it was probably in the neighborhood of 1000.

Q. And in 1939?

A. In 1939 probably around 1600.

Q. And it increased each year?

A. Yes.

765 Q. I show you Commission's Exhibit 106 for identification, which is an original letter from Minneapolis-Honeywell to Cleveland Steel Products Corporation, Attention Mr. W. J. Smith, dated April 13, 1939, and ask you if that came from your files and if you can identify it as received in your office.

Mr. Freeman: We'll concede it is a Minneapolis-Honeywell letter and we will concede it was sent to the Cleveland Steel Products Corporation, and we'll concede that they received it.

By Mr. Haycraft:

Q. And is that the letter then that also accompanied your agreement dated April 1939?

A. I would say yes.

Mr. Haycraft: I offer that letter in evidence as Commission's Exhibit 106.

Trial Examiner Sheppard: Under the agreement, we'll accept it.

Mr. Gilpatric: No objection.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 106 was received in evidence.)

By Mr. Haycraft:

Q. I show you paper marked for identification Commission's Exhibits 107-A, B, and C; A being a letter
766 from W. J. Smith to Mr. McGoldrick dated April 18, 1939, dictated April 17th, and 107-B and C being a carbon copy of a letter from Mr. Smith to Mr. J. W. Pauling, Vice President of Minneapolis-Honeywell, dated April 18, 1939, and dictated April 17th; and I will ask you whether

or not the original of this, to your knowledge, the original of this letter was mailed to Minneapolis-Honeywell, to the parties indicated on the carbon?

Mr. Gilpatric: We'll concede all these you know if you want to save time.

Mr. Haycraft: All right then, I'll offer that in evidence.

Mr. Freeman: It's all right.

Trial Examiner Sheppard: It may be accepted as Commission's Exhibits 107-A, B, and C.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 107-A, 107-B, and 107-C were received in evidence.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 108 for identification, which is an original letter from Mr. Lockrae to W. J. Smith, dated April 24, 1939.

Mr. Freeman: Same concession.

Mr. Haycraft: Offer it in evidence.

Mr. Gilpatric: No objection.

767 Trial Examiner Sheppard: It may be accepted.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 108 was received in evidence.)

By Mr. Haycraft:

Q. I show you two letters marked for identification Commission's Exhibits 109-A and B, 109-A being a carbon copy of a letter from Mr. Smith of the Cleveland Steel Products to Mr. Harold W. Sweatt, of Minneapolis-Honeywell, dated May 1, 1939, dictated April 28th, and 109-B being an original letter from Harold W. Sweatt to W. J. Smith, dated April 21, 1939.

Mr. Freeman: Same concession.

Trial Examiner Sheppard: It may be admitted.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 109-A and 109-B were received in evidence.)

By Mr. Haycraft:

Q. I also show you a series of letters and papers—

Mr. Freeman: (Interposing.) We'll concede them all.

Mr. Haycraft: I then offer in evidence Commission's Exhibits 110-A to E, 110-A being a carbon copy of a letter from W. J. Smith to W. J. McGoldrick dated May 11,

1939; 110-B and C being an original letter from W. J.
768 McGoldrick dated May 11, 1939 to W. J. Smith, and D and E are sketches attached to the letters and mentioned in the letters.

Trial Examiner Sheppard: All right, they may be accepted.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 110-A, 110-B, 110-C, 110-D and 110-E were received in evidence.)

Mr. Haycraft: I also offer in evidence papers marked Commission's Exhibit 111 for identification, being a carbon copy of a letter from W. J. Smith to A. H. Lockrae, dated June 26, 1939.

Mr. Freeman: No objection.

Trial Examiner Sheppard: May be received.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 111 was received in evidence.)

Mr. Haycraft: Also offer in evidence Commission's Exhibits 112-A and 112-B, 112-A being a carbon copy of a letter from W. J. Smith to A. H. Lockrae, dated August 9, 1939, and 112-B being an original letter from Mr. Lockrae to W. J. Smith dated July 20, 1939.

Mr. Freeman: Same concession.

Trial Examiner Sheppard: They may be accepted.

769 (The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 112-A and 112-B were received in evidence.)

Mr. Haycraft: Also offer in evidence letter marked for identification Commission's Exhibit 113, being a carbon copy of a letter from W. J. Smith to W. J. McGoldrick, dated September 1, 1939.

Mr. Freeman: No objection.

Trial Examiner Sheppard: It may be accepted.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 113 was received in evidence.)

Mr. Haycraft: Also offer in evidence papers marked for identification Commission's Exhibits 114-A and 114-B, 114-A being an original letter from Lockrae to W. J. Smith, dated September 5, 1939, and 114-B being a carbon copy, confirmation of a telegram from Lockrae to Smith dated September 5, 1939.

Mr. Freeman: Same concession.

Trial Examiner Sheppard: They may be accepted.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 114-A and 114-B were received in evidence.)

Mr. Haycraft: Also offer in evidence original telegram from Lockrae to W. J. Smith, dated September 5, 1939.

770

Mr. Freeman: No objection.

Trial Examiner Sheppard. May be accepted.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 115 was received in evidence.)

Mr. Haycraft: Also offer in evidence letters marked for identification Commission's Exhibits 116-A and B, 116-A being a carbon copy of a letter from J. L. O'Brien to Minneapolis-Honeywell, dated November 19, 1940, and 116-B being the original letter from Mr. Lockrae to Mr. O'Brien dated November 13, 1940.

Mr. Freeman: No objection.

Trial Examiner Sheppard: May be accepted.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 116-A and 116-B were received in evidence.)

Mr. Haycraft: Also offer in evidence letter marked for identification Commission's Exhibit 117, being the original of a letter from Mr. Lockrae to Mr. O'Brien, dated November 22, 1940.

Mr. Freeman: No objection.

Trial Examiner Sheppard: It may be accepted.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 117 was received

771 in evidence.)

Mr. Haycraft: Also offer for evidence letters marked for identification Commission's Exhibits 118-A and 118-B, 118-A being a carbon copy of a letter from J. L. O'Brien to J. W. Pauling, dated March 5, 1942, and 118-B being the original of a letter from J. W. Pauling to W. J. Smith, dated February 25, 1942.

Mr. Freeman: No objection.

Trial Examiner Sheppard: They may be accepted.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 118-A and 118-B were received in evidence.)

Trial Examiner Sheppard: What about 119?

Mr. Haycraft: Didn't I offer it?

Mr. Freeman: You referred to it.

Mr. Haycraft: All right, I'll offer it in evidence. Letter marked Commission's Exhibit 119, being an original letter from J. W. Owens to J. L. O'Brien, dated March 29, 1939.

Mr. Freeman: No objection.

Trial Examiner Sheppard: May be accepted.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 119, was received in evidence.)

Mr. Haycraft: There is one exhibit I didn't offer,
772 Commission's 103. I didn't offer it in evidence because they are duplicates, so 103 and letters are not offered.

Trial Examiner Sheppard: How about 104?

Mr. Freeman: That's the same situation.

Mr. Haycraft: Yes.

Trial Examiner Sheppard: Let the Examiner show those as unnecessary to be used because already in evidence by other exhibits, the exhibits marked for identification Commission's Exhibits 103 and letters, and 104.

By Mr. Haycraft:

Q. Now you have mentioned in your testimony two firms that you manufactured oil burners for, Fox Furnace Company, a subsidiary of the American Radiator Company?

A. Yes.

Q. And Westinghouse?

A. Yes.

Q. Now I don't believe I asked you—and if I have I'll run the risk of repetition here—now when did you start manufacturing burners for Fox?

A. 1936.

Q. Do you know how many you made during that year for them?

A. Not many, I would say probably not more than a hundred.

Q. And in 1937?

773 A. In 1937 we probably made five or six hundred.

Q. And 1938 and 9 did that increase?

A. No, I think '39 was—I don't think we made them in '39. In '38 it increased, but in '39 I think they were not using our burner.

Q. Well now did you manufacture for any other furnace manufacturer during those years?

A. Oh yes, in those particular years.

Q. Yes.

A. Or during the whole—

Q. (Interposing.) Yes, during those years, from 1935 to 1941?

A. Yes, we have manufactured for Kelvinator Corporation.

Q. When did you start manufacturing for Kelvinator?

A. 1936.

Q. About how many did you make during that year?

A. Well in 1936 likewise, not very many, probably not more than a hundred or so, and in 1937 we ran up close to 2000 I think. It would be something in between 1500 and 2000.

Q. And were these Kelvinator and Westinghouse all gun type?

A. The Kelvinator were all rotary.

Q. All rotary?

A. Yes. The Fox were mixed. The first year they 774 were almost eighty per cent., probably, gun, but in the next year and the last year, they were more rotary than guns.

Q. And the Westinghouse, what were they?

A. Westinghouse was always exclusively gun.

Q. Now—

A. (Interposing.) And we have several other small manufacturers, if you want to bring them in.

Q. Now the sales figures that you gave here included all of these for these outside accounts. For instance your rotary type figures in 1937 included the rotary burners for these outside companies?

A. Yes.

Q. Well those were the principal accounts; you say you had others?

A. Yes, we had some smaller accounts, Marshall Furnace Company of Marshall, Michigan.

Q. Was that gun type?

A. That was both; they used both rotary and gun.

Mr. Haycraft: That concludes the direct examination, Mr. Examiner.

Trial Examiner Sheppard: Cross-examination?

775 *Cross-Examination by Mr. Freeman.*

Q. Mr. O'Brien, you mentioned Quietheet as a competitor. You had other competitors during the same period of time that Quietheet was a competitor, is that right?

A. Oh many of them.

Q. Did you have the Aldrich Company of Wyoming, Illinois or Peoria, Illinois as a competitor?

A. Surely.

Q. And did you have any other competitors? Name some of the companies that you were out competing with.

A. Well we were out competing with practically all oil burner manufacturers in the country. There may be a few out on the Pacific Coast that didn't get into our bailiwick, but eighty per cent. of the oil burners that are sold in the United States were sold right in the territory that we were looking for sales in, and we hoped we were competitors with all of them.

Q. Well did you compete with Timken Company of Detroit?

A. Sure, sure.

Mr. Haycraft: Objected to as irrelevant and immaterial, and not proper cross-examination.

Trial Examiner Sheppard: I think we'll let him go on so we won't have to call him again.

Mr. Freeman: It isn't a question of calling him
776 again. I think when the Commission's attorney asked about who was a competitor and he names one, we certainly have a right to show there are other competitors, by this witness.

Q. How about Petroleum Heat and Power?

A. Yes.

Q. Gilbert and Barker?

A. Yes.

Q. Now how did your price of oil burners compare competitively with Petroleum Heat and Power, Timken, and Gilbert and Barker?

A. Well on the rotary burner, the prices were pretty much alike; they were quite uniform. There were only five or six manufacturers of rotary wall flame burners, and the prices were held quite uniform. On gun type burners they were all over the map. We had the cheap gun type burners, as we called them, that were down competitive with the pot type burner, and they went from there up to.

twice that. I mean the high price burner is twice the price of the low price burner. Well we were pretty much in the upper bracket. We would be classed in with Gilbert and Barker and Electro and Petroleum Heat and Power that you mentioned. We were in that group, and there's another group, the Aldrich group, including Quietheet and S.K. and—well a number of them. There were
777 probably ten or fifteen in that, what we call cheap class.

Q. Just give us say the range of prices for the gun type burner from the so-called cheap class to the so-called high price class.

A. Well of course you are covering a period of years here.

Q. Well give us—

A. (Interposing.) When there's quite a change of price.

Q. Well give us 1937 if you can.

A. Well in 1937 the pressure burners in our class were up around $75.00 or $76.00, and in the Lapidus, Aldrich class were down around $60.00.

Q. And that name, Lapidus, that is Quietheet, is it not?

A. Yes, it is Quietheet. It seems easier to refer to Lapidus because that is the way I have always known it.

Q. And these prices you are giving us, are given for the burners as you sell them, not installed?

A. Oh no, that is the burner to the dealer.

Q. To the dealer?

A. Yes.

Q. Now how about 1938 prices, the range?

A. Well I would say that this year is representative of the relative, comparative prices. We dropped in '38
778 and sold it then. They went clear down around fifty dollars, and we went down to sixty. Oh I think we went at one time as low as $62.50.

Q. Then over this period, say from say 1935 up to the end of 1941, the difference between high and low price burners was around $15.00.

A. Yes, I would say that, or a little more, probably between fifteen and twenty dollars was the difference between the burners that we liked to include in our class, and when I say that, I am not just picking a class out of the air, there is a group like Lapidus who make a burner

and say "there it is". They hold no responsibility for what happens to it afterward. I mean if the customer buys a Lapidus burner from somebody, and it doesn't function, Lapidus don't do a damn thing about it.

Mr. Haycraft: Mr. Examiner, is it understood that all of this is over my objection, because I am going to call Mr. Lapidus and he might have a different story, and I don't want to be bound by it.

The Witness: Inasmuch as you are going to call him, I will amplify that so there will be a basis for it. Companies in our class, Petroleum Company, and companies of that type have a field organization to take care of service of their burners, to know that the customer does get the performance that he has promised for him.
779 Now it is our belief that that has never been done by the low priced burners. I'd like to be shown if it ever has been, because that is the story our field men tell us of the kind of competition they have to buck.

Q. Now the testimony you are giving now in answer to the last few questions I have asked, is based upon your intimate knowledge of the oil burner industry, actual experience?

A. Oh actual experience, yes indeed.

Q. Now you mentioned the S. and K. or S. K. Company, do you know where they are located?

A. Camden, New Jersey.

Q. Is that a relatively large company or small company?

A. No, it is a small company, operated by two men and their families, I guess.

Q. And you had to meet that competition?

A. Yes.

Q. Or at least you met that competition?

A. Actually, yes. We have lost business and some of our good accounts to them.

Q. And you put the S. and K. when it comes to competition, in the same class as Aldrich and Lapidus, is that correct?

A. Well yes, I group them all; I think my own opinion is that the S. K. was a little better constructed burner.
780 I think it was a better burner. That is my opinion but insofar as the services that went with their burner are concerned, I don't think there was any difference. I

don't think that S. K. had any field organization that backed up their burner.

Q. And the selling price of the S. K. burner was about the same as the selling price of the Aldrich burner or the Lapidus burner, generally speaking?

A. Yes, generally speaking, pretty close, probably not quite as low as Lapidus went sometimes, but I think probably as low as Aldrich went.

Q. You recognize Lapidus or Quietheet today as a large producer of oil burners, and when I say "today", I mean prior to the war emergency of today?

A. Oh decidedly so.

Q. And I take it that you recognized the Aldrich Company likewise as a large manufacturer of oil burners in the years 1940 and 41?

A. Among the largest.

Trial Examiner Sheppard: Did he say the Lapidus were big people.

Mr. Freeman: Yes.

Q. Did you say that Aldrich was among the largest?

A. Yes, definitely.

Q. And ranged along in the same class as Quietheet?

781 Mr. Haycraft: Object to that; he didn't say that.

Mr. Freeman: Well I am asking that.

Trial Examiner Sheppard: Follow that up.

The Witness: I would say that Aldrich and Lapidus were definitely in the first ten. I'd say positively they were in the first ten, and I think probably in the first five.

By Mr. Freeman:

Q. Now you bought Minneapolis-Honeywell controls for your rotary burner in 1935, correct?

A. Yes.

Q. And you continued to buy Minneapolis-Honeywell controls for your rotary burner in 1936 and so on, is that correct?

A. Yes.

Q. Now you mentioned on direct examination that you would not put anybody else's controls, other than Minneapolis on a rotary burner, and Mr. Haycraft did not ask you why. I will.

A. Well I think I brought that in myself, that there was no suitable control on the market.

Mr. Haycraft: I didn't have to ask him; he told you.

By Mr. Freeman:

782 Q. You say there was no suitable control?

A. No control that we considered suitable for it.

Q. Did Mercoid make a control that you could have used on your rotary burner in 1935 and 36?

A. No, not one that we would accept, no.

Q. Did you ever talk to the Mercoid Corporation with respect to using its controls on your rotary burner?

A. Oh yes, indeed we did.

Q. They solicited that business, did they not?

A. They—

Q. (Interposing) The Mercoid Corporation?

A. Rotary business?

Q. Yes.

A. They didn't solicit because they didn't have a control. They asked us numerous times whether we would give them the rotary business if they had a suitable control, and we told them yes, we would, and they promised that they would have a control.

Q. That is, Mercoid promised they would have a control?

A. Yes, and they did bring out one in 1941; they brought out a control which I think is equally as good as Minneapolis.

Q. And with whom did you have the conversation about whether you would buy controls from Mercoid if they made one that would work on your rotary burner?

783 A. Well all the serious conversation I guess was with Jimmy Owens. I had some with "Doc" McCabe because he was the fellow that was supposed to bring the control out, and who had been telling me at various meetings where we came together in the oil burner conventions—

Q. (Interposing) That is Ira A. McCabe or Ira E. McCabe?

A. I don't know what his initials are, but I call him "Doc". He's the inventor, the head of the Mercoid Corporation.

Trial Examiner Sheppard: Yes.

Mr. Freeman: Head of the Research Department.

The Witness: He does all of that.

Trial Examiner Sheppard: Ira M.

The Witness: Oh Doc told me, oh I don't know, for five or six years, that he had it just at the end of his fingers,

all he'd have to do was reach a little bit further and he'd have it. But it never came. It got to be quite a joke with Jimmy. I felt very bad when Jimmy did come along; he came along afterwards we had gone all along with Minneapolis, because we had gotten them to make a special control for us for this quantity burner that we were bringing out, this model S, gun burner, burner-mounted control, instead of mounted in the stack, we built it right into
784 the burner at the factory.

Q. And who did you have make this special control for you, that was burner-mounted?

A. Minneapolis.

Q. I notice considerable correspondence here between W. J. Smith of your Company, and McGoldrick of Minneapolis-Honeywell Regulator Company. Will you tell us whether or not that correspondence relates to the special building of a burner-mounted control by Minneapolis-Honeywell for your company?

Mr. Haycraft: I'm going to object to that unless the correspondence is mentioned, because this speaks for itself.

Trial Examiner Sheppard: I'd like to know myself what all that correspondence is about.

Mr. Haycraft: We'll read it.

The Witness: That correspondence, if I might explain.

Trial Examiner Sheppard: Go ahead.

The Witness: That correspondence between McGoldrick and Mr. Smith definitely relates to that particular burner. That's how that correspondence took place between those two people. They were the two crackpots on one end, with the inventor of the burner on one end, and the inventor of the control on the other. That is, ordinarily the
785 correspondence would be carried on by myself, but Mr. Smith did all of the development work on this burner. It was his baby.

Trial Examiner Sheppard: He's your inventor, is he?

The Witness: Well he's the head of our—he's Vice President and head of our Company, but he's an inventor. At least he thinks he is, and he does a pretty good job at it too. He had this baby, this low-priced burner that he was going to knock these cheap burners in the head with. In other words we could go ahead and do all the things we had been doing, and still sell a burner at those prices and make a profit on it.

By Mr. Freeman:

Q. Now you said you or that he wanted to come out with a low-priced burner. Did you come out with a low-price burner?

A. Yes, and that was this stamp burner, Model S, steel stamp burner.

Q. Now—

A. (Interposing) With the control mounted right on it.

Q. And you got Minneapolis-Honeywell to build a special control for that burner?

A. Yes.

Q. And—

786 A. (Interposing) As near as I know I don't believe anybody else ever used that control. They hadn't during the year 1940.

Q. And that model S burner that you came on the market with, was to compete with what class of oil burner manufacturers?

A. Oh Marr, Lapidus, is that what you mean?

Q. Yes, price class.

A. Well the cheap gun type burner, and also the pot type burner. The pot type burner became quite a factor in the last few years.

Q. You referred to a model S oil burner made by your Company, and referred to it as a "stamp burner". I hand you a circular which we will ask the Reporter to mark for identification Respondent's Exhibit 6.

(The document referred to was marked Respondent's Exhibit No. 6 for identification.)

By Mr. Freeman:

Q. Showing you this paper, Respondent's Exhibit No. 6, I will ask you to merely look at it and tell us if that is the burner that you referred to when you stated the Model S burner was made as a cheap burner?

A. That's the burner.

Q. And can you tell us the price at which you sold your cheap burner, or Model S burner?

787 A. Well that price in 1939, 1940 was down around $62.50.

Trial Examiner Sheppard: When did it first come out, Mr. O'Brien?

The Witness: It came out in '39, I think.

Trial Examiner Sheppard: And that was the price then?

The Witness: It wasn't—just a minute, there were two prices in that year. We changed the price. It came out around $65.00 and then we reduced it to $62.50.

Mr. Freeman: We offer Respondent's Exhibit 6 in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: It may be accepted.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT No. 6 was received in evidence.)

The Witness: Instead of $65.00, it should be $67.50.

By Mr. Freeman:

Q. And then it was lowered in price later on?

A. To $62.50.

Q. What about the lowering of the price, if you recall?

A. Well I think the fact that our field men still
788 felt that to get any of this volume that was going to these low-priced burners, that we'd have to come down. You see they had reduced their prices way down in the low $50.00 bracket at that time, and our field men felt that we still were not low enough to get that volume of business.

Q. How low did you ultimately go with the Model S burner?

A. Well $62.50 was as low as we went in our regular sales. We had a few special deals.

Q. At what price?

A. Where that price went down to, well about $58.00.

Trial Examiner Sheppard: But there were still some other manufacturers of low-price burners under that price?

The Witness: Oh yes, many.

Trial Examiner Sheppard: All right.

The Witness: We had some deals where we sold on a discount from the dealer list price, jobber accounts, that we gave twenty off, and that brought the price down below the regular distributor price of $62.50.

By Mr. Freeman:

Q. Now when you lowered your price from $67.50 on down, did you buy controls any cheaper from Minneapolis-Honeywell on account of the new burner, or the lower
789 priced burner that you were then selling?

A. No, we did not.

Q. How were you able to lower your price, or how were you able to effect a savings in manufacture that permitted you to lower your price five, six, or seven dollars? Did the lowering of the price have to do with burner design?

A. No, no, originally, yes, very definitely so. The lowering of the price, I mean the $62.50 price was definitely because of the low cost of the burner itself. In other words, the—well the castings in a gun type burner alone cost twice as much as the completed burner here. I mean the burner body itself. To just buy the castings, and you have your machining and all that kind of thing.

Q. So that by burner design, that is burner construction, you were able to make a much cheaper burner?

A. Yes.

Q. And the controls for the Model S burner cost you substantially the same price as the higher price burner that you had sold prior to that time, those controls that you bought from Minneapolis-Honeywell.

A. Substantially. There was a reduction in the price, I think that year. I think the R 116 was brought down in 1939, wasn't it?

790 Q. That is from one bracket to the next?

A. No, I mean wasn't there a general reduction in price?

Q. Let me ask this question. Was there any reduction in price of controls of itself, to justify the seven or eight dollar difference in your selling price of oil burners?

A. No.

Q. Now you mentioned when you brought out that burner, that you were going to compete with gun type burners and pot type burners, is that correct?

A. Yes, all the burners that went into our field, probably eighty per cent, of burner sales, particularly our burners, are in the small, five, six, seven-room homes. Now pot type burners go into those places. I mean they are competitors for that business, just as well as the cheap type burner.

Q. I notice in connection with your type S burner that the capacity is from one gallon per hour to three gallons per hour.

A. Yes.

Q. And I take it that where oil is consumed at the rate of about a gallon an hour, that is for use in an ordinary small home?

A. Yes, I'd say probably more than fifty per cent.
791 of all oil burners are below a gallon and a quarter.

Q. And the pot type likewise burns about the same amount, a gallon or so an hour?

A. Yes, the pot type will do a pretty good job up to probably a gallon and a half or 1.65, some place around there they do a pretty good job, up to that.

Q. When you say "they do a pretty good job", you also mean, do you not, that you have to compete with them when it comes to selling an oil burner for use in a small home?

A. Sure we do. Their price is way below us.

Q. So that—

A. (Interposing) The volume of sales will convince you that there are those manufacturers who are able to make people believe that they are all right, and they work, and they go on selling them year after year.

Q. And they sell them in large quantities, do they not?

A. Yes, we say they are no good, but we can't get the world to believe us.

Q. Well you say they are "no good", because you want to sell your gun type burner?

A. Maybe.

Q. Now you mentioned Westinghouse, as having manufactured oil burners for that company, and you also
792 mentioned that you bought, that Westinghouse had bought controls or bought burners from the Marr Oil Burner—

Mr. Haycraft: I think you have got that mixed up.

The Witness: I didn't say that they had, but that the Marr burner competed with us. I don't quite understand.

By Mr. Freeman:

Q. Well let me ask you this question so that we get it straight. You sold oil burners to Westinghouse?

A. Yes.

Q. And you started selling them along in 1937?

A. Yes.

Q. Do you know from whom Westinghouse bought their oil burners prior to the time you began selling them?

A. Yes.

Q. What company?

A. Marr Oil Burner.

Q. And what type of oil burner was it that the Marr Company sold to Westinghouse?

A. That's a pot type.

Q. Then you went in and solicited Westinghouse's business for your gun type burner in 1937, correct?

A. Oh you can put it that way if you want to. I don't know whether we went in, or whether they came in, but
793 at any rate we tried to sell them our gun type burner.

Q. In 1937?

A. Yes.

Q. And was that to take the place of the pot type burner that Westinghouse had bought prior to that time from the Marr Oil Burner Company?

A. Yes, it was. There's a little distinction in companies there. The Westinghouse Electric and Manufacturing Company—

Q. (Interposing) Of Mansfield, Ohio?

A. Well they were Mansfield then, Springfield now, is the company that we sold the burners to. The Marr burner was sold to the Westinghouse Electric and Supply Company, what they call "Wesco". The Manufacturing Company never bought a burner until they bought ours, but the Supply Company, the distributing company sold the burner, handled it on a jobber basis.

Q. Well did the Supply Company after you began selling Westinghouse Electric and Manufacturing Company, continue to handle the Marr Oil Burner, or did they then continue to handle your gun type?

A. No, they gave up the Marr burner completely, and the Westinghouse Electric and Manufacturing Company took over the burner business completely. In other words
Wesco no longer handled it, a burner, except as a
794 distributor for Westinghouse Electric and Manufacturing Company.

Q. And as a distributor, that company then handled oil burners manufactured by your Company, and sold to Westinghouse Electric and Manufacturing Company?

A. That's right, that is where our competition came in there, when we got out to Wesco's distributors and dealers, we had the job of getting them to give up the Marr burner because, of course, Marr immediately went to all these accounts to try to get them to hang on to their burner, and—it being a lot cheaper than ours—we had a job. Some places we couldn't do it. For instance they had a good account in Washington, D. C., the Loughborough Oil Company. They had to take the account,

Westinghouse took the account away from them because they refused to go along on our burner, on the new Westinghouse burner.

Q. When you say you "had a job", does that mean you had a job out in the field?

A. Yes, a job out in the field to go and convince these distributors that they should pay fifteen or twenty dollars more for this new Westinghouse burner.

Q. Wesco is a jobbing subsidiary of the Westinghouse Electric and Manufacturing Company, is it not?

A. Yes, it is a wholly-owned subsidiary.

795 Q. So your company went out and called upon the dealer trade in order to get them to take on your burner in lieu of the pot type burner.

A. Well let me put it this way, I went out personally with the—

Q. Westinghouse people?

A. —Westinghouse people, to help them to do a sale; that Hildreth who was manager of the heating division asked me to go out and help him sell some of these fellows that couldn't see paying 15 or $20. more for the new Westinghouse burner. They were satisfied that the old pot type burner was doing a good enough job. In other words, they thought it was good enough. They could get more volume.

Trial Examiner Sheppard: I think I get the picture there, Mr. Freeman.

Mr. Freeman: All right, that's a good place to stop.

Trial Examiner Sheppard: We'll take an adjournment until 1:30. Mr. Reporter, you lock the door and get the key for us.

(Whereupon, at 12:35 noon, a recess was taken until 1:30 p. m., this day.)

796 Afternoon Session.

1:30 p.m.

Trial Examiner Sheppard: All right, gentlemen, on the record. Proceed with the cross-examination, Mr. Freeman.

J. L. O'BRIEN resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Freeman.

Q. You referred on your direct examination to some contracts with the Mercoid Corporation, is that correct?

A. Yes, I have contracts here.

Q. And you had a contract with Mercoid for the year 1936?

A. Yes, I believe so.

Q. And for 1937?

A. Yes.

Q. And is it a fact that you had contracts year in and year out, starting with about 1936 up to and including 1941, with the Mercoid Corporation, for controls?

A. Yes, I believe we had contracts with them back for a good many years prior to that.

Trial Examiner Sheppard: Those are all that we'd be interested in, from 1935 on is what we're interested in.

The Witness: Yes, we had contracts with them.

797 By Mr. Freeman:

Q. May I see that?

A. Yes.

(Handing paper to counsel.)

Mr. Freeman: Mark this Respondent's Exhibit 7.

(The paper referred to was marked Respondent's Exhibit 7 for identification.)

By Mr. Freeman:

Q. Showing you paper marked for identification Respondent's Exhibit 7, the pen and ink prices after "Primary Controls" and "Thermostats", referred to in that contract are those prices which Mr. James W. Owens referred to in the Commission's Exhibit 119?

A. Well he doesn't refer specifically to the prices here.

Q. Does he refer to the pen and ink prices on the contract as distinguished from those that appear in printed form? Please note the "P. S." on the letter.

A. Yes, he does.

Mr. Freeman: We offer in evidence this agreement, Respondent's Exhibit 7, the Mercoid Corporation agreement with Cleveland Steel Products Company, for the year of 1939.

Trial Examiner Sheppard: I thought that was 1937.

The Witness: This is 1939.

Trial Examiner Sheppard: All right. Any ob-
798 jection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: It may be accepted.

(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 7, was received in evidence.)

By Mr. Freeman:

Q. And just for the purpose of the record how many units are specified in the 1939 contract?

A. 15,000.

Trial Examiner Sheppard: What do you mean "units," thermostats and primary controls?

A. No, when they refer to units they refer to the separate pieces, three pieces in a complete set.

Trial Examiner Sheppard: That's what I mean, thermostat, primary control, and limit control.

The Witness: Each piece is a group.

Trial Examiner Sheppard: That's right.

By Mr. Freeman:

Q. So that 15,000 units, translated into sets would mean 5,000 sets?

A. That's right.

Q. And for the year 1940 you had an agreement with Mercoid calling for 15,000 units, is that correct?

A. That's correct.

799 Trial Examiner Sheppard: In other words, that's 5,000 sets too, is that correct?

The Witness: Yes.

By Mr. Freeman:

Q. I understand that you bought very few controls from Mercoid in 1938, is that correct?

A. Apparently we bought practically none. I only see two thermostats in that year.

Q. Whose control did you use as standard on the gun type burner in 1938?

A. Oh Mercoid.

Q. Even though you didn't buy any controls from them that year?

A. Yes.

Q. How do you explain that?

A. Well it must have been a carryover, we bought enough controls in the previous year to carry us through '38.

Q. I note in one of the proposed agreements with Mercoid the notation "Perfex, 1939."

Mr. Haycraft: Object to that unless it's in evidence. He is examining the witness about a lot of things that are in evidence.

Mr. Freeman: It's one of the agreements he referred to this morning on direct examination.

Mr. Haycraft: Put it in evidence.

800 Trial Examiner Sheppard: If it is in evidence—

Mr. Haycraft: It's not in evidence.

Mr. Freeman: We'll put it in evidence.

Mr. Haycraft: Put it in evidence before you examine him on it.

Mr. Freeman: Let me do it my way.

Mr. Haycraft: I don't like it, I'm objecting.

Trial Examiner Sheppard: Go on and mark it Respondent's Exhibit 8.

(The paper referred to was marked Respondent's Exhibit 8 for identification.)

Mr. Haycraft: Yes. May the witness be instructed not to answer unless it is in evidence.

Mr. Freeman: We offer it in evidence.

Trial Examiner Sheppard: I will accept it. It is in evidence.

(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 8, was received in evidence.)

By Mr. Freeman:

Q. Now go ahead and answer my question.

Trial Examiner Sheppard: Repeat the question.

(The reporter again read the question as follows:

"Q. I note in one of the proposed agreements with Mercoid the notation "Perfex, 1939").

801 A. You want to know what that notation means?

Q. Yes. What does that notation refer to?

A. Well it apparently refers to the prices quoted by Perfex on Perfex controls.

Q. Will you give us the prices quoted you by Perfex for the year 1939 in accordance with the notation appearing upon Respondent's Exhibit No. 8?

A. Thermostat $2.40, primary control $8.90, limit control $2.65, $13.95 for the set.

Q. Was Perfex soliciting your control business in the years 1936, 1937, and 1938?

A. I don't believe Perfex was soliciting our business back in 1936 and possibly not in '37. It was either in '37 or '38, I think that Perfex came out with their controls.

Q. And did they solicit your business?

A. Oh yes.

Q. And who called on you from that company?

A. Well we had field men call, I don't remember just who they were but in 1936 the President of the company, Mr. Julius Luthe, called on us personally.

Q. Did you buy any controls from the Mercoid, from the Perfex Corporation?

A. Yes we bought some; in fact we made a contract with them and I believe agreed to standardize on their controls.

802 We had a very favorable price and the test that we had made on their constant ignition controls, seemed quite satisfactory, I mean the tests we had made in our laboratory. So we made a contract with them and we bought some controls, I think possibly, oh not many more than a hundred, there may have been two hundred, but we ran into trouble in the field immediately and—

Q. What year was it that you were going to standardize on Perfex controls?

A. I think I have it here, the contract is here unless you have it. Well that would be in the year 1939, it was in 1938 that we had the negotiations, we bought some controls from them in '38 and it was in 1939 that we made the contract.

Q. Did you plan on standardizing on Perfex controls prior to the time that you standardized on Minneapolis-Honeywell controls for the gun type burner?

A. Prior to the time that we planned on standardizing?

Q. Prior to the time that you actually standardized on Minneapolis-Honeywell controls?

A. On the gun type burner?

Q. Yes.

A. Yes.

Q. So that in order to get this sequence of control companies straight, you first standardized on Mercoid controls, that is in about 1935 and 1936, correct, on the gun type
803 burner?

A. On the gun type burner, yes.

Q. And then you bought controls from Perfex and planned on standardizing Perfex controls?

A. Yes.

Q. Now why was it that you left Perfex and then standardized on Minneapolis-Honeywell controls?

A. Because of the trouble we had with the Perfex controls, we were quite sincere when we made the deal with Perfex and it was our intention to use those controls as standard. As a matter of fact, their control, if it had been satisfactory on one, would have been satisfactory on both. The trouble we had with it was apparent in both types, they had both an intermittent or rotary control and pressure type.

Q. So that when you left Mercoid you left Mercoid in favor of Perfex, correct?

A. On the gun type burner, yes.

Q. And you had trouble with Perfex and you then went to Minneapolis-Honeywell controls, correct, on the gun type burner?

A. Well we went to the Minneapolis, what you might call standard, the way we have been using that term, after we came out with our model S burner. Earlier in the year when we were using the Perfex controls we were using
804 them on our model G or model H burner, and when we left the Perfex there, we continued on with Mercoid until we switched over to Minneapolis when the model S burner came out.

Q. Well the reason for not continuing with Perfex was because of the troubles that you had in the field, is that correct?

A. Yes we had to. I think, as near as I know, there was one hundred per cent of them replaced in the field.

Q. And your controls that you purchased from Perfex were much cheaper than those that you bought from Minneapolis-Honeywell?

A. They were cheaper than any of them.

Mr. Haycraft: That we were—

The Witness: They were the cheapest control we bought, cheaper than Mercoid.

By Mr. Freeman:

Q. And you wanted to buy Perfex if they did the job because of the savings your company could effect?

A. Yes, and we had confidence in them. It was a new company and new control but the man who designed it, we had dealt with him for years, Mr. Cunningham was an engineer for Minneapolis Company and had designed the other controls, so we probably had a little more confidence than we would have had in somebody that we didn't know.

805 Q. And the price was right?

A. The price was low so we thought the control probably was all right.

Q. And when you did standardize on Minneapolis-Honeywell controls afterwards, you paid Minneapolis-Honeywell a higher price than you paid for the Mercoid controls, and likewise a higher price than you paid for Perfex controls, is that right?

A. Oh we have always paid more for Minneapolis controls.

Q. Well why does your company pay more for Minneapolis-Honeywell controls than it had to pay for other controls?

A. Well probably the easiest answer I can give you is to say that we have always sought to have one type of control to be used all the way through and Minneapolis was the only place that you could get one control that would handle all of our burners.

Q. When you say "one type of control," you mean satisfactory control?

A. Yes I mean one company that made a control suitable for each of our burners.

Q. And Mercoid didn't have a suitable control for your rotary burner?

A. That's right.

Q. Up until about 1941?

A. That's right. I think that Minneapolis would

806 have had a hard time getting in at that time if Mercoid had brought their control out a year before.

Q. Minneapolis-Honeywell does make a good control, does it not?

A. Yes I think they do. I might add to that that so do Mercoid.

Q. I notice in one of the agreements that you had with Minneapolis-Honeywell there is some reference to season's requirements, did that mean to you that you couldn't buy controls from any other company?

A. No I don't think so.

Trial Examiner Sheppard: Tell us what you think that meant?

The Witness: We used to make contracts that—way back some years ago, all our contracts were written that way. It simply meant that probably there was agent's agreements between the company and the salesman that we were going to use those controls and standard, as we have been using the term standard here. That is, that we would put those controls on our burners as the standard controls unless the buyer specified another make. We never have refused to furnish other standard makes of controls. I don't mean standard, I mean recognized makes of controls. For instance, such as Mercoid, or Penn, or Perfex. We would have furnished people, any of those controls, if
807 the customer insisted on them we'd furnish them.

Q. Your 1938 Minneapolis-Honeywell agreement referred to season's requirements, but as a matter of fact you standardized on Mercoid controls on the gun type burner that year, is that correct?

A. Yes, as far as we're concerned, the sense of that, the meaning of that was merely what we need from you, that's what it meant to us.

Q. So that I definitely understand that—

A. Here's what we'll pay for what we buy from you, what we need of your stuff this year.

Q. So that "season's requirements" meant to you and your company that you would buy Minneapolis-Honeywell controls from the Minneapolis-Honeywell Company?

A. At these prices.

Q. And that meant further, whatever controls you needed of Minneapolis-Honeywell manufacture, you'd buy from Minneapolis-Honeywell?

A. I don't quite—

Q. Let me ask that over again, whatever Minneapolis-Honeywell controls you required, you'd buy from the Minneapolis-Honeywell Company?

A. Surely.

Trial Examiner Sheppard: Here's what I want you to

answer for me, Mr. O'Brien, in a contract containing
808 those words, would you feel free to buy controls from other concerns?

The Witness: Quite, and feel that we were entirely living up to our understanding. That it was the perfectly proper thing to do. I don't think that Minneapolis ever kidded themselves or Mercoid either, that when we made a contract of that kind that they were getting all of our business to the exclusion of everything else, never.

Trial Examiner Sheppard: In other words, those words mean to you or rather don't mean to you that you bought a hundred per cent of your requirements from them?

The Witness: No.

Trial Examiner Sheppard: You felt free to go outside in the market if you wanted to and buy controls from Perfex or any of these other makes?

The Witness: We did, we felt free to, and we did.

Trial Examiner Sheppard: As a matter of fact, did you do that?

The Witness: We did, yes.

Trial Examiner Sheppard: What year did you do that?

The Witness: All years.

Trial Examiner Sheppard: Nothwithstanding the
809 fact that those words were in your contract with the Minneapolis-Honeywell?

The Witness: Yes, all years. The fact of the matter is that that's been my experience over a period of twenty years in the business, with the Silent Automatic Corporation in Detroit. They were one of the largest manufacturers in the business at that time. We made contracts like this but we never interpreted them any differently. We used Mercoid over there on a certain number of our burners, even at a time when we considered that Minneapolis was standard.

By Mr. Freeman:

Q. Do you know whether or not the Mercoid Corporation knew that if anyone ordered a burner with Mercoid controls on, that you would furnish that burner with Mercoid controls on it?

A. Do they know that?

Q. Did they know that?

A. Oh yes, they knew it and it's been confirmed. I have some letters here that confirmed that. I wrote to them and told them just that. They have reports different times.

from their field men to the effect that certain customers wanted to use their controls but Cleveland wouldn't give them to them and Jimmy Owens has written to us on that subject, and we have told him every time that there's
810 no such case, any time your customer wants Mercoid controls he can have them.

Q. You refer to some correspondence, do you have that here?

Mr. Haycraft: Object to it, Mr. Commissioner, and improper cross-examination.

Trial Examiner Sheppard: Mr. Freeman, I think the witness has made that plain enough, I'm not interested enough in the special correspondence on that.

Mr. Freeman: Well might I see the correspondence anyway?

Trial Examiner Sheppard: Yes you can look at it. I'm trying to keep the Exhibits down.

Mr. Freeman: I won't put it in, I'd like to see it.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Freeman: Mark this letter Respondent's Exhibit 9-A, and this letter as 9-B.

(The papers referred to were marked Respondent's Exhibits 9-A and 9-B for identification.)

Mr. Freeman: We offer these in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: Objected to as irrelevant and immaterial and not proper cross-examination.
811

Trial Examiner Sheppard: Well we'll let them go in for the information contained in them.

Mr. Freeman: Respondent's Exhibit 9-B is the letter from Mercoid dated December 8th, 1939, to J. L. O'Brien of the Cleveland Products Company, and Exhibit 9-A is the letter from J. L. O'Brien to J. W. Owens of the Mercoid Corporation dated December 14th, 1939.

(The papers referred to, heretofore marked for identification RESPONDENT'S EXHIBITS 9-A and 9-B, were received in evidence.)

By Mr. Freeman:

Q. You sold gun type burners to Westinghouse, and I now ask you whose controls did you use on those burners as standard?

A. Minneapolis.

Q. Did Westinghouse have anything to do with designating the particular control or controls to be used on the burners that it bought from you?

A. They indicated the controls they wanted.

Q. And whose controls did they indicate?

A. Minneapolis.

Q. Did you offer to sell Westinghouse oil burners with Mercoid controls on at less money than what you would sell oil burners to Westinghouse with Minneapolis-Honey-
812 well control on?

A. Yes we did.

Q. And Westinghouse still insisted on Minneapolis-Honeywell controls even though you were going to charge more for the burners?

A. Yes.

Q. And do you remember how much more you were going to charge Westinghouse for your oil burner equipped with Minneapolis-Honeywell controls?

A. Well I think that we agreed to handle either type of control or either make of control on the same basis and that was ten per cent markup on our cost. In other words, we would charge them ten per cent more in either case so that the cost to Minneapolis—I mean to Westinghouse, would be $3.00, or whatever the difference was that we paid, plus ten per cent.

Q. And in each case I understand Minneapolis-Honeywell's prices were higher?

A. Yes that's correct.

Trial Examiner Sheppard: Mr. O'Brien, you are doing war work now?

The Witness: Yes, a hundred per cent.

Trial Examiner Sheppard: Well that's the reason I have told these gentlemen that I'm letting certain matters come out with you now that would rightly come out on the
813 other side of the case, just so we won't have to bother you any more. I know how busy you are now.

The Witness: Yes, I appreciate that, now it would be a hardship to have to go again.

By Mr. Freeman:

Q. Do you happen to have the answer received from Minneapolis-Honeywell, in reply to the Commissioner's Exhibit 107-C or is that Commissioner's Exhibit 108, is that the answer?

A. Yes that's the answer. We had a little controversy,

a little understanding between John Pauling and Mr. Smith on price. This was a special control that they made for us as I told you, it was a burner-mounted control and they had to make a special case for it for us and we had the die for making that case, you see this is the transformer and this is the control (indicating).

Q. Referring to Respondent's Exhibit 6?

A. One side is the transformer, the other side is the control and we wanted to match that up for balance, symmetrical balance of the burner. So we made this cover for them and it was Mr. Smith's understanding that they were going to buy that from us and pay us for it but it was John Pauling's understanding that we were going to make it and pay for it ourselves. So Art Lockroe was the referee and he decided in favor of Mr. Pauling so we paid for it.

814 Q. So as a matter of fact, Minneapolis-Honeywell gave you no concession because of that particular part which your company made?

A. I wouldn't think so.

Q. Since the Perfex Company came into the control business have you been solicited regularly by that company? That is each year for your business?

A. No, they dropped us like a hot potato since this thing. Oh they came in a few times right shortly after we stopped buying from them, but since then they haven't, I don't think they have anything to sell us in fact.

Q. And have you been solicited regularly since you have been connected with Cleveland Steel Products Company by the Mercoid Corporation?

A. Oh, yes, they call on us regularly.

Q. And have you been solicited by the Penn Electric Switch Company for your control business?

A. Yes, they call on us, not very often. They don't push it very hard; they haven't got much to sell us either. They know we're not at all favorable to their particular design of control, and that I'm not particularly, and I think they feel the same way about Mr. Smith. It's courtesy calls, occasionally they come in.

Q. And you bought some limit controls from the Spencer Thermostat people, correct?

815 A. Yes, back some years ago, six or eight years ago we bought them from Spencer.

Q. And you likewise bought some limit controls from the Bishop and Babcock Company of Cleveland, correct?

A. Yes, bought lots of them.

Q. Did you say you bought a lot of them?

A. We bought a lot of them, this same smart salesmen that sold these last contracts, McGoldrick, he was in both places, he's a pretty good salesman I guess.

Q. Did you ever have Spencer thermostat solicit your business for thermostats?

A. Oh yes, yes, McGoldrick tried very, very hard to get us to use the thermostat, and we looked quite favorably on it too, eye appeal particularly, Mr. Smith is very long on the eye appeal, the artistic touch, and he felt that that thermostat, and we came pretty close to using it. I don't know just how it did get sidetracked but there was a time it looked as though we were going to use it.

Q. Were you faced with competition from the Timken people on its rotary burner wherein it used a constant level control?

A. Well they use a constant level control on all burners.

Q. Well in the form of a safety device?

A. Oh you're referring to the control with the constant level built right in?

Q. That's right.

816 A. The control burner mounted, the constant level valve the same as they use on the pot type burners.

Q. Yes.

A. Oh yes, sure.

Q. And in the Timken case, that particular oil level device was used to prevent the abnormal flow of oil when something went wrong with the burner, is that correct?

A. Yes.

Q. And used in substantially the same way as a primary control used on your gun type burner?

A. Yes, has a trip-bucket safety, if the oil isn't consumed, it comes back and operates a trip bucket.

Q. So that if no combustion occurs in both cases, the burner goes to safety?

A. Yes, that's right, yes.

Q. And did you have to compete with that type of device as made and sold by Timken?

A. Sure did.

Q. And what did you do to meet that kind of competition, did you do anything special? Did you ever consider using an oil level safety device yourself?

A. Yes.

Q. What did you actually do to meet that kind of competition?

A. Well when you say "what did we actually do," you mean what did we ever get into production and sell the field?

817 Q. Yes.

A. No, we never did, we worked on that type of control. The fact of the matter is, we're still working on it.

Q. Wasn't the S type of burner directed to help meet that kind of general competition?

A. Well now you're going back to the—you were talking about the—

Q. Gun type?

A. You were talking about the rotary wall flame previously. On the gun type burner we used a burner mounted control but it doesn't operate at all on the principle of the trip-bucket.

Q. Well sofar as—

A. It's the same principle as the old stack mounted control, I mean it's the same general principle of operation.

Q. But so far as providing heat, they operated substantially the same to produce heat?

Mr. Haycraft: Object to that, Mr. Examiner, as going too far afield. There are a lot of things furnish heat.

Trial Examiner Sheppard: I'll let you finish that answer but I don't want that pursued. I think it's sort of intangible and we're not interested in it. You complete your answer on that.

The Witness: The answer was yes.

818 Mr. Freeman: I think he said yes.

By Mr. Freeman:

Q. In your experience do you ever use a Minneapolis-Honeywell primary with someone else's thermostat?

A. Yes, I have seen it done with our equipment. We have also objected to it and it's never done with our consent. We won't ship that way.

Q. Why not?

A. Well we don't feel that the Minneapolis circuit should be mixed up with the other types of thermostat, the Minneapolis thermostat has a special cooperative coordinating function with primary control, whereas the other types of thermostats are just a make and break and

it doesn't fit in, doesn't coordinate with the Minneapolis series 10 circuit.

Q. Now do you consider the Minneapolis,Honeywell thermostat and Minneapolis-Honeywell primary as coordinating one with the other?

Mr. Haycraft: I'm objecting to all these things as leading questions, Mr. Examiner, it's entirely outside of the direct examination and has nothing to do with it, and if he's making him his witness that's objected to as leading. Let the witness do the testifying.

Trial Examiner Sheppard: Well they're leading questions, but as I told you in the beginning of this case
819 I don't always object to leading questions, you get a direct answer, so I don't mind that.

A. Did I consider that the thermostat had a coordinating function?

Q. With the primary control?

A. With the Minneapolis series?

Q. Yes.

A. Decidedly so.

Q. And in order to get functional operation of the Minneapolis-Honeywell primary, it is necessary to use Minneapolis-Honeywell thermostat, is that correct?

A. Yes, I believe so. In the hands of the average fellow in the field I don't think it's safe. A serviceman or an installer who has had good experience may hook them up and make them operate perfectly but when we sell stuff, when we match up controls and send it out of our place we have to figure that it's going to work in the hands of the dumbest fellow that's ever going to get it. If it works in the hands of the dumbest fellow then we know it's going to work all right for the other fellows sake.

Q. And you do that for safety's sake?

A. For safety, and to cut our own cost because it keeps backing up to us if we have trouble in the field, especially in the case of these dumb dealers, the service comes back in our laps.

820 Q. And when you connect up proper controls, proper thermostat with proper primary, the chances of being called upon to render service are reduced to a minimum, is that correct?

A. Yes, and there's another side to it, if we have trouble in the field we're mixing up controls, there may

be something wrong with the primary control, maybe something wrong with the thermostat, but if we went to Minneapolis or went to Mercoid or any of them and mixed up their controls, that's not our system, that's a system of our own. In other words, Minneapolis are not going to take responsibility for the proper operation of a control set that's split up in two or three pieces, neither are Mercoid. So we believe that aside—with the limit control I don't think so much of it because, as I said earlier today, that's merely a switch in the line, it's a safety switch in the line that makes and breaks the line. It hasn't any direct connection with the on and off operation of the burner, it simply says that if there's too much pressure, too much heat, then Mr. thermostat "you can't function. I'm going to cut you out for awhile." So we never were concerned about limit controls, but we have always been particular about—

Q. The thermostats and primaries?

A. Yes.

Trial Examiner Sheppard: That's the important 821 thing in the lineup.

The Witness: That's the very important thing, yes.

Trial Examiner Sheppard: All right, go ahead, Mr. Haycraft:

Redirect Examination by Mr. Haycraft.

Q. You have been asked a great many questions about the so-called pot type burner. A pot type burner does not utilize the temperature controls, such as you use on your gun type burner or your rotary type burners, does it?

A. Precisely the same.

Q. Well for instance, do you use a limit control?

A. Oh yes.

Q. Do you use a primary control?

A. Yes indeed.

Q. Well what is the difference then? You have testified that there was a difference, that they were not handled the same. What is the difference between the two in the control?

A. No difference.

Q. Between the pot type burner and your gun type burner?

A. Well now wait a minute. He was referring to a spe-

cial application of Timken but if you're referring now to pot types in general, as I understand it, we have talked
822 about pot types in general. Now the controls used with the general pot type burner such as the Marr that was specifically referred to, that's precisely the same control, adopted in exactly the same way, functions in exactly the same way.

Q. Well what's the difference then between the two controls, between the two burners; what is a pot type burner?

A. Well, a pot type burner is just what the name says, the burner in a pot, there's a cast iron pot and the flame goes down and burns out of that cast iron pot.

Trial Examiner Sheppard: I get the idea, it's a cheaper thing.

The Witness: Yes, yes it's a cheaper burner. There are different types of pot type burners. For instance, go back to the oldest burner, domestic burner, we have a no-coal pot type burner; now that's not at all like the pot type burner of the Marr. The no-coal pot type burner was in principle more like a gun type burner but it operated, in fact, like one of these nebulizers or atomizers.

By Mr. Haycraft:

Q. Well what is it that makes the—breaks the oil up and sprays it so it can burn in the pot type?

A. Well in the one case, if you go back to the no-coal—

Q. No, I'm talking about in your cross-examination—

823 Mr. Freeman (interposing): Modern type.

The Witness: Modern type? It's atomization—I mean vaporization by heat.

By Mr. Haycraft:

Q. Well where is the oil that's heated?

A. The hot—I mean the oil is dripped in to the pot and it starts—it's a regular smudgepot until it heats up and as it heats up it gasifies the oil so that there isn't enough oxygen down in that pot to burn down there any more and it lifts up and burns up off the top of the pot from vaporization.

Q. Well as I understand your testimony, the same protector relay, a Minneapolis-Honeywell protector relay is used in a pot type burner?

A. Precisely.

Q. And the same way with thermostat and limit control?

A. Precisely. The thermostat is up on the wall to turn on the burner and your relay is up in the stack to control the operation of that burner and your limit control is on the boiler or the heater to control the temperature and pressure just exactly the same.

Q. What is it that controls the oil that goes to the burner?

A. With the pot type burner.

Q. Yes. Solenoid valve like that which would be used on a rotary wall flame burner. When the thermostat
824 calls for heat it opens up this solenoid valve and allows the oil to drip in there by gravity, drips in to the floor of this pot. There's a little pilot in there and that lights this oil down on the floor of the pot and it burns with a smudgy smoky fire for a little while until it builds up enough temperature to gasify that oil, then you get what they call hydroxilation, you get a mixture that's too rich to burn down so it lifts up and burns off the top or from the top of the pot. It's vaporizing, that is the theory of it, it's vaporizing, the same principle as the other old hot plate burner where they drip the oil off on to a big plate and it heated the plate up. It's vaporization.

Q. What type of burner does the A. B. C. put out?

A. The A. B. C. build a high-speed rotary and a gun or pressure type. Their high-speed rotary differs from the wall flame type in that the speed of the head is so great that it breaks the oil down so that it leaves the lip of the cup in about the same state that the oil would be when it's pushed through a nozzle by pressure. In other words, if you start an A. B. C. burner up and you don't have any pilot to light it, you'd see that oil, instead of going out here and hitting the wall like it does with a wall flame, it will float, there will be a regular fog in the air. Well that burns right from the head. In other words, it's a sus-
pension flame again, the difference between a wall
825 flame and gun type is one is a suspension flame and the other is a gaseous flame.

Q. Now you were asked on cross-examination about these contracts that have the phrase "Seasonable requirements" that you had by seasonable requirements from Minneapolis-Honeywell controls other than from the manufacturers?

A. You couldn't buy them anywhere that I know of, at least we wouldn't.

Q. Well is there any place on the market that they are for sale?

A. Oh they have jobbers, I guess, if we wanted to go and pay a jobbers price for them I suppose we could buy them from a jobber but I don't know any reason why we'd do it.

Q. Cost you a lot more?

A. Cost us a lot more money. That doesn't necessarily mean that, it merely means that for our seasons requirements we're going to pay that much.

Q. Do you recall that in 1937 that the "seasons requirements" were stricken out and "a thousand sets" were inserted, do you know why?

A. I saw that and I haven't the slighest idea why it was changed unless it may have been along about that time that they started the bracket business, I wouldn't be sure about that.

Q. Well during 1939 and 1940 and 1941 you standardized on Minneapolis-Honeywell controls for all your burners, did you not? 826

A. Yes.

Q. Gun type and rotary type?

A. Yes we standardized on them.

Q. And during those three years did you buy Mercoid controls for any of your burners that were not specified by the dealer that he wanted Mercoid controls?

A. Did we use any?

Q. Yes, did you buy from Mercoid and install on your burners any Mercoid controls that were not specified by the purchasers?

A. Well that's rather an involved question. You say did we buy them?

Q. Well take out the "buy", did you use—

A. Yes I'd rather say use. We may have had them in stock and shipped out, I wouldn't think so unless it may have been that we were out of controls at sometime. But when we set up our standard burner, it's set up for specific controls on our sheets and we order out one G-60 burner for instance, that calls for certain equipment.

Q. Well the only way that you would use a Mercoid control after April, 1939, was to be where a dealer specified that?

A. Yes that's generally so.

Q. And the only time that you would buy a Mercoid
827 control would be to install it under the same situation, that is where a dealer requested it and you didn't have any other on hand?

A. Yes, your'e saying that was our practice?

Q. Yes.

A. There was nothing, no reason why we had to do that, but that's what we did, is that what you mean?

Q. I'm asking you what you did during those three years, 1939, 1940, and 1941.

A. Yes that's what we did, by choice we did.

Mr. Haycraft: That's all.

828 Trial Examiner Sheppard: Any recross examination?

Mr. Freeman: Yes.

Recross Examination by Mr. Freeman.

Q. Did Minneapolis-Honeywell in any way insist on your using, that is on your company using Minneapolis-Honeywell controls as standard?

A. Insist?

Q. Yes.

A. I'd like to know how they could insist on what we use standard. No, they never did. How could they insist on what we used?

Trial Examiner Sheppard: Don't ask the attorney questions, just answer his questions. You are here to answer his questions.

The Witness: All right. No, they did not.

By Mr. Freeman:

Q. And your choice of Minneapolis-Honeywell controls was of your own volition? That is you did that voluntarily?

A. Yes, yes, I should say so.

Mr. Freeman: That's all.

829 *Redirect Examination by Mr. Haycraft.*

Q. Did you know at the time that the price that Minneapolis-Honeywell made you in April 1939, when you standardized on Minneapolis-Honeywell controls, was lower than competitors buying in equal quantities could buy?

A. I don't know how I could compare them, because there wasn't anybody else buying the same controls. We were the only company that was buying that control from them. They didn't make the control for anybody else, so how could I compare them?

Q. You mean that control couldn't be used on any other burner?

A. No.

Q. How could you use a Mercoid on that burner then?

A. We didn't use a Mercoid on it; we never used anything but—when we started over, what we call standard again with the Minneapolis is when we came out with the Model S burner, and that's when they brought out the special control for us.

Q. Is that the only burner you made from that time on?

A. No, oh no.

Q. Well what percentage of your business was the Model S as compared with other types, rotary or gun type burners?

830 A. Oh it was way in the majority. The fact is—

Q. (Interposing) On those others?

A. The others were on their way out; when we made the Model S our intention was, and still is, to wipe out the other completely and to make just the one burner.

Q. Well could you use a Mercoid control on your Model S?

A. No.

Q. So that a customer couldn't get a Mercoid control on a Model S if he wanted it?

A. No; well no, I wouldn't say that; he could, he'd have to mount it himself, the same as they used to; he'd have to mount it up in the stack. There's nothing to prevent him from taking a Mercoid control and mounting it in the stack.

Q. Well let's see; what did you do; did you ever sell a Model S burner with a Mercoid control?

A. No, no.

Q. So that after April, 1939, the great bulk of your business was on Model S controls?

Mr. Freeman: Burners.

By Mr. Haycraft:

Q. Yes, burners, and equipped with Minneapolis-Honeywell controls?

A. That's right.

Q. You couldn't use a Perfex control on that burn-
831 er, could you?

A. No, no, that was designed for that particular application.

Q. Well on those burners that were not Model S one of your old G type burners, was it?

A. Yes.

Q. After April, 1939, did you continue to use Mercoid controls standard, or did you standardize on Minneapolis-Honeywell on those controls?

A. We standardized on Minneapolis; used them on everything.

Q. So that if the customer or dealer wanted a G type burner, he could; you would equip that Mercoid control?

A. Oh yes, sure.

Q. And if—

A. (Interposing) And as I said, we'd give him the other if he wanted to pay the price for it, we'd give it to him.

Q. What do you mean "wanted to pay the price"?

A. Well we have got the control, one control already on the burner, and if he wanted to use a Mercoid and put it up in the stack, this would be just excess baggage.

Q. He wouldn't need it, in other words?

A. No, it wouldn't have any function at all.

Q. Wouldn't be practical?

A. He'd just have to go around it, that's all.

832 Q. What price did you sell your old G type? Did you sell it at the same price as the Model S or higher price?

A. Oh higher price.

Q. What price did you get for your G type?

A. What year?

Q. 1939, 40, and 41?

A. 1939 I think the G was $72.50, wasn't it, or higher.

Q. Do you have anything you can refer to there?

A. No I haven't got any price list with me.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: Well of course there again you mean the sheet price which was $79.50. Well $72.50 is probably as close as we could come to the price.

By Mr. Haycraft:

Q. In 19— well do you have any figures or can you tell from the figures you have there, the percentage or the proportion of your sales in '39 that were the G type and the percentage which were the S type?

A. No I can't.

Q. Either '39, '40, or '41?

A. No, I can't, they are all together.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

833 Trial Examiner Sheppard: On the record. Mr. Haycraft, if you want that, you can have him look it up and give it to us.

Mr. Haycraft: Will you look that up and give it to us?

A. Yes, and G and H.

Trial Examiner Sheppard: You write me a letter Mr. O'Brien and I'll put it in the record as an exhibit, and either one of these gentlemen can use it.

Recross Examination by Mr. Freeman.

Q. I think maybe I can straighten it out. Mr. O'Brien, isn't it a fact that when you came out with your Model S burner, your Model G burner was then going to become obsolete?

A. That's right.

Q. So that then any overlap of the sales of the Model S with the Model G was only the ending of the Model G and the beginning of the Model S business?

A. Yes, that would be particularly true with Westinghouse. You see Westinghouse decided to go out of the oil burner business. They were using the Model G and there was some question in their mind as to whether they would switch over. They liked the Model G burner as to its performance. Dealers liked it, and they thought that 834 probably there'd be an advantage in their not having a burner that was a Chinese copy of ours; that every time somebody saw that, they said "that's a Toridheet," and so we may have continued, but as it worked out, they quit the business, so the Model G burner was definitely on the way out.

Q. And as the Model G went out with its price of around seventy or $72.00 and a half, you came on the market with a lower price burner, which is now illustrated in Respondent's Exhibit 6, your burner, Model S, is that correct?

A. Yes. That was definitely Mr. Smith's idea when we made this burner, that there wasn't any excuse for any other burner. This is the best burner we know how to build, so why build another one.

Q. And it was the cheapest burner you ever sold?

A. It's the cheapest burner we ever made before, and it is the best burner, and he didn't want to have the thing standing out as a cheap model of Toridheet. It was the best Toridheet there is.

Q. And it became your standard burner?

A. That's right.

Q. All right.

Trial Examiner Sheppard: And that is on the increase, as I understand it, and the Model G is on the decrease?

The Witness: G is out. We won't build any more
835 Model G until we get rid of the G's we have in stock.

Mr. Freeman: I wonder if you still want that letter with this explanation?

Mr. Haycraft: I do, yes.

Trial Examiner Sheppard: All right, then send it to me.

Mr. Freeman: When you put it in, put it in in our presence so we have the right to object to it.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record. Mr. O'Brien, I want to state to you that the Exhibits that Mr. Haycraft has introduced into the record today, which are your originals, he will have them photostated and returned to you, the originals which he has used this morning.

The Witness: All right.

Trial Examiner Sheppard: All right; thank you very much for coming out.

Mr. Gilpatric: The Respondent would like to have two photostatic copies of each of the exhibits to which the Examiner has made reference, and the exhibits offered by the Respondent, except Respondent's Exhibit 6, as introduced today.

Trial Examiner Sheppard: Off the record.

836 (Discussion off the record.)

Trial Examiner Sheppard: On the record. Gentlemen, just come to order a minute.

Mr. Haycraft: That concludes the taking of the testimony in Cleveland, Mr. Examiner, and I ask that we take an adjournment to convene in New York City on the 16th at 10 A. M.

Trial Examiner Sheppard: All right. In view of what Mr. Haycraft says, the Examiner thought we were going to have another witness here, but if not, okay, and we will adjourn to meet in Room 500, 45 Broadway, New York City, September 16th, 1943, at 10 o'clock in the morning. We stand adjourned.

(Whereupon, at 2:50 o'clock p. m. of Tuesday, September 14, 1943, the hearing in the above-entitled matter was adjourned.)

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Room 505,
45 Broadway,
New York, N. Y.,
Thursday, September 16, 1943.

Met, pursuant to adjournment at 10:00 a. m. E. W. T.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and B. R. Shute, Esq., 15 Broad Street, New York, N. Y., and Bair & Freeman, by Will Freeman, Esq., 135 South LaSalle Street, Chicago, Illinois, appearing for the Respondent.

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Proceedings.

Trial Examiner Sheppard: We will convene the hearing in the Minneapolis-Honeywell Case, Docket No. 4920.

Let the record show the appearances of counsel for the Federal Trade Commission and for the Respondent.

Mr. Haycraft: I will call Mr. Max.

CHARLES A. MAX was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Trial Examiner Sheppard: Give me your name, please, Mr. Max.

The Witness: Charles A. Max.

Trial Examiner Sheppard: And your address?
The Witness: 54 Webster Street, Irvington, N. J.
Trial Examiner Sheppard: All right, Mr. Haycraft.

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Max?
A. Petroleum distributor and oil burner installation work.
Q. How long have you been in that business?
A. 13 years.
Q. Where do you conduct your business?
A. 178 Coyt Street, Irvington.
Q. And before that you were in Newark?
839 A. That is right, Jellief Avenue, Newark.
Q. How far do you do business? Where are your customers?
A. Mainly in Essex County, Hudson County and the immediate counties surrounding Essex and Hudson.
Mr. Freeman: What state?
The Witness: New Jersey.

By Mr. Haycraft:

Q. How long have you been handling oil burners?
A. A matter of seven or eight years.
Q. And when you first started to handle oil burners what make of oil burners did you handle?
A. The Herco Burner.
Q. Where was that manufactured?
A. In Lancaster, Pa.
Q. What is the name of the company that manufactured it?
A. The Herco Company.
Q. Did the burners that you bought at that time come equipped with temperature controls as a part of the equipment of the burner?
A. It came equipped with three controls.
Q. What were the controls?
A. The relay, thermostat and pressure control.
Q. The relay you refer to is the relay sometimes known as a primary control?
A. I think you can refer to it as that.
840 Q. And the pressure control?
A. Pressure control and rheostat.
Q. Is that known as the limit control?

A. I don't know what you call it.
Q. What you call it is a pressure control?
A. Pressure control.
Q. Where was it attached? What function did it perform?
A. To regulate the pressure of the burner. When the pressure hit what the burner was set for the pressure was cut off, otherwise the thing would climb up indefinitely.
Q. The relay control where was it attached to the burner?
A. Usually on the stack, smokepipe.
Q. And the thermostat in the room?
A. That is right.
Q. Did you install those burners with furnaces?
A. Yes, sir.
Q. What make or what manufacture of temperature controls were attached to the burners which you bought from the Herco Company?
A. Minneapolis Honeywell was what I always called for.
Q. And you always got what you asked for?
A. I always got what I asked for.
Q. Did they sell any other types?
Mr. Freeman: To whom do you refer to when you say they?
841 Mr. Haycraft: The Herco.
A. Yes, they did.
Q. What other type did they handle?
A. They handled the Mercoid.
Q. You could have either one but you preferred the Minneapolis Honeywell?
A. That is right.
Q. How long did you buy burners and temperature controls from the Herco Company?
A. A couple years, two years.
Q. Do you remember what price you paid for the burners equipped with the controls?
A. It was around $71 or $72 and then there is a freight item of about $3.00 etc. on a burner, which brought it up around $75.
Q. Then you started to buy from Quiet Heet Mfg. Co. Do you remember when it was that you started to buy from Quiet Heet Manufacturing Company?
A. About five years ago.
Q. That would be about 1936? About then?
A. 1938, 1939.

Q. Do you remember what you paid for the Quiet Heet oil burner equipped with Minneapolis-Honeywell Temperature Control?

A. I would say approximately $65.00.

842 Q. Did you buy them for any less since that period of time from 1939 or 1938?

A. Buy them for any less than that?

Q. In the Quiet Heet?

A. About that price, probably about that price.

Q. Would that include standard temperature controls?

A. The same controls, the same three controls.

Mr. Haycraft: Will you mark these for identification?

(The documents referred to were marked Commission's Exhibits 120, 121, 122, and 123 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 120 for identification which purports to be an original invoice of the Quiet-Heet Mfg. Corp., dated January 30, 1942, to the Power-Oil Refining Company, and ask if you identify that as an invoice of a Quiet-Heet oil burner?

A. Yes.

Mr. Gilpatric: We concede that as to its authenticity.

A. (Continued) This is a receipt of the Quiet Heet Oil Burner.

Q. I show you Commission's Exhibit 121, which purports to be an invoice of the Quiet-Heet Mfg. Corp., dated August 6, 1942, and ask if that covers the purchase of

843 two Quiet-Heet oil burners?

A. Yes.

Q. I show you Commission's Exhibit 122 for identification purporting to be an invoice of the Quiet-Heet Mfg. Corp., dated September 8, 1942, covering 3 T111's and ask you whether or not that is an invoice for three clock thermostats?

A. That is right.

Q. I show you Commission's Exhibit 123 for identification purporting to be an invoice of the Quiet-Heet Mfg. Corp., dated October 7, 1942, which contains two items of T111, and ask you whether or not that is an invoice of two clock thermostats?

A. That is right.

Mr. Haycraft: I offer these invoices in evidence.

Trial Examiner Sheppard: Is there any objection?

Mr. Gilpatric: No objection.

Trial Examiner Sheppard: Let Exhibits 120 to 123 inclusive be accepted.

(The documents referred to heretofore marked for identification COMMISSION'S EXHIBITS 120, 121, 122 and 123, were received in evidence.)

By Mr. Haycraft:

Q. Now referring to Commission's Exhibit 120, I notice that the item is "G" with a number following, "pump
844 1 R117, 1 T 111, 1 P 404, and 1 C 402". Can you tell us what those various items are?

A. Well that was one of the biggest jobs that Quiet-Heet made and the 117 is the relay, the T111 is the chronotherm, and the 404 is the pressuretrol, and the 402 was the low water cut off, I believe, if I am not mistaken.

Q. What was the price of the burner separate from the control, do you recall?

A. Well, that is all one. They have a fixed price now of $146.

Q. You don't know how to break that down?

A. No, I would not know.

Q. Commission's Exhibit 121 calls for two items of BD, then some figure after it, a pump and 2 R117, 2T 111, and 2 P404, and the price is $65.15. Will you describe the equipment on the burner and the type of burner?

A. Well there are two burners there.

Q. What type of burner were they? Were they large, small or what?

A. They would be the smaller size probably with a special motor on, a special pump on there and 2 117 relays and 2 111 thermostats and 2 pressuretrols.

Q. What was the special pump which you had on there?

A. I usually get a two-stage instead of one-stage. I think there was a dollar or two dollar charge on it more. It is a little stronger pump.

845 Q. Now referring to Commission's Exhibit 122, that calls for three T 111. That is the clock thermostat?

A. That is right.

Q. And the price is $43.95, is that what you paid for the three?

A. Yes.

Q. And the same on Commission's Exhibit 123, there are two T111 and the rate there is $19.50 or a total of $39.00, is that correct?

A. Correct.

Q. These invoices are for 1942. About how many burners did you handle in previous years, say beginning with 1938-9?

A. I used to average about 40 or 50 a year.

Q. And that was about what you were averaging when you were buying from Herco also?

A. Yes.

Q. Did you go to the Quiet-Heet plant and get the burners and the controls, or did they deliver them to you?

A. No, we picked everything up at the Quiet-Heet plant. It was convenient.

Q. What sort of service did you get from the Quiet-Heet Mfg. Company on them?

A. We did not require any service. We bought and paid for burners and that was the end of the deal, but if there is ever any question of a control not being right, Min-
846 neapolis made good for their controls for a period of a year, and if there was any question on the burner itself Quiet-Heet would always make good for it.

Q. What other parts did the burner have besides controls?

A. It had a Webster pump on it, or a pump on it, or transformer on it, and those could, would—

Q. Who made the adjustments on them?

A. Either Quiet-Heet would make good for the pump or I would take it over to Certified Fuel. They are an agent for the Webster people and they corrected it there. It was within the first year.

Q. How about the transformer?

A. The transformer, I never had one go bad, so I would never know.

Q. Do you know who made them?

A. Jefferson or Webster.

Q. Was that Quiet-Heet burner an assembly job as it is known?

A. An assembled job.

Trial Examiner Sheppard: Just what do you mean by "assembly"?

The Witness: In other words, the parts were bought from other companies. I think the only thing belonging to the Quiet-Heet was the housings, the casing.

Trial Examiner Sheppard: You say you bought the thermostat from one concern?

847 The Witness: All controls are Minneapolis controls.

Trial Examiner Sheppard: All controls are Minneapolis controls?

The Witness: Yes.

By Mr. Haycraft:

Q. And they came with the burner?

A. They came with the burner.

Trial Examiner Sheppard: I see.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Gilpatric.

Q. Why did you prefer the Minneapolis controls to Mercoid controls when you were buying burners from Herco?

A. Why? Somehow I always liked Minneapolis. I don't know why, but in doing business with the Minneapolis Control Company I could always call upon their field man, Mr. Jensen. He always came out and assisted me in getting the proper controls for jobs if I ever had any trouble on a job there. My service men and other service men could not find the trouble if it was one of the controls. Mr. Jensen would come out and somehow in jig time he always remedied the condition, so I always favored Minneapolis. Also for servicing parts they were convenient. I would mail a package over in New York and in several days had the control back.

848 If the control was bought within a year they always sent another control and made good for it. They were very reliable and I always favored them for this reason.

Q. Had you ever had experience in other burners equipped with other controls?

A. I never take them.

Q. You spoke of a clock thermostat with which some of your burners, that is, Quiet-Heet's, became equipped with. The clock part is not a standard item, is it?

A. That is part of the chronotherm.

Q. You pay extra for the clock on the thermostat?

A. The clock is part of the thermostat. They call that the chronotherm.

Q. But you paid more for that than you did for the ordinary thermostat?

A. Yes.

Q. That clock is an additional feature of convenience for the users, is it not?

A. Right.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

You call yourself a dealer, don't you?

The Witness: Yes, sir.

By Mr. Gilpatric:

849 Q. Just to clear up this point that Mr. Peters has mentioned to me off the record, the standard form of thermostat was a T11?

A. It was a chronotherm or T11.

Q. And the other item, the chronotherm was not the standard type; you could order that if you wanted that?

A. That is right.

Q. Mr. Max, why did you shift in purchasing oil burners from Herco to Quiet-Heet in 1938 or '39?

A. About that time they had a strike. The truckmen had a strike. All the parts from Herco were brought in by truck and it was in the fall of the year I needed some controls. I chased out once. It is a matter of about a return trip of 250 miles. I brought in six controls.

The strike lasted for several weeks and I realized the inconvenience of going out of town for burners. I realized Quiet-Heet was local and any time I needed anything I could go right down there. So I decided I would change. It was like a stockroom, Quiet-Heet. You can go down there to get anything at any time, to get anything you needed.

Mr. Gilpatric: That is all.

Redirect Examination by Mr. Haycraft.

Q. You could get a lower price?

A. I was not so much concerned with that.

850 Q. Answer my question?

A. The price on the burner was lower, yes.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Thank you, Mr. Max.

(Witness excused.)

Trial Examiner Sheppard: Show a recess for ten minutes, Mr. Reporter.

(A ten-minute recess was taken.)

Trial Examiner Sheppard: On the record.

Mr. Haycraft: I will call Mr. Peters.

SAMUEL LOUIS PETERS was thereupon called as a witness for the Commission and, having been first duly sworn testified as follows:

Trial Examiner Sheppard: The witness's name is Samuel Louis Peters, 135 New Jersey Railroad Avenue, Newark, N. J.

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Peters?
A. Manufacturer of oil burners.
Q. How long have you been engaged in the manufacture of oil burners?
A. Since 1936.
Q. What name do you give to your burner?
851 A. Quiet-Heet.
Q. Before that what did you do?
A. I was an oil burner dealer and refrigeration dealer.
Q. Located where?
A. I was located in Newark for about a year and one-half to two years prior to 1936 and in Baltimore, Maryland, for about four or five years prior to that.
Q. Engaged in that same business in Baltimore?
A. Engaged in the same business.
Q. What line of oil burners did you handle when you were a dealer?
A. Williams Oilomatic, Carter Korth, but our business then was predominantly refrigeration. Oil burners played a small part.
Q. This Quiet-Heet name was it one that originated with you in 1936 or was it one that was used before?
A. No, I originated it.
Q. When you first engaged in the business of manufacturing oil burners did you manufacture them yourself or did you have them manufactured for you by someone else?
A. Well, for a short while I purchased oil burners that carried my label from other manufacturers.
Q. And from whom did you purchase them?
A. They called themselves the Korth Oil Burner Corporation, and in fact there were others; Mohawk Oil
852 Burner I think was the other name.
That was before I became a manufacturer.
Q. In other words, they manufactured them for you?

A. That is right.

Q. Was that in 1935 or 1936?

A. It would be around that time, prior to 1936 I believe.

Q. In manufacturing your oil burner, Quiet-Heet, what are the various parts that go into it to make up an oil burner and where do you get them?

A. Well, there are pumps that we purchase from either Webster, Sunstrand, Tuttle. Fred Tuttle is another name, and there are various other makes. Then the motors, those we get either from G. E., Westinghouse, Delco, Wagner, a number of other manufacturers. I have so many that it is too numerous to mention.

The transformers we get from Webster, Super or other sources and the automatic controls from the Minneapolis-Honeywell, or Mercoid. We use very few of any other make.

Q. When you first started out in 1936 what controls did you put on your oil burners?

A. The first purchase that I made was from Mercoid, a very small quantity. I think it was about a dozen sets or so, and I followed it very shortly thereafter by a purchase from Minneapolis-Honeywell of about an equal amount.

Q. Did you standardize on either one of those?

853 A. No, we never did.

Q. During, say the year 1937, from whom did you purchase most of the controls that you put on your burners?

A. Minneapolis-Honeywell.

Q. How many burners did you manufacture and sell during that year 1937?

A. I think the figure was 7500.

Q. That is your recollection?

A. That is my recollection.

Q. How many did you manufacture and sell in 1938?

A. About 10,000.

Q. 1939?

A. 15,000.

Mr. Freeman: 15,000?

The Witness: Yes.

Q. 1940?

A. About 24,000.

Q. 1941?

A. About 25,000.

Q. At the time that you started buying Mercoid controls and from Minneapolis-Honeywell, was there any difference in the price of temperature controls?

A. Very little.

Q. Do you have any invoices for those earlier years that you referred to that will give us the exact prices?

854 A. I have all the invoices but not with me. I have the last several years with me.

Q. What is the earliest year that you have?

A. I have 1941 and 1942 here.

Q. Well, what were you paying for thermostats, limit controls and primary controls purchased from Mercoid in 1941?

A. I have to refer to the invoices.

Q. Will you refer to them?

A. Here is a file of typical prices. I will vouch for the contents of those. They are exactly—

Mr. Freeman: Mr. Peters, you have no objection to our likewise looking at the files?

The Witness: Not in the slightest.

Mr. Freeman: At these documents you just handed the Commission's attorney?

The Witness: No.

Mr. Haycraft: You had better get your 1942 out for Mercoid.

The Witness: 1942 Mercoid, yes. (Witness examines a box of papers.) You don't have the '42 in there, Mr. Haycraft, do you? I don't see them here.

Mr. Haycraft: That may be in here. We have not looked through all of them.

By Mr. Haycraft:

Q. I will ask you to refresh your recollection from 855 these invoices which you produced here, and testify as to the prices paid for the various items that you purchased and put on your burners, describing the items and their use, as you go along.

Trial Examiner Sheppard: Take them up one at a time.

A. Yes.

Q. What month is that?

A. I have an invoice dated January 10, 1941, numbered 1948, that refers to 25 JM Pyratherms, 115 volts, 60 cycle, each at $7.75, total amount $193.75; 27 Type H Sensatherms, range 55-85 degrees, $2.50 each.

Q. That is a thermostat, is it not?

A. That is a thermostat.

Q. The first one you mentioned, the Pyratherm, is the primary control?

A. Right.

Q. Go ahead.

A. 5 DA 31 Steam Controls, range No. 1 0-14 pounds, $2.75 each, total $13.75; 20 M 51 Warm Air Controls, range 50-500, degree limit, $3.25, $65 total; total amount of invoice $340.

So far as I know this is exactly the price we paid for this and this invoice is correct.

Q. And the DA 31 and M51 are limit controls, two different types of limit controls?

856 A. Yes.

Q. What is the DA 31?

A. The DA 31 is marked "Steam Control" so obviously it is a steam limit control, and the M 51 is marked "Warm Air Control", so it is a warm air control.

Q. Will you glance through the other invoices and see if there are any changes for the various items or other items?

A. There are other items.

Q. Just hit the other items. If the same price prevailed throughout the year there is no use repeating it. If there is any change in the price or other items, just indicate it?

A. Here is an item marked M 80 Com. F and L control, range 50 to 300 degree, with summer switch and flat flange 61-85. Those were $14.70 a set. This appears on the invoice—

Q. What is included in the set?

A. Well, I think they are controls as a set. Oh, there is on here a flange for mounting it, just mounting attachments.

Q. I see.

A. Mounting attachments come with every control.

Q. Go ahead.

A. The invoice is No. 21209 and the date is July 16, 1941.

Q. Those are the prices for Mercoid. Will you refer to your invoices with Minneapolis-Honeywell during 1941 for comparable controls?

Trial Examiner Sheppard: I suppose the record 857 shows that those are Mercoid?

Mr. Haycraft: Those are Mercoid, and they were in large quantities; there were 25, etc., as he indicated.

Trial Examiner Sheppard: All right.

A. Here is an invoice from the Minneapolis-Honeywell, No. 20747-1, dated 5/13/41, showing the following prices: R 132, A 1K relays, $455; T44, $270; T45, $270; T42, $425; D11, $9.25; T109, $6.35.

Q. You have not indicated what these various things are? What is that 1 T 109?

A. If you wish it, T indicates thermostats, the letter "L" indicates limit controls and the "R's" indicate primary controls.

Q. Relays are the same as primary controls?

A. That is right.

Q. R 132 that you just mentioned in there, is that a primary control?

A. It is a primary but only half a primary. You have got to get something to add to it to make a whole control out of it. LA 401, $5.25.

Q. That is a limit control?

A. Yes; L 147A-1, $6.95; L428, $5.85.

Trial Examiner Sheppard: Those are all in 1941?

The Witness: The date was 1941.

By Mr. Haycraft:

Q. See if there are any other items or changes of 858 price during the year?

A. This is invoice 22414, dated 4/23/41. L 408, $5.50; RA 117, $8.55.

Q. R 117?

A. RA 117; R 19, $3.80; R 132, $4.55; T 11, $2.70; T 44, $2.70; T 45, $2.70, T109, $6.35, P 404, $4.50.

I think these prices are typical. I might find an isolated price of some odd control.

Q. I notice you did not mention R 116. Did you buy any of them?

A. If we did I would have to go through all the invoices to find one of them.

Q. Do you have a copy of your contract here with you to see what your price would be?

A. Yes. What is that, '41?

Q. 1941.

A. Yes, $8.60; RA 116 protectorelay.

Q. That is five cents more than RA 117, is that right?

A. Yes.

Q. Will you indicate which one of the Mercoid controls

was comparable to the Minneapolis-Honeywell and used for the same purpose?

A. The RA 117 in Minneapolis-Honeywell and the JM Pyratherm in the Mercoid are both used for the same purpose, as a primary control.

859 The type H Sensatherm in Mercoid and the T111 Acratherm the T11 I mean, in Minneapolis-Honeywell are both thermostats that are used for practically the same purpose.

The P404 Pressuretrol of Minneapolis and the DA 31 Steam Controls in Mercoid are used for the same purpose.

This of course is a rough explanation because the electrical circuits on both sets of controls are different and their method of operation is different, but they serve the same purpose after the oil burner is installed.

Q. Do you have anything in the Minneapolis line that corresponds with the M 51?

A. Yes.

Q. What is it?

A. The M 51, that is their hot air control or hot water—

Q. Hot air?

A. Yes. The L-419 airstat in Minneapolis corresponds to M 51.

Q. Does Minneapolis have anything to correspond with M 80?

A. What is that?

Mr. Freeman: That is a combination limit switch.

A. (Continued) I don't remember Minneapolis' number on that. Did you call that a combination fan limit switch?

Mr. Freeman: Yes, Combination Fan Limit Switch.

A. (Continued) LA 401 in Minneapolis corresponds to M 80.

Q. What is the price of LA 401?

860 A. The price of the 401 is $5.25.

Q. In that M 80 set can you tell what is the price of the M 80, that is the switch and fan control? Combined you have $14.70 for the set. What is the separate price for the switch?

A. That corresponds to Minneapolis 401. From this invoice I can't tell but if I could find another invoice where they billed them separately, I then could tell. M 80, $4.75 each.

Q. The price of the M 80 switch and fan control, which

is comparable to Minneapolis LA 401 is priced at $4.70, is that right?

A. That is right, $4.75.

Q. Now I want to check again on M 51. The Mercoid 51 you have testified is $3.25 whereas the Minneapolis-Honeywell is $2.50 for the 419, is that right?

A. That is right, if that is what I testified to. It is right.

Q. What would be the comparable set price of your typical installation of a thermostat limit control and limit control on your oil burner, one purchased from Mercoid and the other from Minneapolis Honeywell?

A. I have to add it up, or the total of the three controls that I gave you.

Mr. Gilpatric: There are some invoices there.

Mr. Haycraft: I know there are various installations.

861 By Mr. Haycraft:

Q. Take your steam control, DA 1, or take one M 51 with the 409?

A. According to the Minneapolis-Honeywell Regulator contract dated December 15, 1941, the Acratherm is priced at $2.95.

Q. Those prices are for 1941. I want them for 1942.

A. As I said, that is for 1942.

Q. I want them comparable. Give us the 1941? I meant for the 1941.

A. Then this 1940 contract is for 1941. According to the Minneapolis-Honeywell Regulator contract dated December 10, 1940 and applying to 1941, the Acratherm is priced at $2.70; the Protectorelay at 8.55, and the Pressuretrol at $2.50, making a total of $13.75 for a set of controls.

Mercoid controls, according to invoice No. 6778, are priced at $7.75 for the Pyratherm; $2.70 for the Sensatherm. Those prices together were the price of their DA 31 steam control, which is $3.25, and totals—

Q. That is not the price you gave us before.

Mr. Freeman: The DA 31 was $2.75.

A. Oh, I am sorry. I got the wrong price. I looked at the wrong lines—$2.75—I looked at the M 51 here—as compared with the Mercoid price of $13.00.

Q. Will you make the same comparison using the hot air limit control instead of the steam?

862 A. How about me putting—

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

A. The Minneapolis-Honeywell Airstat 419B was $3.00. The Mercoid control for a similar application, called their M 51 Warm Air Control, was $3.25.

Q. So that would make comparable sets using $13.50 for the Mercoid and $14.25 for the Minneapolis-Honeywell?

A. That is correct.

Q. In your testimony a while ago you said that the L 419 was comparable to the M 51 of Mercoid? Do you want to correct that now and say that that was the long airstat T 419B? Is there a letter to it?

A. Yes, I guess I had better. You see the Mercoid line did not have comparable controls to the Minneapolis-Honeywell line all the way through.

Q. I know, but you did have 419B or long 419, which would correspond to Mercoid M 51?

A. That is true, but I did not recollect that at the time I said it.

Q. When did you first sign an agreement with the Minneapolis-Honeywell Regulator Company?

A. I would have to look up the date of the agreement in order to be able to tell. Unless I find the agreement
863 or Minneapolis-Honeywell will refresh my memory, I do not offhand remember what the first contract was, but I think it was some time in 1937.

Mr. Shute: January 1936.

By Mr. Haycraft:

Q. January 1936?

A. That was the date. Then you will accept that?

Mr. Freeman: We have not got the contract.

The Witness: I will accept that as probably so.

By Mr. Haycraft:

Q. And you have got a signed agreement or have you a signed agreement with them each year after that?

A. Yes, I have.

Q. And during that period of time have you also bought controls from the Mercoid Corporation?

A. That is correct.

Q. I show you Commission's Exhibit 3, which purports to be a photostatic copy of an agreement between Quiet-

Heet Mfg. Co. and Minneapolis-Honeywell dated January 27, 1938, and ask you if you recall that agreement?

A. Yes, I recall signing that agreement.

Q. That I notice is based on or rather it is an agreement to purchase during the life of the contract 7500 sets of the company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control and
864 one Primary Control. Do you know how that number of 7500 was determined?

A. Well, I think the 7500 sets were necessary to get into a certain bracket designation.

Q. Did it have anything to do with what you had sold in the previous year, 1937?

A. No, but we signed—

Q. I mean purchased.

A. (Continued) No, but we signed the contract and when I signed the contract they would only permit me to sign a contract for a reasonable amount based upon my sales of the previous year.

Q. And you testified, I think, that you sold about 7500 burners for 1937?

A. That is correct.

Q. So that was would you say then the basis of arriving at your 7500?

A. Well, I don't know how they arrived at the 7500 excepting that I thought I could sell that number of sets and that is the number I bought and that was the number that price bracket called for.

Q. And these represent the prices that you paid during that year?

A. That is true.

Q. During the year 1938 I think you testified that you sold approximately 10,000?

865 A. That is right.

Q. Did you get any retroactive reduction in your price for that year?

A. I don't recall the details but if the book records indicate it, I did. I don't remember.

Q. Was there any understanding if you obtained a different bracket during that year that you would be given a retroactive discount?

A. I think in that year something like that occurred, but then again I don't recall. Was it incorporated in the contract?

Q. There is nothing in the written contract.

A. Did I get a lower price later?

Trial Examiner Sheppard: Cannot you refresh his memory?

By Mr. Haycraft:

Q. The bracket that you were in in that year was Bracket 4, was it not, which extended from 7500 to 14999?

A. That was so.

Q. So that if you did not sell more than 10,000 you would not get any retroactive rebate?

A. That is right.

Q. Now in 1939, do you remember the quantity that you agreed to purchase that year?

A. If you will refresh my memory by letting me
866 look at the contract, I will certainly be able to answer you.

Q. I will refresh your recollection. Were you in Bracket 5, and was the quantity you agreed to purchase 10,000 and up?

A. Yes.

Q. In other words, there was a change in the bracket there?

Mr. Freeman: That is right. Commission's Exhibit 1, the stipulation, shows that change.

By Mr. Haycraft:

Q. Then in succeeding years, have you got your contract for 1941 with you? What does the agreement provide as to the quantity to be purchased?

A. The contract you mean dated '40?

Q. Yes.

A. January 4, 1941, that calls for 10,000 sets.

Q. And in 1941 you sold about 24,000. Was your bracket 5 the best bracket, or the lowest, of the largest discount that Minneapolis-Honeywell had to offer you?

A. That was the largest. I was not satisfied with it, but they claimed that they could not make a bracket for one customer regardless of how well entitled he was to it. I did not see the justice for this and I kept arguing with them for the last couple of years concerning that.

Q. At what price did you begin to sell your oil burners as they were equipped with Minneapolis-Honeywell
867 controls in the beginning of 1936-1937 and on down to the present time?

A. We started with a price of approximately $70. Of

course, that price varied with the type of equipment that went on it.

Q. Take the minimum equipment, that is, the ordinary one we have been talking about here with, we will say with R 117 and S11 and P404 or L419?

A. We started with about $70 and we tried to effect a reduction of approximately 10 per cent each year in the years that followed.

Q. Will you indicate what that would be in figures, from the $70 in 1936?

A. I will have to have my memory refreshed, what we actually did, to go over the details, but that is close.

Q. Do you have some invoices with you that you can refresh your recollection from?

A. Let me see if I can work it out with a pencil and paper.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

A. (Continued) As far as I can remember our prices were approximately $70 per burner in 1937; $65.00 in 1938; $60.00 in 1939; $55.00 in 1940; $50.00 in 1941, and about $45.00 in 1942.

Q. Well, to refresh your recollection a little bit—

Mr. Haycraft: Mark this for identification?

868 (The document referred to was marked Commission's Exhibit 124 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 124 for Identification and ask you whether or not you sent out that postal card to the trade?

A. I did.

Q. Does that indicate the price at which you were selling your burner at that time equipped with Minneapolis-Honeywell controls?

A. Our post cards which we sent out from time to time do not always reflect the standard price at which we sold merchandise. In some cases they referred to special models that we used to stimulate business.

Q. What does this particular one refer to, this particular card dated November 22, 1940?

A. That was our standard burner with standard equipment designed to stimulate business in an area where sales

were very low. It was addressed to the Topeka Oil Company, Topeka, Kansas.

You see, there were some areas in which we got practically no business. We would often have a special price in that area to see if we could open up an account.

Probably in this locality we never got anything to amount to anything but it was worthwhile to offer those dealers
869 that were there to induce them to get their business.

Q. And this price was for 1941?

A. No, our price was approximately—

Q. I say, on this special?

A. On this special card, yes. In other words, as I said, these cards don't necessarily reflect the actual price we got for merchandise for those years but to stimulate.

Q. What was that, a delivered price?

A. No price was delivered price and there were c. o. d. charges.

Mr. Haycraft: I offer this card in evidence.

Mr. Freeman: No objection.

Trial Examiner Sheppard: That will be received.

(The document referred to, heretofore, marked for identification COMMISSION'S EXHIBIT 124, was received in evidence.)

The Witness: This other card, this other one, I can make reference to. It was not a standard burner, just a special burner.

Mr. Haycraft: Just a minute.

Will you mark this for identification.

(The document referred to was marked Commission's Exhibit 125 for identification.)

By Mr. Haycraft:

Q. In your last answer you referred to, did you not,
870 Commission's Exhibit 125 for identification, which I now hand you?

A. Yes.

Q. You identify that as a circular sent out in the fall of 1937?

A. No, I can't identify that as a circular sent out unless it is addressed to a specific area with a postage stamp on it, so that I can tell whether it was actually sent out. You see it makes all the difference in the world where these things were sent to.

Q. You did send that out but you cannot tell when or where?

A. No, no, I can't tell you much about that unless there is an address and post mark. We printed it. It is our folder. I can't tell where it was sent to.

Q. Would you say that refreshes your recollection that during 1937 you made a special price on occasion in certain territory of $65 for a burner?

A. You don't know that this was printed. When did you say 1937?

Q. It was picked up in 1937.

A. And I say I don't either. I know we have not used this model in quite some time and I don't recollect any of the details connected with this particular one.

Q. Well, what is the lowest price at which you ever sold a burner equipped with Minneapolis-Honeywell stand-
871 ard controls during this period of time from 1937 to 1941?

A. About $40.

Q. And that was you say a special?

A. That was a special, designed to stimulate business under some conditions, or to meet a competitive condition where that existed.

Q. Was that price to a dealer or to a wholesaler?

A. No, well, sometimes a dealer could get a very low price by indicating that he could use a very large volume, but yet he would start out with samples. In other words, we could be misled into giving a dealer a low price.

The difference between a dealer and distributor was largely the amount of business they could do.

Q. What was your setup on that? What was your policy on that? What difference did you make in the price to your trade?

A. Well, there was about a 10 per cent difference in price between dealer and distributor, but since we had only one salesman on the road and he covered comparatively few of those accounts and most of our business was done by mail, it was very hard to determine the status of an account and to find out whether he did a strictly wholesale business or whether he did retail business, and often an out-of-town customer used to build us up to the extent
where we would be impressed with the volume he might
872 give us, and he turned out to be of very little consequence.

Q. What territory did your one salesman cover?

A. Well, he covered the entire country but of course you

can't cover it very intensively. He tried to hit the high spots.

Q. Who was your salesman?

A. My brother.

Q. Robert?

A. Robert.

Q. And did he travel by train or go by automobile?

A. Train, plane and car, and of course I insisted—

Q. Did he carry samples with him?

A. He had them shipped to the hotels in the various points generally and as a rule the dealers would come up or the distributors in the area would come up and view this exhibit and discuss prices, terms and the proposition with him, and he tried to pick the outstanding account in the area to make a deal with.

Of course, we were often mistaken. You know that is very hard to tell.

Q. Did you sell any to furnace manufacturers?

A. I suppose we had. Oh, yes, we had furnace manufacturers on our books.

Q. And how would their price compare with the price at which you sold dealers and wholesalers?

873 A. I don't know that we had any very successful furnace manufacturers or that we sold any very large volume to them. I could not answer that question without discussing the matter with my brother or someone that handled the sales, you know.

Q. You mean in detail?

A. In detail. I would just be guessing. I could give you a price but it would be just a guess.

Q. Do you remember whether you sold any to the Penn?

A. Yes, we did.

Q. Penn at Lancaster?

A. We sold them not a very large volume but I know we did business with them and if you can show me one of their invoices I will be glad to give you the price.

Mr. Haycraft: I offer Commission's Exhibit 125 for identification in evidence.

Mr. Freeman: No objection.

Trial Examiner Sheppard: Let Commission's Exhibit 125 be accepted.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 125, was received in evidence.)

Mr. Haycraft: Will you mark these for identification?

(The documents referred to were marked Commission's Exhibits 126-A, 126-B, 126-C, 127-A, 127-B, 127-C, 874 127-D, 127-E, 127-F, 128-A, 128-B, 128-C, 128-D, 129-A, 129-B, 129-C, 130-A, 130-B, 130-C, 131-A, 131-B, 131-C, 131-D, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 126-A to C to 131-A to D, purporting to be invoices to the Penn Boiler and Mfg. Co., Lancaster, Pa., and ask you if you are able to refresh your recollection as to what price you received for your burners, the type of burners you sold?

A. These invoices are correct. Is that what you want?

Q. No, I want to know whether they refresh your recollection as to what price you received?

A. Well, they do in so far as the invoices are concerned.

Q. What prices did you receive?

A. I received $40 for a burner designated as a model C on February 17, 1940.

Q. Did it have any controls on it?

A. With three controls. This was not a standard burner.

Q. What was it, a smaller size?

A. Yes, a special.

On October 23, 1940, I sold the Penn Boiler and Mfg. Co., 2 BDQ, pump no test, 180, and 2 T45's at $41 each. There were only two controls with these burners instead of three.

Q. What one was left off?

A. The limit controls.

875 Q. How much more would it cost them to have a limit control on them?

A. On October 24, 1940, another invoice. This one with 3 controls, $43.50.

Q. That gives the answer.

A. I think our actual cost was deducted. Is that right we deducted our actual cost?

Here are 3 BDQ's on October 30, 1940 for $41 each.

Q. Was that about the price at which you usually sold to Penn?

A. No, this was considerably lower. This was one of the customers who gave us the impression it would be much larger than it actually did.

Q. Do you have any recollection what he actually did?

A. I can see from these invoices that he never was a sub-

stantial customer from the standpoint of volume. Of course we had the impression that his volume wase going to be much larger than it was in order to give him these prices. It never materialized.

Q. What was your policy with respect to the sale of controls separate from the burners?

A. Where the customer wanted controls for repair or replacement we always sold them to him.

Q. And at what price or what were the prices of the controls?

A. The existing prices on those items were 25 per
876 cent off to dealers and 25 and 25 off to jobbers but there were a great many controls where there was a very big difference between the list price and our net cost and in those cases competitive conditions made it necessary to sell the controls for better than the given discounts. On the other hand, there were some controls where if we gave the 25 and 25 discount to jobbers it might even be below our cost, so we had to alter that to meet general conditions.

Then every large account was under considerable pressure from our competitors to purchase and generally could buy controls at pretty close prices. Where we were reasonably certain that that was taking place we had to meet that price condition, so that we had a general policy but no specific one.

Q. Where a customer of yours, that is, one that bought burners from you, what did you usually charge him for extra controls?

A. At the very close to our cost price. We would add a little for our handling but as a rule we assumed that all controls that went with the burner were supplied the customer at practically cost.

Q. What about replacements?

A. Well, replacement parts were supposed to be governed by those discounts I just mentioned, but a customer was supplied or rather entitled to four controls with a burner. If he wanted them that was so, and in some
877 cases five, where he used an extra limit control. If he came in a few days later and wanted a control I could not very well charge him the regular discount because he could reason, "say, if I took that control last week I would have paid so much and so much so what difference does a week make?" Since that was generally reasonable and it only happened to the local customers incidentally who came

in themselves, we would probably give them the control at about the same price they would have paid for it if they had gotten it with the burner.

Mr. Haycraft: I think this will be a good place to take a recess.

Trial Examiner Sheppard: You are excused, Mr. Witness, until two o'clock, and we will now take a recess until that time.

(Whereupon, at 12:30 p. m., a recess was taken until 2 p. m. this day.)

878 Afternoon Session.

2:00 P. M.

Trial Examiner Sheppard: Get on the record and let us proceed.

SAMUEL LOUIS PETERS resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Haycraft.

Q. Mr. Peters, are you in a position to testify as to the prices that you charged for oil burners and controls to the firm of Rubel and Jensen at Newark, N. J.?

A. Yes, that is one of the accounts you asked me to bring a file on and by looking at the file I think I can give it to you.

They were not a large customer and they did not buy very much, but I can give you what you want to know. Would you like a sample invoice or do you have some, or do you want to ask me some specific question?

Q. If you can refresh your recollection from what you have there that will save us putting the invoice in.

A. TL 111 they paid $19.50; A53 cost them $7.00 apiece.

Q. A53?

A. Yes.

Q. What is that?

879 A. It is a control that I have here. I am just reading from—

Q. What year is that?

A. In '42. I will have to get something older than that because they did not buy much in '42. Here is an invoice

dated 10/7/41 for 5 oil burners including all automatic controls plus extra controls plus chronotherms that they paid $302.20 for.

Q. How many controls?

A. This invoice called for five R117, only three T11, five P404, and 10 LI70 and two 111's with locking devices.

Q. And how many burners?

A. Five burners.

Q. Does the invoice itemize those?

A. No, the invoice totals the amount of $302.20, an average of about $60.00 a burner, but it included these extra controls.

Here are two Model E's we sold them that apparently only included six controls for $144.30, the invoice being dated 9/19/41.

Q. That was for a Model E?

A. It is a larger size. Here is one Model E $60.00, 8/21/41. I said E; I meant BD.

Q. Model BD, your standard model?

A. That is right. At the present it is but there were 880 times when it was not.

Here are five BD long hour stage pumps with 10 R117; four T11, 10 P404; 10 L170; six 11; six C402 for a total of $642.22.

Q. For how many burners?

A. Ten, but there were 34 nozzles on this which means they needed extra nozzles so that would change the price a little.

Q. That would run around $60?

A. Yes, but these were special controls and were not part of our regular setup. That is representative of the thing.

Q. Now will you also testify as to the sales of burners and controls to the Burns Supply Company, Long Island City?

A. The Burns Supply Company purchased from us on December 29, 1942, two L420AB at $6.47; two R132 at $5.07.

Q. What are those that you just mentioned?

A. Those are automatic controls. I don't really know their application myself.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

A. (Continued.) They were not much of a customer if I recall. They did very little business with us.

Q. Do you remember when you first started selling them?

A. We never did much with them. Their total business did not amount to anything.

881 Q. How about Rubel and Jensen? When did you start with them?

A. I gave you the '41 figures and the '42 figures.

Q. How far back have you got something?

A. I would just be guessing but probably we sold them for quite a number of years. They are also not a very big account.

Q. Will you testify as to the prices you received for burners and controls sold to the Petroleum Service Company, Providence, Rhode Island?

A. What was the name of that account that you mentioned?

Q. Petroleum Service.

A. That company I think was a customer of a distributor of ours. We did not handle them direct because there is no file on them, which means they were handled by the distributor.

Q. Southwark Plumbing and Heating and Supply Company, Philadelphia, Pa.?

A. Here is Southwark.

Q. What year?

A. This file starts with '41. Let us see where it runs to. This is the '41 file on Southwark. In an invoice dated December 23, 1941 I see eight burners complete with controls for $48.20.

Q. A piece?

A. A piece.

882 Q. Those were BD burners?

A. These are marked BA burners. During that period we had other burners that were special, something like that. They would have B basic as a designation but A to indicate something special. What the special about it was I don't recall now because it might have been something they specified.

Q. You say something about extra limit control there?

A. Yes, this seems to have immersion aquastats in it. Here is one BA at $51.50 on November 19, 1941.

Q. How was it equipped? What controls did it have?

A. It had a hot air control called L419, I don't know whether it was a long or short, a III and R 17. Now there

was some specials on that job with hot air draft and there was another special item on that.

Q. All included in the price?

A. All included in the price of $51.50.

Trial Examiner Sheppard: That was just one burner?

The Witness: Just one burner. That was fairly typical as I see here of those invoices.

By Mr. Haycraft:

Q. Was that a substantial customer? Did they buy substantial quantities?

A. You know of all the customers you asked me about there were no large ones included in your inquiries. When I talk about large customers I mean a customer that
883 buys a thousand burners a year or even 500.

These burner prices were all approximately the same as far as I can see.

Q. Were there any controls separate from the burners?

A. I am looking for that now. They bought additional controls but it was included in his burner bills. He bought them at the time he bought his burners mostly.

Q. Did you have any instances of that?

A. Here is an invoice dated January 9, 1941 in which he bought additional L170, ten of them.

Q. What is that, a relay?

A. No, that is an immersion aquastat.

Q. How much did he pay for it?

A. He paid 75 cents additional for them.

Q. Additional to what?

A. Additional cost instead of taking the regular limit control. That is about all I see in this file.

Q. The same question with respect to the Rackliffe Company, New Britain, Connecticut?

A. On March 18, 1941 he purchased three BD burners, got a quantity of extra nozzles in there I see. Oh, wait a minute. It is 132 classifications, 3 and 10, and he paid a total of $558.10 for them.

Q. Thirteen burners?

A. Yes.

884 Q. Were they all equipped with controls?

A. Yes. That seems to be his representative price for this stuff.

Q. Did you see any invoices of separate controls?

A. No, I don't have any invoices of separate controls there.

Q. The same question with respect to Metro Sales Company?

A. That is a customer that was handled in part by us and in part by the Boston distributor.

Q. Who was the Boston distributor?

A. That was this Winston that I was telling you about. When he left me as sales manager he became a distributor. He operated under the name of Quiet-Heet Company, Boston.

Trial Examiner Sheppard: He is not with you now?

The Witness: He is not. He is in a separate business. He left there when the oil burner business was finished.

Here is a shipment to him of burners with automatic controls. It consists of 41 oil burners and does not stipulate the controls, what he got with them, and totals $1508.

Here is a bill that might be controls though it does not say on the bills, 51 replacements for Quiet-Heet burners for $4.24 each. I don't know what items they were. They might be controls.

Here is another bill of a like character, replacement parts, that might be controls.

This is the '42 file I think because I know that cus-885 tomer was not handled by us prior to that period.

Q. You have not anything for 1941?

A. No. As a matter of fact, it was only after this fellow closed up shop, partially closed up shop, that we had this account.

Q. The same question with regard to the Tower Mfg. Company, Boston, Mass.?

A. For that customer the same thing holds true. We might have sold him a little stuff but he did practically all his business with our distributor in Boston. I have practically nothing in here except a little correspondence once in a while when he wrote us a letter.

Q. Have you any way of telling when you first sold these accounts that I have told you about?

A. Well, most of them we have sold over the last four or five years.

Q. The same question as to the Automatic Home Appliance Company, Jamaica, Long Island?

A. Here is an invoice 5/7/42 consisting of two burners with an assortment of automatic controls that are not stipulated, $109.80.

Here are five burners for $247.50, dated 5/18/42.

Q. Does it indicate what equipment it had, what the controls were?

A. Yes, it indicates 20 controls. In other words,
886 there were four controls to a burner. That is about all.

Q. Have you got any for 1941?

A. What is that?

Q. Do you have any information as to the sales in 1941? What you just gave are 1942.

A. I only have his '42 folder here.

Q. Is that all you have?

A. That is all I have, his '42 folder.

Q. All right. The same question with respect to the Bennett Oil Company in Brooklyn?

A. That was an account that was handled through our New York distributor. We did not handle that.

Q. Who was the New York distributor?

A. Silent Heat Company.

Q. Where are they located?

A. On Coney Island Avenue. They are still in business.

Q. The same question with respect to the West Hoboken Plumbing and Supply Company, Jersey City, N. J.?

A. He is our customer. On 12/6/41 he bought 1 oil burner with three automatic controls for $52.50, and 1 Model E for $75.45.

Q. The same year?

A. The same year, 9/18/41, and here are six T111 automatic controls that he paid $77.58 for.

Q. That is the chronotherm?

887 A. That is the chronotherm. The other bills are similar.

Q. You have other bills which are similar, with the same price?

A. The same price.

Q. The same question with regard to Paragon Oil Company, Brooklyn?

A. We never did business with that account. I don't know where you got the name. They are competing. We never had orders from them, never sold them anything. We never did any business with them.

Q. Neither you nor your supplier or distributors?

A. Well now, you are asking me something that I don't think I could answer very readily. I think it is very unlikely that any of my suppliers would do business with them because of the nature of their relations but they might have sent down to the Brooklyn distributor and got-

ten control parts now or then. We personally never did business with them.

Q. Where were the bulk of your sales made?

A. Our sales were made throughout the country. Our most successful areas consisted of Baltimore, Philadelphia, Boston, New York, New Jersey, the West Coast.

Q. You said you did some business on the Pacific Coast. Did you sell direct out there?

A. We sold direct out there.

Q. And was most of your business obtained through
888 the mail or by personal contact of your salesman?

A. I would say that most of our business was obtained through the adverse publicity that the trade papers gave us, emphasizing our very low prices which interested dealers to such an extent that their inquiries came in to see if it was actually possible that any manufacturer was selling at so low a price, and naturally that stimulated interest among all the dealers and we sent out considerable advertising and it probably amounted up to the same thing.

Q. About how much advertising budget did you have in the way of circulars and bulletins?

A. In dollars and cents it was very low actually. I could not give you the amount but if you send out 10,000 post cards the postage is easy to calculate and that includes the cards and the printing is a comparatively small item, so if you send them out every two months say, how much is 10,000 times one cent?

Q. What I am trying to get at is is that or was that the way you solicited?

A. Yes, that is the way.

Q. Sending out postal cards?

A. Of course, I and my brother contacted a large number of customers personally, especially the larger ones.

Q. And you did obtain some large accounts?

A. Yes.

889 Q. Will you name some of the larger accounts that you obtained?

A. Well, I would say the Hoffman Oil Company in Bridgeport, Connecticut; Hoffberger in Baltimore; Modern Oil Company of Philadelphia; Sunbeam Oil Burner Company in Seattle, Washington.

Trial Examiner Sheppard: Seattle?

The Witness: Seattle. Offhand I could not—

By Mr. Haycraft:

Q. Did you say you personally called on the trade yourself?

A. Yes, some part of it.

Q. Did you carry accounts with these people or were most of them c. o. d.?

A. All c. o. d.

Q. No open accounts?

A. None whatever.

Q. You named two distributors. Did you have any other distributors besides the ones that you named?

A. No, those were the two factory distributors that did the outstanding business. Of course there were a number of others but they were not in the same class. These people actually covered the entire areas mentioned, that is, the Boston area and vicinity, the New York area and vicinity.

Q. During the time, say from 1937 to 1941 or 1942, you did sell some burners equipped with Mercoid controls, is that true?

890 A. Yes.

Q. And where did you sell those?

A. The same areas, to anybody that wanted them or anybody that stipulated that they wanted Mercoid controls and to customers that Mercoid's representatives contacted and got requests from.

Q. Most of your advertising matter, however, featured the Minneapolis Honeywell controls as the equipment, did it not?

A. No, I would say that initially we started out complete with a set of controls. That was ambiguous and the dealers wanted to know what controls were being shipped and we decided most of our business was Minneapolis and that we furnished Minneapolis.

At one time our literature carried either Mercoid or Minneapolis, and most of the dealers knew they could get either one of the two makes because they were the two standard makes. The two pieces of literature you identified today, both of them indicate Minneapolis controls even to the type of control?

A. They were probably later pieces of literature when we found that the Mercoid control angle did not help there. Is that on there?

Q. Both of them feature the Minneapolis-Honeywell controls.

A. Well, we tried to sell Mercoid controls just as hard as we did the Minneapolis-Honeywell controls. As far
891 as we were concerned we would just as soon sell Mercoid as Minneapolis. The Mercoid is a very high class concern and nice people. I like to see them do business and do business with them, and I think I sold all the Mercoid controls I could whenever I possibly could.

Q. Well, did you feature any advertising matter such as Commission's Exhibits 124 and 125 in which you featured the Mercoid controls?

A. Yes, definitely.

Q. In what years did you do that?

A. I would have to look up some of my old literature and I think I could furnish it to you.

Q. Do you think you have some on hand?

A. I am sure I could find some that featured Mercoid controls.

Q. I noticed in—

A. (Continued.) I know definitely that we had one card out that we featured Mercoid controls exclusively and made no mention of Minneapolis.

Q. That is what I meant.

A. We had one card out that we made a special effort with to move Mercoid controls.

Q. Do you recall whether that was in 1939 or when?

A. I don't remember. I told them I wanted to give the largest possible volume and I wanted to do a 1,000 year.

892 Q. That was the year you did the thousand?

A. We were very anxious to move that thousand.

Q. The year 1939?

A. We always tried to fulfill our contracts. It looked a little difficult so we made a concerted effort to push Mercoid controls and we did manage to dispose of the thousand I think.

Mr. Haycraft: That is all, Mr. Examiner.

Trial Examiner Sheppard: Cross-examine.

Mr. Freeman: I would like to have a five-minute recess.

Trial Examiner Sheppard: Show a short recess.

(A short recess was taken.)

Trial Examiner Sheppard: On the record.

Mr. Haycraft: Mr. Examiner, I am asking at this time to withdraw Mr. Peters because I have a witness here from up in Connecticut and I would like to get through with him

this afternoon and let him get the train home. I don't think it will take very long.

Trial Examiner Sheppard: Mr. Peters can just stand aside for a while.

(Witness temporarily excused.)

Mr. Haycraft: I will call Mr. Gillis.

Trial Examiner Sheppard: Mr. Reporter and gentlemen, this is Mr. Herbert Gillis, Branford, Connecticut.

893 HERBERT GILLIS was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Haycraft.

Q. What is your present occupation, Mr. Gillis?

A. I am with the War Production Board, Contract Specialist in the New Haven Office.

Q. How long have you been in that position?

A. Since December 2, 1942.

Q. Before that what did you do?

A. I was manager of the Oil Burner Department of the Malleable Iron Fittings Company in Branford, Connecticut.

Q. How long did you occupy that position?

A. Ten years.

Q. What business is that company engaged in?

A. Well, they had various businesses. The principal business was malleable iron fittings. They had a steel foundry where they make steel castings, malleable castings, brass and aluminum castings.

They had a pole hardware department in which they made hardware parts used on electric light poles, etc. and an oil burner department.

Q. How long have you been in the Oil Burner Department?

A. Ten years, I started with that.

894 Q. What were your duties there?

A. I had general control of the entire oil burner department, sales, manufacture, advertising, general manager of that department.

Q. Where did you sell your oil burners mostly?

A. Mostly in the New England and Middle Atlantic States.

Q. Under what brand name?

A. Branford Oil Burner.

Q. Where did you buy your controls, temperature controls used in the equipment on your oil burners?

A. Up until 1939 we bought them from Minneapolis-Honeywell Regulator Company exclusively. After that we bought them from Minneapolis-Honey and Mercoid.

Q. Can you testify as to the total number of oil burners you sold from the year 1937 through 1942?

A. I could not from memory but you have a memorandum there that I could testify to; to refresh my memory I had this report made out.

Mr. Freeman: You did not make the report yourself?

The Witness: No.

Mr. Freeman: And it was not made while you were with the company?

The Witness: No, that is right.

By Mr. Haycraft:

Q. Does it refresh your recollection?

895 A. Yes.

Q. All right, how many did you sell?

A. In 1937, 649; 1938, 517; 1939, 867; 1940, 1233; 1941, 1151 and in 1942, 396.

Q. While you were buying automatic temperature controls from the Minneapolis-Honeywell Regulator Company did you have a contract?

A. Yes, each year a contract was submitted which we signed.

Mr. Haycraft: Will you mark this for identification?

(The document referred to was marked Commission's Exhibit 132 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 132 for identification and ask you whether or not that is the contract which represents the agreement between the Minneapolis-Honeywell Regulator Company and the Malleable Iron Fittings Company for the year 1937, the contract being dated December 22, 1936?

A. That is right.

Q. Is that your signature?

A. That is my signature to the contract covering the 1937 requirements.

Mr. Haycraft: I offer that in evidence.

Trial Examiner Sheppard: Is there any objection?

Mr. Freeman: None.

896 Trial Examiner Sheppard: Let it be accepted.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 132, was received in evidence.)

By Mr. Haycraft:

Q. I notice in Commission's Exhibit 132 that the fourth paragraph begins, "The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract Season's Requirements sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control."

What is your interpretation of that phrase "Season's Requirements"?

A. Whatever we needed to supply all the oil burners we sold with Minneapolis-Honeywell controls. That means all oil burners were sold with controls. If we sold a thousand oil burners that meant we would use a thousand sets of controls.

Q. Did you buy them from Minneapolis-Honeywell?

A. Always up until 1939 we bought no other controls excepting Minneapolis-Honeywell.

Q. In other words, you carried out this agreement?

A. Yes, sir.

Q. This agreement also, as a part of this same paragraph, stated, "Because the Company's costs are

897-8 figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls."

Did you carry out that provision also?

A. Yes, we didn't sell them out of balance at all. We sold them as complete sets so that approximately the same number of each item was purchased.

Q. Did you purchase temperature controls from the Minneapolis-Honeywell Regulator Company during the year 1937 for the Malleable Iron Fittings Company at the prices indicated in this contract?

A. Yes, these were the prices and the invoices as they were received were always checked with the prices shown

on the contract and always agreed before the bill was passed.

Q. I notice at the bottom on the first sheet of this contract where there is reference to B6510 Immersion Aquastat and L416 Immersion Aquastat that some typewritten prices are blocked out and prices written in in pen and ink. Who wrote those prices?

A. They were written in by the Minneapolis-Honeywell. We didn't change anything on the contract after it was signed.

Q. During 1937 did you experience anything peculiar or out of the way in the way the competition in the sale
899 of oil burners in the territory in which you were selling oil burners?

A. Well—

Mr. Gilpatric: What year?

Mr. Haycraft: 1937.

A. (Continued.) There began to be a decrease in market prices that was very noticeable.

Q. Did you call that matter to the attention of the Minneapolis Honeywell Regulator Company in correspondence?

A. I don't think I did as early as 1937. I think I did in 1938.

Mr. Haycraft: Mark these for identification?

(The papers referred to were marked Commission's Exhibits 133, 134, 135, and 136 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 133, which purports to be a copy of a letter by Herbert Gillis, Manager Sales Promotion, Oil Burner Division, Malleable Iron Fittings Company, addressed to Minneapolis-Honeywell Regulator Company, New York City, attention Mr. Chapler, dated June 8, 1937, also Commission's Exhibit 134 for identification, purporting to be a carbon copy of a letter from yourself to Minneapolis-Honeywell, attention Mr. Chapler, dated June 23, 1937, Commission's Exhibit 135 for identification, purporting to be a carbon copy of a letter from yourself to Mr. Chapler, under date of December 22, 1937, and ask if you can identify those as carbon copies of original letters sent to Mr. Chapler on or about the
900 dates in those letters?

A. Yes, they are carbon copies of letters that I wrote the Minneapolis-Honeywell.

Q. And I show you Commission's Exhibit 136 for identification, which purports to be an original letter from Mr. Chapler to yourself under date of December 30, 1937, and ask if you received that in reply to your letter under date of December 22, 1937?

A. That is right. I received those letters.

Mr. Haycraft: I offer these in evidence.

Trial Examiner Shappard: Any objection?

Mr. Gilpatric: We want to look at them, Mr. Examiner.

Mr. Examiner, I would like to ask a question or two on voir dire examination.

Trial Examiner Sheppard: All right.

Voir Dire Examination by Mr. Gilpatric.

Q. Mr. Gillis, did you yourself take these letters from the files of the Malleable Iron Fittings Company?

A. No, I have not been there for six months.

Q. Where did these letters come from?

A. The man who was purchasing agent of Malleable Fittings Company took them from the files.

Mr. Haycraft: He is present in the Court Room and
901 if any further identification is necessary he can be interrogated.

By Mr. Gilpatric:

Q. I want to know who did the selecting and whether the files are here?

A. The complete files are here.

Q. Have you looked over the complete files yourself?

A. No, there is too much of it.

Q. Will the complete file be available to us to see the letters that fit in between the letters that have been offered?

A. Oh, yes.

Mr. Haycraft: They all fit in. They are all there on that subject. I will let you see them if you want to.

I might say, Mr. Examiner, that the correspondence of this firm was produced. Mr. Lang from the firm is here in the Court Room at this time and he produced them.

Mr. Gilpatric: On the understanding that we can see the other correspondence, we have no objection to Commission's Exhibits 133, 134 and 135. Of course we have no objection to the Minneapolis-Honeywell letter, Commission's Exhibit 136.

Mr. Haycraft: All this correspondence is between the

witness and the respondent, and certainly if there is anything else that bears on this subject that has not been
902 available now I will have no objection to that being offered in evidence, but that it all there is on this subject and available to me.

Mr. Gilpatric: The witness has testified that I can look at the other.

Mr. Haycraft: You have the other side of it in your possession.

Trial Examiner Sheppard: Let Exhibits 133 to 136 be accepted.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHBITS 133, 134, 135 and 136, were received in evidence.)

Direct Examination (Continued) by Mr. Haycraft.

Q. Did you discuss the correspondence matter with Mr. Chapler in addition to the letters that you have written?

A. Yes, I discussed it with Mr. Chapler, Mr. Sweatt, Mr. Pawling—

Mr. Freeman: Which Mr. Sweatt?

The Witness: There is a letter I wrote to him. Do you want him by initials or description?

Mr. Freeman: Just so we know.

The Witness: H. W., that was the one. His initials slipped my memory. H. W. Sweatt, and John Feigenbaum, their Hartford representative, I discussed it
903 verbally with all of those gentlemen.

Mr. Haycraft: Mark these for identification?

(The papers referred to were marked Commission's Exhibits 137-A, 137-B, 138, 139, 140-A, 140-B, 140-C, 141 and 142 for identification.)

By Mr. Haycraft:

Q. Mr. Gillis, I show you Commission's Exhibits 137-A and B purporting to be a carbon copy of a letter from yourself to Mr. H. W. Sweatt, dated January 14, 1938, and ask you if you mailed the original of that letter to Mr. Sweatt on or about that date?

A. That is right. I wrote that letter.

Mr. Haycraft: I offer it in evidence.

By Mr. Haycraft:

Q. Did you mail it?

A. Oh, yes, it was mailed.

Q. I show you Commission's Exhibit 138 for identification which purports to be an original letter from Minneapolis-Honeywell to Malleable Iron dated February 24, 1938, and ask you if you can identify that letter?

A. Yes, that is right. That is an original letter which I received.

Q. I show you Commission's Exhibit 139 for identification purporting to be an original letter from Minneapolis-Honeywell signed by H. E. Chapler, addressed
904 to Malleable, to Mr. Gillis, dated June 11, 1937, apparently in response to your letter of June 8, 1938, Commission's Exhibit 133, and ask you if you received that original letter on or about that date?

A. That is right. This is a copy of a letter which I wrote and the original which I received.

Q. I show you Commission's Exhibit 140 for identification A, B and C, and ask you to identify it as a carbon copy of a letter you sent to Mr. Sweatt under date of October 28, 1938?

A. That is right, that is a carbon copy of a letter I wrote.

Q. I show you Commission's Exhibit 141 for identification and ask you if you can identify that as an original of a letter from Mr. W. L. Huff, Vice-President and Treasurer of Minneapolis-Honeywell, addressed to yourself and dated November 3, 1938, in response to your letter of October 28, 1938, Commission's Exhibits 140-A to C for identification?

A. That is right. I received that.

Q. I show you Commission's Exhibit 142 for identification and ask you if you can identify that as a carbon copy of a letter you sent and mailed to Mr. H. W. Sweatt, under date of November 4, 1938?

A. Yes, that is a copy of a letter I wrote.

Mr. Haycraft: I offer this correspondence in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Gilpatric: I have no objection to these letters.

905 Trial Examiner Sheppard: They will be admitted in the record as Commission's Exhibits 137 to 142 inclusive.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 137-A 137-B, 138, 139, 140-A, 140-B, 140-C, 141 and 142, were received in evidence.)

By Mr. Haycraft:

Q. I notice that this letter of November 4, 1938, in that letter you refer to a conversation of last night with Mr. H. W. Sweatt. Do you have a recollection of that conversation?

A. Yes. Mr. Sweatt and Mr. Chapler called in our office one evening just about closing time, about five o'clock, and I remember I stayed until six with them.

Mr. Sweatt, he had been making the rounds of manufacturers in New England and ours was the last one of the day and he kept me overtime.

Q. And what did you discuss at that time?

A. We discussed the subjects that were covered by the letter, the fact that our dealers can buy Minneapolis-Honeywell controls as cheaply as we can buy them from Minneapolis-Honeywell Company. We wanted that situation corrected.

Q. Did you make the suggestion to him verbally that you make in this letter on the last part of the letter in the third from the last paragraph?

A. Yes, I did.

906 Q. Did Mr. Sweatt have any comment with respect to that?

A. No, he was non-committal except, if, he said, there were any unethical practices going on he would see that they were stopped.

Q. Was there any further discussion with respect to this matter before 1939 when the new contract was entered into?

A. Well, all the discussion was in 1938 and before the time for the 1939 contract to be signed we notified them that, verbally, we would not commit ourselves to handling Minneapolis-Honeywell controls exclusively.

Q. When did you make that statement to them and to whom did you make it?

A. Feigenbaum and Chapler along around November 1938.

Mr. Haycraft: Mark this for identification?

(The paper referred to was marked Commission's Exhibit 148 for identification.)

The Witness: They were regular contact men of Minneapolis with us. Any other contacts we had with men like Mr. Sweatt or Mr. Pawling were on special matters.

By Mr. Haycraft:

Q. I show you Commission's Exhibit 143 for identification and ask you if that is the contract between Minneapolis-Honeywell and Malleable Iron Fittings Company for the year 1938, signed February 1, 1938?

A. Yes, that is the contract that I signed to cover 907 the 1938 requirements.

Q. And were the prices indicated on there, the typewritten ones, the prices which you paid for the controls purchased from Minneapolis-Honeywell Company during 1938?

A. Yes, all bills were checked against this contract we received.

Q. I notice pencil notations in the right hand column of the exhibit. Who put those on there?

A. I did. That was a comparison between the prices of this contract and the prices in the previous year's contract.

Q. The previous year's or succeeding year?

A. Succeeding year. Excuse me.

Q. They were not on the agreement when it was submitted to you for signature?

A. Oh, no, that is a lead pencil notation I put on the exhibit.

Mr. Haycraft: I offer the exhibit without the pencil notation.

Trial Examiner Sheppard: Any objection?

Mr. Gilpatric: No objection.

Trial Examiner Sheppard: Commission's Exhibit 143 is accepted.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 143, was received in evidence.)

908 Mr. Haycraft: Mark this the next number?

(The document referred to was marked Commission's Exhibit 144 for identification.)

By Mr. Haycraft:

Q. Do you know what price brackets you were in in accordance with this?

A. In the third price bracket we were in.

Q. I show you Commission's Exhibit 144 for identification and ask you if you can identify that as a price list of the Malleable Iron Fittings Company of Branford, Connecticut, for the year 1938?

A. Yes, that is the price list we issued for 1938 on oil burners, parts and controls.

Q. The control prices being on the back sheet of the exhibit?

A. That is right.

Mr. Haycraft: I offer that in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Gilpatric: Mr. Gillis, on the back side of this Commission's Exhibit 144 there are some typewritten figures which have been typed in after the list of controls. Was that on the list as sent out to the trade?

The Witness: Yes, that same price list was used the previous year, but the price of controls had changed and the revised control prices were typed in in 1938.

Mr. Gilpatric: So that the—

909 The Witness: I don't recall offhand whether the prices were increased or decreased, but we sold the controls at the lists published by the control manufacturers.

Mr. Gilpatric: So that this price list was used for two years then, '37 and '38?

The Witness: That is right.

Mr. Gilpatric: No objection.

Trial Examiner Sheppard: Let Exhibit 144 be accepted.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 144, was received in evidence.)

Mr. Haycraft: Mark these for identification?

(The documents referred to were marked Commission's Exhibits 145 and 146 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 145 for identification and ask you if you can identify that as a contract between the Minneapolis-Honeywell and the Malleable Iron Fittings Company for the year 1939, being signed by yourself on January 5, 1939?

A. Yes, that is my signature on that contract for 1939.

Q. I show you Commission's Exhibit 146 for identification and ask you if you received that original letter from Minneapolis-Honeywell Regulator Company, dated

910 January 9, 1939, and whether that accompanied the agreement which you just identified?

A. That is right.

Q. This is dated January 9, 1939, signed by Charles S. Hoyt of the Minneapolis-Honeywell Regulator Company.

Mr. Haycraft: I offer these in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Gilpatric: No objection.

Trial Examiner Sheppard: Let them be accepted.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 145 and 146, were received in evidence.)

By Mr. Haycraft:

Q. I notice in Commission's Exhibit 143, your 1938 agreement, that your contract provides for 1200 sets, whereas in the 1939 agreement, which you just identified as Commission's Exhibit 145, it only refers to 350 sets. What explanation do you have of that variation in the quantities?

A. Well, we had notified Minneapolis-Honeywell in the meantime that we did not intend to furnish their controls exclusively and that was the first contract that was offered to us after we had notified them to that effect.

The quantity was smaller and the discount was proportionately smaller.

Mr. Haycraft: Mark this the next number?

911 (The document referred to was marked Commission's Exhibit 147 for identification.)

By Mr. Haycraft:

Q. What bracket did this agreement put you in?

A. That would put us in the highest bracket.

Q. Bracket One?

A. Bracket No. 1.

Q. I now show you Commission's Exhibit 147 for identification and ask if you can identify that in any way?

A. Yes, that is a bulletin I sent to our dealer organization in 1939.

Mr. Gilpatric: What month?

The Witness: I don't recall exactly but I think it was October or November of 1939.

Mr. Haycraft: Mr. Examiner, this exhibit is the same as Commission's Exhibit 32 already in evidence.

To refresh the witness's recollection as to the time this was issued I call his attention to Commission's Exhibit 32-B and C.

By Mr. Haycraft:

Q. I call your attention to the fact that it was picked up by Minneapolis-Honeywell's man in March 1939. Would that refresh your recollection?

A. It was picked up very shortly after it was issued.

Q. So it was some time in March 1939?

912 A. February or March of 1939.

Mr. Haycraft: I will not offer that in evidence.

By Mr. Haycraft:

Q. What prompted you to write this bulletin, Mr. Gillis?

A. Well, our repeated endeavors to have Minneapolis-Honeywell correct the situation, which was to our disadvantage. They failed to do it after repeated requests and we decided that we would not handle their controls exclusively any more because when we tried to sell controls to our dealers they would tell us they could buy them as cheaply as we could and we notified Minneapolis-Honeywell that we were going to give our dealers the option of specifying Minneapolis-Honeywell or Mercoid. They could specify whichever they preferred.

Mr. Haycraft: Will you mark this the next number?

(The document referred to was marked Commission's Exhibit 148 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 148 for identification and ask you if you will identify that and ask you to tell us what, if anything, was done with it, and what you know about it?

A. That is our trade price list that was effective November 1, 1941, and superseded the one which I just a short time ago identified. It succeeded that one. It is a price list on oil burners, on oil burner parts and on oil burner controls.

913 Trial Examiner Sheppard: You circulated that to your dealers?

The Witness: To our dealers.

Mr. Haycraft: I offer that in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The document referred to, heretofore marked for iden-

tification COMMISSION'S EXHIBIT 148, was received in evidence.)

Mr. Haycraft: Mark these the next numbers?

(The documents referred to were marked Commission's Exhibits 149 and 150 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 149 for identification and ask you whether you can identify that in any way, and what was ever done with it?

A. That was a contract which was submitted to us for signature in 1939 for 1940 controls' purchases which was never signed by us. Nothing was done with it.

Q. Did you discuss it with anyone in connection with Minneapolis-Honeywell?

A. Yes, I discussed it with Feigenbaum, the representative who contacted us, and told him that we would not sign a contract for controls in the first bracket.

914 Q. And was he the man that submitted the contract to you?

A. He used to deliver them personally to us and he did on that occasion.

Q. I show you Commission's Exhibit 150 for identification and ask you if you can identify that?

A. That is one that was submitted; when we told him we would not accept that proposition he submitted another one which gave us prices in the third bracket covering a larger quantity.

Mr. Haycraft: I offer the two exhibits in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Gilpatric: No objection.

Trial Examiner Sheppard: Let Exhibits 149 and 150 be accepted.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 149 and 150, were received in evidence.)

By Mr. Haycraft:

Q. Did you make any claim on the occasion of the signing of this agreement that you had sold as a matter of fact a thousand sets during the previous year or that you had a hold-over from the previous year?

A. I made no claims or no commitments.

Q. This Exhibit 150 puts you back in Bracket No. 3 basis, did it not?

915 A. That is right.

Q. And to correct your recollection on Exhibit 149, would that put you in Bracket No. 2 rather than No. 1 that you testified to?

A. Bracket No. 2, that put us in.

Q. That would also be true with respect to the other contract, Exhibit 145 for the 1939, that is, 350 sets also?

A. That would be in Bracket No. 2.

Q. I think you said Bracket No. 1 in your testimony a moment ago?

A. No. 2.

Mr. Haycraft: Mark this the next number?

(The document referred to was marked Commission's Exhibit 151 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 151 for identification and ask you if you can identify that as the Minneapolis-Honeywell agreement for the year 1941 with the Malleable Iron Fittings Company?

A. That is right.

Q. What are the pen notations on the first page, the first and third columns, those two columns?

A. On November 15 of 1941 Minneapolis-Honeywell changed their price list. The pen notations are the new list prices and the new net prices at the same discounts.

916 Q. Did you put those on there?

A. That is my handwriting.

Mr. Haycraft: I offer that in evidence subject to correction.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: No objection.

Trial Examiner Sheppard: Let it be accepted as Exhibit 151.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 151, was received in evidence.)

By Mr. Haycraft:

Q. Since February 1939 have you been selling your burners equipped with Mercoid and Minneapolis-Honeywell controls?

A. At the option of the dealer, yes.

Q. At the option of your customers?

A. That is right.

Q. And how have those controls been sold? Have you sold more with Minneapolis-Honeywell or more with Mercoid?

A. I think we sold more Mercoid than we did Minneapolis-Honeywell. There was a $2.00 price difference to us in cost and we passed that $2.00 difference along to the customer. For instance, he could buy a burner with Mercoid controls $2.00 cheaper than with Minneapolis-Honeywell controls.

Q. How long have you done that?

917 A. For 1939, 1940 and 1941.

Q. In your experience were you able to use the Mercoid controls on the same burners that already had Minneapolis-Honeywell controls on them?

A. No, it required an alteration in the wiring if they had previously had Minneapolis-Honeywell controls. It required a rewiring to adapt the Mercoid controls.

Q. Was that ever done in your experience?

A. In a small number of cases, not many, because that would be necessary only where controls had to be replaced because of wearing out or some other cause which necessitated replacement.

No different treatment was necessary when they were installed new with a new burner.

Mr. Haycraft: You may cross-examine.

Cross-Examination by Mr. Gilpatric.

Q. Mr. Gillis, you testified I believe that you started in as manager of the oil burner sales for Malleable Iron Fittings about 1932?

A. That is right, 1932 or '33.

Q. Was your company then buying controls from Minneapolis-Honeywell?

A. They were.

Q. And it continued through the period up until 1939?

918 A. They never used any other from the time they started which was, oh, probably 1925, somewhere along in there, and they purchased Minneapolis-Honeywell controls exclusively until 1939.

Q. Do you know what led to that preference for Minneapolis-Honeywell controls in those years?

A. When they started in the oil burner business they had no choice. There wasn't any other.

Q. Why did you continue that policy after you became oil burner manager?

A. Because there was no reason to discontinue it. The Minneapolis-Honeywell controls were good controls and we liked the controls. We liked the people that handled them and the others were comparatively new. Minneapolis-Honeywell had an established reputation.

Q. Did you have many service difficulties with Minneapolis-Honeywell controls from the customers? Did they?

A. No, we had more in 1938 than we did at any time.

Q. Your principal difference with Minneapolis-Honeywell was over prices I take it?

A. That is right.

Q. And you objected to the fact that other cheaper oil burners were equipped with Minneapolis-Honeywell controls, the same controls that your higher priced burner was equipped with?

919 A. No, there was no objection to equipping them with Minneapolis-Honeywell controls if they wanted them to. I objected to them being given the price preference over us who had been buying their controls for 15 years or more, so that it made it more difficult for us to compete with the other burners because our prices were higher.

Q. And what did you do about meeting that competition?

A. We lowered our prices from time to time as far as we were able to.

Mr. Gilpatric: May I have Commission's Exhibit 144, please?

By Mr. Gilpatric:

Q. Mr. Gillis, now let us see when did you reduce your prices. Commission's Exhibit 144 was in effect for how many years?

A. I believe this was in effect about three years.

Q. What years?

A. The three years prior to the date on that one. That is November 1, 1940, isn't it?

Q. 1941.

Mr. Haycraft: 1941.

The Witness: The three years prior to that.

By Mr. Gilpatric:

Q. Didn't you testify on direct examination that that was your 1937 price list with changes on the control prices to indicate changes in those prices in 1938?

920 A. Yes, I believe this was the 1937. I believe, that is the best of my recollection. I only have my memory to depend on there though, but I think it was in 1937.

Q. Is it your recollection that your Model F Branford Oil Burner sold at $95 from 1937 to 1941?

A. I believe that is right, yes.

Q. During that period wasn't there a reduction in the price of controls that you received from Minneapolis-Honeywell as shown by these contracts in evidence?

A. Well, I would have to look at the contracts to see that. I don't remember. Well, there is no change in prices in the 1940 and the 1939 contract. The prices on these two contracts are the same but they were increased in November of 1941.

Q. Compare your 1937 and 1938 prices and see what you find?

A. There was an increase in price in 1938 over 1937.

Q. Well now, how do you explain these price reductions on the back of Commission's Exhibit 144, on your price list, your own price list?

A. Well, these are supposed to be the list prices of the Minneapolis-Honeywell Company. We always sold them to our dealers at the manufacturer's list with no discount except to jobbers who sold wholesale to dealers.

Q. Doesn't that exhibit which I handed you, Exhibit 144, show a reduction in the list prices for controls for the year 1938 over the year 1937?

921 A. This is not dated and I cannot say from memory. That is four years ago and I cannot say from memory between what two years these changes were made. I have nothing but memory to guide me, but I know that the prices given on these price lists were invariably the list price of the manufacturer.

Q. Is that also true with the M.H. prices shown on the fourth page of Commission's Exhibit 148?

A. That is right.

Q. Mr. Gillis, what is your general recollection about the trend of the cost of your other burner parts, transformers, and motors, during the years 1937 through 1941? Were they increasing or remaining the same?

A. They were remaining very much the same. I believe there was a slight reduction in the price of transformers, maybe 5 per cent, not more than that. The cost of motors and pumps to my recollection was the same and it remained constant for at least five or six years.

Q. And does that explain why you kept your burner prices the same during that period?

A. That is right.

Q. What about your competitors' prices during that period?

A. They were getting lower.

Q. But nevertheless you did not reduce your prices?

A. Not until we had to do it to stay in business at all.

Q. This difference in the policy which you had with
922 Minneapolis-Honeywell in 1938 and 1939 led to a dispute as the record shows here?

A. Well, I don't know that you can call it a dispute. It is a difference of opinion.

Q. Isn't it a fact that you were trying to get other manufacturers to join with you in your side of that?

Mr. Haycraft: That is objected to as immaterial, irrelevant and not proper cross-examination.

Trial Examiner Sheppard: I am going to let him answer. I want the whole story.

A. No, I did not.

Q. Well, how do you account for the fact then that copies of your letter of January 14, 1938 to Mr. H. W. Sweatt, President of the Minneapolis-Honeywell, Commission's Exhibit 137, were sent to the following companies: Silent Glow Oil Burner Company, Petroleum Heat & Power Company, and Harvey Whipple, Inc.?

A. Because the Minneapolis-Honeywell policy was always a very live topic of discussion wherever a group of oil burner manufacturers assembled, and shortly before that these men were present at a meeting that I had attended in Hartford, and I sent that to them to keep them informed as to what we were doing.

No attempt was made to get them to join anybody's side.

There was not any side as far as I was concerned,
923 only Malleable Iron Fittings Company and the Minneapolis-Honeywell Company. What others did was their own affair.

Q. How did you happen to have this meeting in Hartford then if you were not interested in what they were doing?

A. It was a meeting for another purpose entirely.

Q. Why were they interested in your quarrel with Minneapolis-Honeywell over prices?

Mr. Haycraft: That is objected to. This witness has not said that they were interested. Furthermore, he is not a mind reader. He does not know why they were interested. I object.

Mr. Gilpatric: I will withdraw that question.

By Mr. Gilpatric:

Q. What was your reason then for sending this letter to them on this subject?

A. To keep them informed as to what we were doing about it.

Q. About what?

A. About objecting, or questioning the policy of the Minneapolis-Honeywell Company.

Q. Well, did you know they were interested in what you were doing about that?

A. Certainly I knew.

Q. How did you know?

A. From a half dozen discussions I had with them.

Q. How?

924 A. Every place, every time a group of oil burner manufacturers would gather for any purposes the conversation would drift to that subject before the meeting was over.

Q. Just what subject?

A. The subject of the price policy of the Minneapolis-Honeywell Company.

Q. Just to get this straight, just what was your objection in your own words, as you recall it now, to Minneapolis-Honeywell's policy?

A. You want my opinion?

Q. I want to know what your best recollection is of your objection to the price policy?

Mr. Haycraft: It is stated in this correspondence. Of course if he wants to examine—

Trial Examiner Sheppard: I want to hear it from Mr. Gillis. Go on.

A. My objection was this: Minneapolis-Honeywell never manufactured oil burner controls until oil burners were manufactured and the pioneers in that field cooperated with the Minneapolis-Honeywell Company to de-

velop controls for oil burners, to make them safe, and it was they that built up the oil burner control business for the Minneapolis-Honeywell Company and then when oil burners became popular and there was a very large sale of them and consequently a large sale of controls, the pioneers didn't increase in volume as rapidly as some
925 of the newcomers in the field who sold on a price basis.

But the price policy of the Minneapolis-Honeywell Company, basing their prices in volume, gave some of the pioneers who had helped build their business up a decided disadvantage in trying to compete with some of the cheaper ones because of the larger volume.

Q. In other words, you wanted the pioneer companies, of which you numbered your company one I take it, to be able to maintain their prices and not have to meet the cheaper makes?

A. No, we knew we would have to meet prices, lower prices.

Q. You did not do it, did you, during the period from 1937 to 1940?

A. No.

Q. Based on volume production it is always cheaper to produce on a large volume?

Wasn't the nub of it that you wanted to be able to continue to sell your burners at the prices that you had been selling them at?

A. No, that was not it.

Q. What was it?

A. We wanted to be able to sell controls to our own dealers at the prices established by the manufacturer of the controls and not have someone else come in and sell them to our dealers at prices as low as we could get them from Minneapolis-Honeywell Company ourselves.

926 Q. You did not want the dealers to have burners for sale at lower prices than your burners were available?

A. I am not talking about burners now. I am talking about controls.

Q. I am talking about burners equipped with Minneapolis-Honeywell controls. That is what your dealers carried, wasn't that what your dealers were selling, the whole burner equipped with controls?

A. Yes, most burner manufacturers sold them with controls.

Q. So it was the price that the dealers were selling their burners at that you were interested in, wasn't it?

A. No, I could not quarrel with them over that. They could sell burners at any price they wanted to.

Q. But when the burners were equipped with Minneapolis-Honeywell controls then you were interested in the price of the complete control unit?

A. Even then I cannot object to it. I objected to selling controls alone to our dealers as cheaply as we could buy them.

Q. And you were not at all interested in the fact that the Quiet-Heet Company, for example, sold in 1937, 1938, burners equipped with Minneapolis-Honeywell controls for say $60?

A. Interested, certainly because in that business I could not help but be interested.

Q. Wasn't that your real quarrel with Minneapolis-Honeywell, they were selling controls to companies 927 like Quiet-Heet Mfg. Company?

A. No.

Q. You never complained about that to Minneapolis-Honeywell?

A. No, I cannot tell them who to sell controls to. I never presumed to.

Q. You mean to tell us you want us to believe that you never at any time complained to any Minneapolis-Honeywell representative of their sales of controls to the Quiet-Heet Mfg. Company?

A. I don't know what you believe but I can tell you that I never did complain if their selling controls to anybody. That would be silly.

Q. Did you ever make any complaints about the Quiet-Heet Company on the subject of controls to the Minneapolis-Honeywell Company?

A. Except that I had reason to believe that they were the ones that were selling Minneapolis-Honeywell controls to our dealers as cheaply as we could buy the controls from the Minneapolis-Honeywell. Yes, I made that complaint.

Q. What did you do about it?

A. I wrote that letter to Mr. Sweatt.

Q. Mr. Gillis, you were asked some questions by Mr. Haycraft on direct examination about your 1937 contract with the Minneapolis-Honeywell Company, that is, Commission's Exhibit 132. I don't think the record is left

quite clear as to your interpretation of the phrase,
928 "Season's Requirements sets of the Company's automatic temperature controls."

You first testified that that meant to you that you were required to buy your season's requirements of Minneapolis-Honeywell controls and later you made an answer which left the impression that this contract required you to buy all your controls, no matter what make, exclusively from Minneapolis-Honeywell?

A. My understanding of that contract each year as it was submitted was that when it stated it covered our requirements it meant it covered our requirements of all controls, which meant that we would buy exclusively from the Minneapolis-Honeywell Company. That was my interpretation of those contracts.

Q. How do you arrive at that interpretation when you read the language which says, "Season's Requirements of the Company's automatic temperature controls"?

A. That contract was probably written by an attorney and attorneys writings are very often difficult to understand, and that was my understanding of it.

Q. Do you know how that language, "Season's requirements", came into that contract? Do you have any recollection of that?

A. I don't recall that. Frankly, I don't remember the occasion for that at all, but I know though it specified a given number on those contracts. When we signed
929 a contract, it was my interpretation of the contract that it meant we should buy all of our requirements for controls from Minneapolis-Honeywell. That is the way I understood it.

Q. Regardless of the number inserted?

A. That is right. I understood the number inserted was simply a basis on which to establish the bracket in which we were to be billed.

Q. So that if you needed a thousand control sets for the burners which you were selling in a particular year, you had to buy them all from Minneapolis-Honeywell?

A. That is what I interpreted those contracts and that is the way we acted on them.

Q. Take for example Commission's Exhibit 151, your 1941 contract. It specifies a thousand sets. Did you interpret that to mean that you had to buy all your controls in that year from Minneapolis-Honeywell?

A. Not for that year because we notified them in advance we did not intend to do it.

Q. So, I see, it depended upon your state of mind and not on the language of the contract at all?

A. Well, the language of the contract might be qualified by a written statement of our own.

Q. Just show us the written statement that qualified the 1941 contract?

A. I don't have it. I have not been there.

930 Q. Do you know that there was such a written contract?

A. I don't know positive. I can't swear that there was. I think there was but I can't state that as a fact.

Mr. Gilpatric: Then I ask that he produce that, Mr. Examiner, in view of his statements that these contracts which the Commission has offered in evidence are qualified by written statements that his company made.

I think it is important that we have that for the record.

Trial Examiner Sheppard: If you have not got it, you will just have to give us your best judgment on it.

The Witness: That is my best recollection. I can't say definitely.

Trial Examiner Sheppard: The record is plain on that anyway.

Mr. Gilpatric: I want to know what this statement said because Mr. Gillis has made testimony here.

Mr. Haycraft: He said he was not sure whether it was in writing or verbal.

The Witness: Of course, the fact—

Mr. Freeman: You don't want a written contract but some written statement.

The Witness: The fact that this price list was effective in 1941 and lists both kinds of controls, Mercoid and

931 Minneapolis-Honeywell, establishes the fact that we had no intention.

By Mr. Gilpatric:

Q. As far as Minneapolis-Honeywell is concerned, your contracts with it were the same all through these years. It was just your interpretation?

A. I believe the contracts were the same.

Q. It is just your interpretation that was different during these years?

A. That is right.

Q. And you decided to buy from Mercoid after you had this difference of view over the pricing policy?

A. That is correct.

Q. Did you ever make a contract with the Mercoid Company?

A. Yes.

Q. Have you got it with you?

A. It is here I believe.

Q. Will you produce it please?

Mr. Haycraft: I object to that as irrelevant and immaterial. Mercoid is not on trial here.

Mr. Gilpatric: It certainly bears on this question of interpretation of the Minneapolis-Honeywell contract, whether this witness entered into contracts with other companies in other years which he felt exclusive.

Trial Examiner Sheppard: Mr. Gillis, I will let you use these contracts simply to refresh your mind.

932 Mr. Haycraft: That is not the purpose. They are getting the Mercoid contracts for some other reason than that.

Trial Examiner Sheppard: I don't know what they are going to use them for.

Mr. Haycraft: I don't know now but I don't see why they should drag them into this case.

By Mr. Gilpatric:

Q. During 1938 were you still selling your burners equipped exclusively with Minneapolis-Honeywell controls?

A. Yes.

Q. And was your interpretation of your contract with Minneapolis-Honeywell that year as you testified, namely, as requiring you to buy all your controls from Minneapolis-Honeywell?

A. I did buy them all anyhow.

Q. How did you happen to sign a contract with the Mercoid Corporation to buy its controls on April 29, 1938?

A. For how many?

Mr. Gilpatric: Will you read the question?

(The last question and answer read.)

By Mr. Gilpatric:

Q. I want an answer to my question first.

Mr. Haycraft: I submit that is not fair.

Mr. Gilpatric: I asked the question if he signed.

A. The answer is I don't know why. I don't remember what the contract was.

933 Trial Examiner Sheppard: That is the reason why I wanted you to refresh your mind on that. It has been some years since you saw them.

Mr. Gilpatrick: Mark this for identification as Respondent's Exhibit 10.

(The document referred to was marked Respondent's Exhibit 10 for identification.)

By Mr. Gilpatric:

Q. I show you Respondent's Exhibit 10 for identification and ask you whether or not your signature is affixed to the fourth page?

A. Yes, that is my signature.

Q. Does that refresh your recollection as to how you happened to sign that contract with the Mercoid Corporation in 1938 when you testified that you had interpreted your contract with Minneapolis-Honeywell as obligating you to buy exclusively from it all your control requirements?

A. Yes, I can tell you why. I signed it. It was in order to establish those prices to us in case we did want to buy any. We have not agreed to buy any specific number of controls.

Q. In other words, you don't consider yourself obligated, or you didn't consider yourself obligated to buy controls from Mercoid under this contract?

A. (Witness does not answer.)

934 Q. Did you consider yourself obligated to buy 1,000 sets from Minneapolis-Honeywell under its contract for 1938, Commission's Exhibit 143?

A. Yes, I considered it an obligation to buy as near that number as we required or as we could.

Mr. Haycraft: Show him the document, the agreement. I think he should be shown the agreement.

Trial Examiner Sheppard: He will.

Mr. Gilpatric: Which document?

Mr. Haycraft: The 1938 agreement with Minneapolis-Honeywell.

By Mr. Gilpatric:

Q. I will show you the document, Mr. Gillis, and ask you whether you want to change your answer in the light of having seen it?

A. What was my answer?

Trial Examiner Sheppard: Read the last question and his answer.

(The last question and answer were read.)

By Mr. Gilpatric:

Q. Is that what you wanted to say, Mr. Gillis?

A. Yes, I won't change that answer.

Q. May we see, Mr. Gillis, your 1939 and 1940 contracts with Mercoid?

A. Beg pardon?

935 Q. I asked if we could see your 1939-1940 contract.

Mr. Haycraft: I have the same objection to that as I have to the previous.

Mr. Gilpatric: Mark this for identification as Respondent's Exhibit 11.

(The document referred to was marked Respondent's Exhibit 11 for identification.)

Mr. Haycraft: Mr. Examiner, I wish to point out in connection with my objection that the language of the Mercoid may be and probably is different than that of the Minneapolis-Honeywell.

As to how he interprets the Mercoid with the different language has no bearing on how he interprets the Minneapolis-Honeywell. We are fanning at windmills.

Mr. Gilpatric: The contract with Minneapolis-Honeywell says one thing. The witness's interpretation is something else. It seems to me it is extremely relevant and material in this proceeding to see how the witness's interpretation of the other contract is made which is as of the same time.

Mr. Haycraft: The interpretation of the other language will have no bearing.

Mr. Gilpatric: Just don't get excited and see what happens here.

Mr. Haycraft: I am not excited.

Trial Examiner Sheppard: Mr. Gillis, I just want 936 you to have a chance to explain everything.

A. I think we can enlighten the gentlemen on that. In 1938 we began the development of a new type of heating system which we called the Colby system of hot water heating, which required different controls from the oil burners and we equipped the Colby system with Mercoid controls.

Q. What year did you say?

A. In 1938 we began that development.

Q. Did you buy any Mercoid controls in that year?

A. Yes, new controls and new types of controls were necessary for that unit and the Mercoid Corporation developed them for that particular type of heating system.

Q. So even though your contract with Mercoid Corporation, Respondent's Exhibit 10 for identification did not specify the number of units you did buy under the contract?

A. Oh, yes, we bought some but not for our oil burners.

Q. Were they automatic temperature controls?

A. They were automatic temperature controls.

Q. Could they have been used on oil burners?

A. Oh, yes, they could have.

Q. I show you, Mr. Gillis, Respondent's Exhibit 11 for identification and ask you if you can identify that for the record?

A. Yes, this is a contract for controls for the year 1940.

Q. And what did that contract obligate you to buy 937 from the Mercoid?

Mr. Haycraft: I object to that as calling for a legal conclusion of a document which is not subject to a layman's construction, that he is obligated to buy.

Mr. Gilpatric: I will withdraw the question.

By Mr. Gilpatric:

Q. What number of units did the contract specify for 1940?

A. What do you mean by specify?

Trial Examiner Sheppard: The number set forth in the document.

The Witness: It says the special net prices set forth here which are based on 1940 control requirements estimated to be 10,000 control units.

By Mr. Gilpatric:

Q. Was that in fact your estimate of your control requirements for that year?

A. We had no estimate. We were developing a new device entirely. We had no definite figures to base an accurate estimate on.

Q. In that same paragraph, Mr. Gillis, the phrase occurs, "the company agrees to sell and the purchaser agrees to purchase during the term of this agreement their re-

quirements of the company's automatic controls." How did you interpret that language?

A. Well, I guess I interpreted that as meaning that
938 we would purchase as many of their controls as our dealer organization called for.

Q. A little different interpretation then, wasn't it, than the interpretation of the language in the Minneapolis-Honeywell contract for 1937?

Mr. Haycraft: About the same language.

Mr. Gilpatric: About the same.

Mr. Haycraft: But it is not the same language.

A. No, I think the interpretation of the wording of the contract was the same, the same as I think the interpretation of the Minneapolis-Honeywell was correct. That is based, it states, "Based on the number which is the estimated quantity consumed." In the Minneapolis-Honeywell contract it says, "The company agrees to sell, and the purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract 1,000 sets or more, which is a definite number."

Q. Go on, read the rest of it?

A. "Of the company's automatic temperature controls."

Q. You thought that meant not merely the company's, the Minneapolis-Honeywell, but any control, is that correct?

A. That is right.

Q. Will you explain to us the difference in your mind between the phrases, "estimated at 1200 sets of the company's automatic temperature controls" in Commission's Exhibit 143, and "estimated to be 10,000 units,"
939 in Respondent's Exhibit 11 for identification?

Mr. Haycraft: Just a moment, before that question is answered. He is not referring to the 1937 agreement, which was the agreement which I asked him about in the first place, which said "estimated requirements" without any number it. Now he has submitted to him another year's contract.

Mr. Gilpatric: Mr. Examiner——

Mr. Haycraft: The question is 1937 and that is his question. He propounded to him with regard to 1937 and I think it is wrong to submit some other agreement to him.

In answer to that question I submit he should have the 1937 agreement before him before he is required to compare them.

Mr. Gilpatric: I will certainly give him the 1937 agreement.

Mr. Haycraft: It is not the same.

Trial Examiner Sheppard: Just refer to that and see if you can give us an answer.

A. I would just like to know what the gentleman would like to know.

Mr. Gilpatric: Read the question.

(The pending question was read.)

A. (Continued.) All the Minneapolis-Honeywell contracts prior to 1938, and I believe later than 1938, named a specific number of controls that the contract covered.

940 This one dated January 13, 1938 states, "The company agrees to sell and the purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract Est. at 1200 sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control."

That is the only one that gave an estimate at all. The rest were specific for the year's requirements.

Q. You still have not explained whether in your view the word "estimate" used in the Mercoid contract had any different meaning that the "estimate" in the Minneapolis-Honeywell contract?

A. That is a difference in this way: this statement in the Mercoid contract says, "the special net prices extended herewith by the company are based on the purchaser's 1940 control requirements estimated to be 10,000 units."

Q. Now read the preceding sentence. That is what I am directing my question to.

A. "Subject to the terms and provisions hereinafter contained the company agrees to sell and the purchaser agrees to purchase during the term of this agreement their requirements of the company's automatic controls."

Q. Now read those two together in comparison with the Minneapolis-Honeywell form? That is all I am asking

941 you to do.

A. "The company agrees to sell and the purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of the contract Est. 1200 sets of the company's automatic temperature controls, each set consisting of one thermostat and one limit control and one primary control."

Q. Outside of the differences in the number of units or sets as the case may be, what difference in meaning did those two provisions have to you?

A. They are worded almost identically. Well, I should take it from this that it would mean that we would purchase as many Minneapolis-Honeywell controls as we needed and on the other as many Mercoid controls as we needed.

Trial Examiner Sheppard: As a matter of fact, is that what you did on both?

The Witness: Prior to 1938 we did not purchase any but Minneapolis-Honeywell controls. After 1938 we did.

Trial Examiner Sheppard: All right, gentlemen, there is the story.

By Mr. Gilpatric:

Q. All right, now Mr.—

Trial Examiner Sheppard: I don't need a thing else from either side. I will take the whole record and study it from that point.

Mr. Gilpatric: I am through with that subject, 942 Your Honor, but I have one more question.

Trial Examiner Sheppard: Go right ahead.

By Mr. Gilpatric:

Q. Who are your competitors, Mr. Gillis, in the sale of oil burners, or rather who were they during the period that you were manager of that division for the Malleable Iron Fittings Company?

A. That is quite a long list.

Q. Give your principal list. I will stop you when I have enough.

A. Williams Oilomatic, Silent Glow, Harvey-Whipple, Reif-Rex-Oil, May Oil Burner Corp., latterly of course there is Quiet-Heet.

Q. Aldrich?

A. We never had much competition with Aldrich.

Q. Did you have any competition with Sears-Roebuck?

A. No, never felt them.

Q. You mentioned Petroleum Light and Power, didn't you?

A. No, I didn't but Petroleum Heat and Power was one. Delco of course and later Chrysler. The list continued to lengthen the last four or five years.

Q. And the price trend went downward in the last four or five years?

A. That is right.

Q. Have you any invoices covering your purchases
943 of Mercoid controls during the year 1938 about which you testified?

A. I believe we have. Here are some invoices for purchases in 1939 of Mercoid controls.

Q. Are those all your invoices from Mercoid?

A. Those are all for 1938.

Q. Did you use any of the limit controls purchased from the Mercoid in 1938 on oil burners Mercoid type 115 immersion, range 50-250 degrees, style No. 1?

A. Yes, we used that in the Colby system that we were working on.

Q. That was an oil burner, was it?

A. It was oil heated. It was an entire heating system of a new type that we were working on. That immersotherm did not control the oil burner. It controlled a circulator.

Q. Was that oil burner unit of yours sold in the general market of 1938?

A. No, it was a different type. It was one designed especially for that unit and not sold as a separate oil burner at all. It was a flange-mounted oil burner on the unit.

Q. Your business in the oil burner field was primarily selling oil burners complete with controls, was it not?

A. Oh, yes, we sold nearly practically all of them complete with controls.

Q. And your sale of controls separately was simply for repair and replacement purposes, wasn't it?

944 A. That is correct.

Q. You never sold oil burners, did you, without a set of controls going with it?

A. Yes, we have. I would not say we never did but it was a very rare occasion. If the oil burner was sold to replace another one and we felt that the controls were still good enough to insure continuous operation, we would sell a burner without the controls, but we would first satisfy ourselves that the controls that were in were all right.

Q. That was not your general practice? That was a rarity?

A. Our general practice was not that, maybe two or three a year. Generally our practice was to sell the burner complete.

Q. You were not competitively engaged in the sale of controls themselves apart from oil burners?

A. Not to a very large extent but of course our dealers who did service work purchased quite a number of controls to replace others of their customers and we did a fair volume business along there in the proportion of the number of burners we sold.

Q. The controls you purchased from Minneapolis-Honeywell were to be used with your burner, weren't they, as original equipment.

A. Oh, yes.

Q. And this other business in controls for service
945 purposes was more of an accommodation than your main line?

A. Well, I would not say it was altogether an accommodation. There was a selfish interest in selling it. We made a profit on it and it was a satisfactory profit.

Mr. Gilpatric: I think that is all we have, Mr. Examiner.

Trial Examiner Sheppard: Anything else, Mr. Haycraft?

Mr. Haycraft: No.

(Witness excused.)

Mr. Haycraft: I think I would like to call Mr. Lang and have him testify just a moment with regard to the documents we have been using here to show where they came from, etc.

Mr. Lang, will you take the witness stand.

HARRISON M. LANG was thereupon called as a witness for the Commission, and having been duly sworn, testified as follows:

Direct Examination by Mr. Haycraft.

Q. Will you state your full name and address for the record?

A. Harrison M. Lang, Pine Orchard, Connecticut.

Q. What is your business address?

A. Branford, Conn.

Q. What is your occupation there?

946 A. Why I am taking Mr. Gillis's place as manager of the Oil Burner Department, what is left of it, and

in addition to that I am director of priorities and also purchasing agent for the company.

Q. Did you produce, pursuant to your subpoena or in answer to Mr. Gillis's, correspondence, invoices, contracts, etc., which we have been referring to and which were referred to in Mr. Gillis's testimony?

A. I produced them out of the files of the Malleable.

Q. Did you hear Mr. Gillis testify?

A. I did.

Q. Did you hear him identify certain correspondence and contracts?

A. I did.

Q. And did you furnish those to Mr. Gillis from the files of the Malleable Iron Fittings Company?

A. I did.

Q. And are those invoices, contracts and correspondence present in the Court Room today so that they may be inspected by counsel for the respondent?

A. Which ones do you mean, the invoices of Minneapolis-Honeywell and Mercoid?

Q. And the contracts and correspondence.

947 A. Yes, they are here.

Mr. Haycraft: That is all.

Mr. Gilpatric: That is all.

(Witness excused.)

Trial Examiner Sheppard: We will have a five-minute recess.

(A five-minute recess was taken.)

Trial Examiner Sheppard: On the record.

In view of the fact that we cannot finish the cross-examination of Mr. Peters, I am going to ask Mr. Peters to come back tomorrow at 9:30 so we can go ahead with his examination and then take up whatever witnesses we may have.

We will now adjourn until 9:30 tomorrow morning in this room, Room 505.

(Whereupon, at 5:05 o'clock p. m. Thursday, September 16, 1943, the hearing in the above-entitled matter was adjourned.)

948

Room 505,
45 Broadway,
New York, N. Y.,
Friday, September 17, 1943.

Met, pursuant to adjournment at 9:30 a. m. E.W.T.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by B. R. Shute, Esq., 15 Broad Street, New York, N. Y., and

Bair & Freeman, Esqs., by Will Freeman, Esq., 135 South La Salle Street, Chicago, Illinois, attorneys for the Respondent.

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Proceedings.

Trial Examiner Sheppard: Mr. Reporter, you can convene the hearing pursuant to our adjournment taken yesterday, in the Minneapolis-Honeywell Case, Docket No. 4920, and show Mr. Samuel Louis Peters on the stand for cross-examination.

SAMUEL LOUIS PETERS resumed the stand and testified further as follows:

Trial Examiner Sheppard: Mr. Freeman, when you are ready you can proceed, sir.

Cross-Examination by Mr. Freeman.

Q. Mr. Peters, you started buying controls from the Mercoid Corporation in 1936, is that correct?

A. That is correct.

Q. And you likewise started buying controls for oil burners from Minneapolis-Honeywell in 1936?

A. Correct.

Q. And your first controls were purchased from the Mercoid Corporation?

A. Correct.

Q. Do you recall in what quantities you first purchased controls from Mercoid?

A. In lots of 10 or 12.

950 Q. And in what quantities did you first purchase controls from Minneapolis-Honeywell?

A. Similar quantities.

Q. And you had a contract with Minneapolis-Honeywell in 1936, did you not?

A. I think so.

Q. And do you recall in what bracket or what price range you purchased controls from Minneapolis-Honeywell in 1936?

A. Not exactly but it must have been a very low bracket, the lowest possible that they had.

Q. And by "lowest bracket" you mean the one where the quantity is smallest and the price highest?

A. That is right.

Q. And when you started selling oil burners in 1936 at around $70 or under you were then paying relatively speaking high prices for controls, is that correct?

A. That is correct.

Q. And how did your price compare for the sale of oil burners, including the three controls, with other oil burners then on the market, and I am referring specifically to the year 1936 or the time when you first started?

A. Mine was the lowest-price burner on the market.

Q. And at that time, that particular time, were you paying Minneapolis-Honeywell's high price for controls?

A. That is right.

951 Q. And notwithstanding the payment of the Minneapolis-Honeywell's high price or Bracket 1 price for oil burner controls you were still able to undersell other oil burner manufacturers, that is, the so-called old line or pioneer manufacturers?

A. That is correct.

Q. You heard Mr. Gillis testify yesterday that he was connected—

Mr. Haycraft: I object to any questions of this witness with regard to Mr. Gillis as not proper cross-examination by Mr. Freeman.

Mr. Freeman: Let the record show that the witness now on the stand was present during the taking of the

testimony in behalf of the Commission of the Witness Gillis.

I will withdraw the question.

By Mr. Freeman:

Q. Mr. Peters, the statement I just made on the record is correct, is it not?

A. That is right.

Q. Mr. Peters, did you hear Mr.—

Mr. Haycraft: Mr. Examiner, I must object.

Mr. Freeman: Wait until I get through. I am going to do this all day.

Mr. Haycraft: I know what your question is going to be.

952 Mr. Freeman: Oh, you do? You must have been reading my notes.

Mr. Haycraft: You have already stated enough to show what the question is going to be.

I object to any interrogation of this witness as to what Mr. Gillis said as not proper cross-examination.

Trial Examiner Sheppard: We will let the usual procedure with reference to the cross-examining go on, that is, Mr. Freeman, you bring out anything you please by this witness in reference to what was brought out by Mr. Haycraft on direct.

Mr. Freeman: Then do I understand, Mr. Examiner, that I cannot ask any questions with respect to the so-called pioneer manufacturers?

Trial Examiner Sheppard: If it was brought out on direct. I don't remember.

Mr. Freeman: Well, the particular price lists of Mr. Peters' company, Quiet-Heet, were brought out on direct examination by the Commission.

Trial Examiner Sheppard: That is all right, if you want to refute, and I no doubt think you will, in time, what Mr. Gillis testified to, put on your witnesses in the usual way. Don't try to do it by cross-examination of another man who probably heard the testimony but had no right to comment on that.

953 By Mr. Freeman:

Q. Mr. Peters, you were in direct competition when you entered the field with the Malleable Iron Fittings Company, manufacturers of the Branford oil burner, is that correct?

A. To the extent that we were both in business. We did not know they were in.

Q. And—

Mr. Haycraft: I move to strike the question and answer.

Trial Examiner Sheppard: I didn't get that. Read it to me, Mr. Reporter.

(The last question and answer were read.)

Trial Examiner Sheppard: I will let that stay in for what it is worth.

By Mr. Freeman:

Q. And you were in competition with oil burner manufacturers who were selling oil burners at around $95 and up for a burner with controls, is that correct?

A. That is right.

Q. And your price was around $70 at the outset of your business career in the oil burner manufacturing business, is that correct?

A. That is right.

Q. How do you attribute, or rather state what the facts are with respect to your ability to manufacture oil
954 burners and equip them complete with a set of controls and sell them at a price of about $70?

A. I think that was largely due to the fact that my competitors misunderstood the trend of the industry at that time, which was into volume production because the F.H.A. and a large volume building construction program had entered the picture. They still stuck to the old policy of trying to get as much as the traffic would bear out of the commodity, whereas I started out to merchandise it on a volume basis, effecting certain economies, making a few shortcuts here and there and trimming down my overhead and operating costs to the minimum.

Q. When you started selling oil burners in '36 at a price of $70 did your company then operate upon a profitable basis?

A. Yes, we always made a profit since we started in business.

Q. And has that continued throughout 1941, that is, you made a profit each year?

A. Yes.

Trial Examiner Sheppard: When did you start business, Mr. Peters?

The Witness: We started the actual manufacture of oil burners in 1936.

Trial Examiner Sheppard: 1936?

955 The Witness: That is right.

Trial Examiner Sheppard: At that time there were a whole lot of other people engaged in that line of business, already established at that time?

The Witness: There were a great many manufacturers in the business.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. And when you say there were a great many manufacturers in business do you have reference to companies of long standing such as General Motors, Delco Division, Petroleum Heat and Power, Silent Oilomatic, Timken, etc.?

A. Well, there were really no companies in the oil burner business of long standing because the entire industry was relatively new, but I would say that there were a great many companies that had been in business for eight and ten years prior to the time I entered the business.

Q. And the general price range of such companies at the time you entered the business was around $90 or upwards for oil burners?

A. That is correct.

Trial Examiner Sheppard: Did that include the controls?

The Witness: That did include the controls.

Trial Examiner Sheppard: All right.

956 By Mr. Freeman:

Q. And you started out on a $70 basis?

A. That is right.

Q. And during the last seven years, that is, from 1936 up to 1941, prior to the present war emergency, your prices dropped each year to the extent of about 10 per cent, is that correct?

A. That is correct.

Q. And your approximate low price for oil burners during the latter part of 1941 or the very early part of 1942 was around $40, correct?

A. That is right.

Q. Do you have any records or any data that was prepared by you at the request of the Commission that will give you the purchases that you made from the Mercoid Corporation in the year 1936?

A. I don't have that data with me.

Q. Didn't you as a matter of fact then in the year 1937 buy approximately $1300 worth of controls from the Mercoid Corporation?

A. I would say that is probably true.

Q. And isn't it true that you have purchased as much as approximately $16,000 worth of controls from the Mercoid Corporation in a single year?

A. From memory I would say that is probably true.

957 Q. And you bought controls from the Mercoid Corporation in sets, did you not?

A. That is right.

Q. And you bought them in a volume of 100 sets or so at a time?

A. Yes, but I also bought them individually.

Q. Yesterday you stated on direct examination that the cost of a set of controls, keeping in mind that when we talk about a set we are talking about a stack switch or primary, an ordinary limit switch and the ordinary thermostat as distinguished from specials, was $13 for Mercoid, and I now ask you to look at a Mercoid invoice dated September 9, 1941, Mercoid Company's invoice No. 26728—

Trial Examiner Sheppard: Has that an exhibit number?

By Mr. Freeman:

Q. Which we will mark for identification Respondent's Exhibit 12. Do you not there find that for a stack switch, a thermostat and a steam control or hot water control the price per set was $12.70?

(The document referred to was marked Respondent's Exhibit 12 for identification.)

Mr. Haycraft: Why don't you offer it in evidence?

Mr. Freeman: It is in.

Trial Examiner Sheppard: It is accepted.

958 (The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 12, was received in evidence.)

By Mr. Freeman:

Q. Have you answered my question?

A. I will answer your question: I see the invoice and I see the figures and as far as I know it is a correct copy of the invoice.

Q. And from the invoice you are willing to testify that

the cost of a set of controls which was sold to you by Mercoid was as low as $12.70?

A. That is so.

Trial Examiner Sheppard: What is the date of that?

The Witness: The date of the invoice is September 9, 1941.

By Mr. Freeman:

Q. Did you ever buy a set of comparable controls from Minneapolis-Honeywell for as low as $12.70?

A. No, I never did.

Q. As a matter of fact, your company paid Minneapolis-Honeywell a premium or at least a higher price for comparable controls, is that correct?

A. That is right.

Q. And that has been your experience from your outset in business up to date, is that correct?

959 A. That is correct.

Q. You testified yesterday that a DA steam control, range 10 pounds to 14 pounds was purchased by you from Mercoid at $2.75. Do you so recall?

A. I read it from the invoice, so I must have.

Q. And that is a limit control, is it not?

A. That is right.

Q. With the cost of controls per set at $12.70, tell me what the cost was for the thermostat and primary control?

A. I can't unless you let me refresh my memory from an invoice.

Q. What I am asking, Mr. Peters, is, take the $12.70 set price and deduct the $2.75 and you get $9.95, is that correct?

Mr. Haycraft: Mr. Examiner, before he answers the question, the invoice does not indicate that the $12.70 price includes a thermostat; only it indicates it includes two controls which do not include the thermostat. So I object to the form of the question. It is misleading.

Mr. Freeman: Mr. Haycraft, you are just so wrong that you are pitiful.

Mr. Haycraft: The exhibit speaks for itself.

By Mr. Freeman:

Q. Mr. Witness, is Mr. Haycraft's statement correct?

A. I see an item here called 200 type H Sensatherm, 960 so evidently it includes the thermostat.

Q. So Mr. Haycraft is wrong, Mr. Peters?

A. It would seem so because here is the invoice. 200 JM Pyratherm, 200 Sensatherm, 100 M80 combination fan and limit controls and 50 steam controls and 50 Risatherms, making a total of 200 sets.

Mr. Haycraft: You have two different prices there, don't you?

The Witness: Yes, evidently 100 of the sets which came equipped with fan and limit controls are higher in price. They total $14.70. The others were the regular controls and total only $12.70.

By Mr. Freeman:

Q. When you say "regular controls," you mean limit controls?

A. Yes.

Trial Examiner Sheppard: You are referring in your testimony, Mr. Peters, now to Respondent's Exhibit 12?

The Witness: Yes. I personally do not remember the prices that this company charged me at this particular period. I am merely taking this invoice and I am assuming that the invoice is correct as rendered to me and I am merely reading it because price controls over the period of time that I have been doing business, I mean the price of controls has varied so much that I absolutely could not testify from memory as to what I paid on any certain specific period.

961

Trial Examiner Sheppard: All right.

The Witness: And if the invoice is in error I want you to know that my testimony is also in error. That is the only thing I can say about it.

By Mr. Freeman:

Q. You are testifying now from the records which you have before you?

A. This is our invoice. We paid this invoice and the invoice apparently appears to be correct but I don't remember purchasing sets at those prices.

Q. Other than from the invoice?

A. From the invoice.

Q. Anymore than you remember purchasing controls at any given price from Minneapolis-Honeywell from memory?

A. That's right.

Q. Will you then answer my question, following the invoice, Respondent's Exhibit 12, as to the cost of the thermostat and primary control?

A. Well, there is no indication on this bill as to what the cost of the thermostat or primary control is as far as I can see unless—

Q. Will you look?

A. What?

Q. Will you look at your other invoices and see
962 what you paid for a DA 31 Limit Control?

A. $2.75 according to invoice No. 1918.

Trial Examiner Sheppard: Dated?

The Witness: Dated January 10, 1941.

By Mr. Freeman:

Q. So that the cost of your thermostat and primary was $9.95?

A. If that is what it totals.

Q. That is, the difference between the cost to you of the DA 31 and the set of controls amounted to $9.95, correct?

A. That is correct.

Q. And I noticed yesterday in your sales to some of these companies, which Mr. Haycraft referred to, that when you omitted a limit control you deducted $2.75, is that correct?

A. Yes.

Q. So that if you sold an oil burner equipped only with a thermostat and a primary the cost to you of such Mercoid controls was $9.95, correct?

A. That is right.

Trial Examiner Sheppard: And what would be the cost if you added the final?

The Witness: The what?

Trial Examiner Sheppard: The other control.

Mr. Freeman: $12.70. We are speaking now, Mr. Examiner, of Mercoid controls.

963 Trial Examiner Sheppard: I understand.

By Mr. Freeman:

Q. Mr. Peters, on the same invoice, which designates 100 combination fan and limit controls or the type M80 Mercoid Control, you have as a set price the sum of $14.70, correct?

A. That is correct.

Q. And you have on invoice No. 28868 of the Mercoid, dated September 26, 1941, which we will mark for identification Respondent's Exhibit 13, the price for such a unit as $4.75, is that correct?

(The document referred to was marked Respondent's Exhibit 13 for identification.)

Mr. Haycraft: I object to that unless it is in evidence.

Mr. Freeman: All right, it is in evidence.

Mr. Haycraft: I have no objection to the exhibit.

Trial Examiner Sheppard: Received as Respondent's Exhibit 13.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 13, was received in evidence.)

A. Yes, that is true.

Q. So for the 100 sets of controls referred to in Respondent's Exhibit 12, where you have the M 80, the cost of the thermostat and primary to you was likewise 964 $9.95, is that correct?

A. That is right.

Q. When you dealt with Mercoid for the purchase of the controls in accordance with Respondent's Exhibit 12 you dealt on a set basis as distinguished from individual controls, is that correct?

A. I can't recall that.

Q. But do you recall getting any individual prices for the controls, for controls themselves that go to make up the sets wherein the price is $14.70 in one case and $12.70 in another case?

A. I cannot recall how they handled their contract or their sales.

Trial Examiner Sheppard: I thought the price of sets was set irrespective of the price of the individual parts in it.

The Witness: Yes, there was the price of sets but I cannot recall at this time whether their piece price totalled to more than the set price if sold individually. In other words, I can't testify to any conversation covering a contract that I entered into with Mercoid. It is so long ago. My memory would not support any statements that I could make but I can testify from these invoices the prices I paid for certain specific controls on certain dates.

Trial Examiner Sheppard: All right.

965 By Mr. Freeman:

Q. You can't take any of the invoices that you have from the Mercoid Corporation for individual controls such as the thermostat, primary control and limit control and get any total of $12.70, can you?

A. No, I can't.

Q. In other words, any of the individual units that you bought irrespective of quantity brings about a price higher than $12.70 for three controls?

A. So I see from totalling up these invoices.

Q. And the same is true in connection with the M 80 or combinaton fan and limit control along with a primary and thermostat, you cannot total those three items and get a price as low as $14.70, is that correct?

A. No.

Q. Did you sign a contract with the Mercoid Corporation as you did with Minneapolis-Honeywell?

Mr. Haycraft: That is objected to, Mr. Examiner, as irrelevant and immaterial.

Trial Examiner Sheppard: I think I will let you answer that. That seems to be in the picture here.

A. Well, I can't recall whether I signed a contract or not. Probably some years they offered it and some years it was a mere formality.

Mr. Haycraft: I want to point out, Mr. Examiner, 966 I have an objection to this line of cross-examination with respect to the Mercoid Company, which is not on trial here.

I understand that Minneapolis-Honeywell's activities are on trial.

Trial Examiner Sheppard: That is true.

By Mr. Freeman:

Q. Were you solicited by Mercoid each year?

A. Well, their local representative called continually just as yours did. I mean every week or so we got a call from their representative. It was a continuous service that lasted from the time we started in business.

Q. And those calls were to get your business?

A. Well, naturally, they wanted my business.

Q. And have you ever been solicited by the Perfex Company of Milwaukee, Wisconsin?

A. If by solicited you mean if we ever bought any merchandise, did the salesman call on us and we did buy merchandise, the answer is yes.

Q. The salesman called on you?

A. Called on us and we purchased merchandise.

Q. From Perfex?

A. Yes, but not in large quantities.

Q. And did you buy from the Penn Electric Switch Company?

A. We placed one order with them but finally returned the merchandise involved in that particular order.

967 Q. Have you had several calls by that company soliciting your business?

A. I can't recall how many, but I know enough to warrant our purchasing one lot of merchandise.

Q. Then, as a matter of fact, since you started in business you had at least four different companies soliciting you for the control business, is that correct?

A. Well, I would say there were at least that number.

Q. The Mercoid controls that you bought in 1941, as evidenced by Respondent's Exhibit 12, were sold by you in connection with oil burners?

A. That is right.

Q. And those controls worked satisfactorily, did they not, for the purpose intended?

A. Yes.

Q. With respect to the handling of Mercoid controls, either with your burner or apart from your burner, did you have any different policy as to how you sold Mercoid controls than the policy you had for the sale of Minneapolis-Honeywell?

A. No.

Mr. Haycraft: That is objected to as immaterial and irrelevant whether he had any different policy. The issues are in what were the policies with respect to Minneapolis-Honeywell.

Trial Examiner Sheppard: I will let the witness 968 answer that if you think it is important.

Mr. Freeman: I think it is all important. Here we have Mr. Gillis come down here yesterday, squawking with respect to what the Quiet-Heet Company did. There are a number of exhibits that have been introduced here that refer to the sale of controls.

Trial Examiner Sheppard: There is nothing about the Mercoid Company though except that he switched to it. It was all the correspondence entirely.

Mr. Freeman: And I want this witness to tell me whether he had any different policy and it is material.

Mr. Haycraft: What of it?

Trial Examiner Sheppard: The question here is the sales of the respondent's controls and not the Mercoid's.

In making up my mind on this case, Mr. Freeman, I

might tell you right straight and it may save you a lot of time, I will have very little to say about the Mercoid.

Mr. Haycraft: They are not on trial here.

Mr. Freeman: It is not a question of being on trial here. It is a question of competition and we have the right to find out whether or not the respondent had competition and whether Mercoid was a factor.

Trial Examiner Sheppard: There is no question about it.

Mr. Freeman: That is all I want to find out.

969 Trial Examiner Sheppard: That is right.

Mr. Freeman: Mercoid is not on trial yet.

Trial Examiner Sheppard: Go back and read the question.

(The question was read as follows: "Q. With respect to the handling of Mercoid controls, either with your burner or apart from your burner, did you have any different policy as to how you sold Mercoid controls than the policy you had for the sale of Minneapolis-Honeywell?")

The Witness: I answered that, no.

By Mr. Freeman:

Q. You bought controls from Mercoid each year starting with 1937 up to and including the year 1943, is that correct?

A. Correct.

Q. And you sold oil burners with Mercoid controls from there on? Is that correct?

A. That is correct.

Q. And you advertised Mercoid controls on your oil burners just as you did the Minneapolis-Honeywell controls, is that correct?

A. That is correct.

Q. In connection with your purchase of Minneapolis-Honeywell's controls did that company as far as you
970 know ever give you any special concession because of your purchase of large quantities of controls?

A. None excepting their standard discount brackets as far as I know.

Q. In other words, if your quantity put you in bracket five you got bracket five prices, correct?

A. That is what I assumed.

Q. Isn't it a fact that you actually registered some complaint with Minneapolis-Honeywell because you were

using so many more controls than what their bracket five called for?

A. That is true.

Mr. Haycraft: I object to that as immaterial and irrelevant.

The Witness: I think it is very important to me. If I might mention it, I don't think Minneapolis-Honeywell treated me very fairly in giving me only bracket five when I was entitled to discounts to something far in excess to what they gave me.

In other words, competitors of mine did one-third the business that I did and they got a price that was equally as low and it appears that simply because I did establish this large volume it was never taken into consideration. Minneapolis' contention always was as long as there was only one customer in that bracket they would not make
971 a new bracket for it. Someone has to start it.

Trial Examiner Sheppard: Let me see, Mr. Peters, there were seven brackets?

The Witness: Five, I think. It ran up to 10,000 sets.

Trial Examiner Sheppard: They started at the lowest Number One, which had a discount?

The Witness: That is right.

Trial Examiner Sheppard: And went up to the fifth, which was the lowest discount?

Mr. Freeman: The lowest price and the highest discount.

Trial Examiner Sheppard: The lowest price and the highest discount?

The Witness: Right.

Trial Examiner Sheppard: And you were in I believe you said the third?

The Witness: The fifth, the largest.

Trial Examiner Sheppard: The largest?

The Witness: Yes.

Trial Examiner Sheppard: You wanted what?

The Witness: A still better price for my controls because my purchases were far greater than anybody else's in Bracket Five. In other words, Bracket Five was established and these brackets apparently were established
972 in a period when volume didn't begin to approximate the volume that was later attained by the whole industry. In other words, the whole setup was obsolete and something should have been done to change it to take into consideration the volume that became possible under the

conditions where the total sales of the industry were far greater.

Trial Examiner Sheppard: That is what made the respondents create, if I understood you right, a new bracket something over ten thousand?

The Witness: That is right.

Mr. Freeman: Mr. Examiner, 10,000 sets entitled a purchaser to go to Bracket No. Five and Mr. Peters complained, as I understand it, that he bought nearly three times that amount or at least two and one-half times 10,000 sets of controls.

Trial Examiner Sheppard: And only got the same.

Mr. Freeman: And only got the same discount that a dealer got who bought 10,000.

Trial Examiner Sheppard: I see.

Mr. Freeman: And what Mr. Peters further said was that Minneapolis-Honeywell said, "We can't make a special bracket for you."

Trial Examiner Sheppard: I see. We will let you and the Minneapolis-Honeywell Company fight that out. We have nothing to do with that specially.

973 The Witness: Well, if the Federal Trade Commission is interested in seeing that some other manufacturers get a fair deal, how about looking after my interests? I have a legitimate complaint here too.

Trial Examiner Sheppard: You have got the right to register it here.

The Witness: It is registered.

Trial Examiner Sheppard: All right.

The Witness: I have been waiting a long time to say this.

By Mr. Freeman:

Q. Isn't it true that your first contract entered into with Minneapolis-Honeywell on January 11, 1936, called for 350 sets?

A. Yes, probably.

Trial Examiner Sheppard: That is a small order, isn't it?

The Witness: That is right.

By Mr. Freeman:

Q. You were a small manufacturer in the beginning, is that correct?

A. That is correct.

Q. And you then paid Minneapolis-Honeywell's price for that particular bracket, correct?

A. Right.

974 Q. And then on July 20, 1936 the same year you got a new contract for 1,000 sets?

A. That is correct.

Trial Examiner Sheppard: That put him in a new bracket, didn't it?

Mr. Freeman: Yes.

By Mr. Freeman:

Q. And that put you in a more favorable price bracket because your quantities of purchases had increased, is that correct?

A. That is correct.

Q. And then on January 4, 1937 you entered into a contract for 4,000 sets, which put you in a still more favorable bracket, that is correct?

A. That is correct.

Q. Of course, your price went down as your bracket went up?

A. That is right.

Q. Then on January 27, 1938 you were put in the 7500 bracket, correct?

A. Correct.

Q. And on May 4, 1939 you were put in the 10,000 bracket, is that correct?

A. That is correct.

Q. And from then on you have remained in that particular bracket notwithstanding you have purchased

975 two or three times the amount of controls called for by the bracket?

A. That is correct.

Trial Examiner Sheppard: I think that is very plain now. I get that now. I understand that.

By Mr. Freeman:

Q. I may have asked this but even at the sake of repetition, when you were paying the price called for by the 350 set bracket you were still under the general market to the extent of about $20 per oil burner, is that correct?

A. Yes, at least that.

Q. Do you do any overall advertising?

A. A limited amount.

Q. Would you say that your advertising cost you $5.00 per burner?

A. Oh, no. I would say that my total direct overhead doesn't cost me a fraction of that.

Q. How about your advertising; do you do any trade paper advertising?

A. We do occasionally. We buy a page in the trade paper at a couple hundred dollars a page but it is a very small percentage of our gross income.

Q. Do you have any service stations where service is rendered your dealers?

A. No.

Q. That policy of yours with respect to rendering
976 service to the oil burner dealers was different, was it not, than what the old line companies had adopted?

A. We made up our mind that we would sell only to the competent organizations who knew enough to maintain their own service and knew how to install our equipment, so that we could eliminate entirely the item of field service which was a very costly item that was being furnished by other manufacturers who were getting much more money for the equipment.

Q. And you gave that savings to the purchasing public who bought oil burners from you?

A. And the reason we felt we should do that was because there was no way of determining how much service a dealer would require after he bought the burner. In other words, a dealer would require so much that you took a loss on the equipment regardless of how much you sold him.

The next was if he knew enough he would require none, and the competent dealers required none, and we determined to eliminate altogether that unnecessary item. Burners were becoming dependable and stable and there were enough competent dealers so we would not have to do business with the others.

Q. And of course that effected an economy in your manufacturing costs?

A. That is right.

977 Q. And now with respect to these advertising post cards that Mr. Haycraft introduced yesterday in evidence in behalf of the Commission, did you furnish those to your dealers free of charge?

A. Well, we mailed them direct and where we had distribution in the area we gave the dealer the leads or the inquiries that came out of them.

Q. And if a dealer wanted to have his name imprinted

on your piece of advertising did the dealer get that for nothing?

A. Oh, no, all advertising was paid for by the dealer. I think we had a rate of $12 a thousand for a very attractively illustrated piece of literature together with a slight additional charge for the imprinting of his name if he chose to do it.

Literature was another business in our business. The dealer would have a habit of taking it in the car and it would become a bunch of garbage after a while and they spent a bunch of money to advertise and never did anything with it. So we decided the only dealers that would get the advertising were those who paid for it.

We had a set of master cuts made up and had a printer who would really work on volume basis by taking the various colors and running them off in large quantity and then do the third imprint and the dealer would ultimately pay for the total cost but of course we would buy in 978 quantity and give him the benefit of the lower price.

Q. So that the dealer solicitation on the post cards calling for Quiet-Heet burners was not paid for by your company at all?

A. The dealer did not send out post cards. We sent out post cards. That was our advertising; the folders or the advertising material the dealer used was of a different nature. It was designed for the customer, the ultimate user and not for other dealers.

Q. And such literature that was designed for the ultimate customer was paid for by your dealers?

A. That is right.

Q. So that you effected an economy in that you did not provide your dealers with a lot of literature?

A. That is right, or any.

Q. You say you didn't provide them with any?

A. Any literature to the dealers. We provided and they paid for it.

Q. You just gave them the benefit of your quantity purchase price?

A. That is all.

Q. Did you furnish your dealers with service manuals with respect to the installation of your Quiet-Heet oil burner?

A. We furnished them with service manuals but we charged them I think $2.00 apiece. They were also a very

attractively gotten up and very well thought out service manual.

979 We always used to call it practically an installation school; if they read that book and read it thoroughly they could install the average oil burner. But again we were up against a costly proposition to just give it to thousands of dealers, so we sold it to them.

Q. And you charged $2.00 apiece?

A. Yes.

Q. For the service manual you gave your dealers who purchased oil burners from you?

A. That is right.

Q. And I take it your sales to oil burner dealers were on a substantially large volume, correct?

A. That is right. We sold approximately 25,000 a year just before oil burners were banned by the O.P.A. originally.

Q. The period we are talking about primarily, Mr. Peters, is that period prior to any of the present war emergency rules and regulations.

A. Yes.

Q. Did you in getting up your burner save any money in connection with the cartons in which you packed the burner?

A. Well, we made a very complete study of the whole item in order to put it on a mass production basis. We had special dies made and special experimental cartons designed that were finally brought into active use which brought the packing cost down one-quarter.

980 We were the first and probably still are the only manufacturer in the country using corrugated cartons with spaces to pack items.

The result of the corrugated item is it eliminates lots of space in the plant. It speeds up production. It speeds up shipment and it enables you to handle three times the volume in about one-third of floor space that you would have to have if you used crates. In addition to that a burner which is attractively finished in our case comes to the customer in an immaculate condition with no scratches or marks, and we think we have the finest looking and the best operating oil burner on the market.

Q. Isn't it true that in connection with your advertising of Minneapolis-Honeywell controls you likewise advertise that the motor was a General Electric motor and

that the pump was made by one of the large manufacturers, etc.?

A. That is true. The dealer was interested in the type of parts he got. Dealers are part-wise. In other words, they have had certain experience with certain types of equipment and they are highly opinionated as to what they want and if you deviate in certain, even minor, details you have a very tough time convincing them they ought to take it.

Q. So you just followed the lines of least resistance customer-wise, is that correct?

A. So far as we could.

981 Q. And so far as you could give them a good product at the same time?

A. Yes.

Q. You never had any hesitancy with respect to the controls or parts that you put on your oil burner as to their operation?

A. No, the parts that we put on oil burners were the highest priced parts money could buy. Our method of making the castings is the highest priced and the best method there is. In other words, in spite of the low price our equipment is an outstanding piece of engineering and design.

Q. And as a result of that outstanding engineering and design and using what you say the high priced parts you were able to have your overall selling price relatively low, is that correct?

A. That is right.

Q. In other words, you merely passed on to the purchasing public the benefits of your savings in manufacturing, etc., is that true?

A. That is right, manufacturing and sales policy and sales method.

Q. When it comes to sales policy did you sell your oil burners on a credit basis?

A. No, we had no open accounts. Every shipment went out c.o.d. or collect with order.

982 Q. Am I correct in my understanding then that you either had the burners and the parts that go to make up the burner in your factory or you had the cash in your bank or drawer?

A. That is right.

Trial Examiner Sheppard: Don't they all do business on that basis?

The Witness: No, I initiated that policy.

Trial Examiner Sheppard: You mean you initiated the cash basis?

The Witness: That is right.

By Mr. Freeman:

Q. In the oil burner business?

A. In the oil burner business.

Trial Examiner: Doesn't the respondent, or don't you know how they do business?

Mr. Freeman: I will be glad to answer.

Trial Examiner Sheppard: I want that on the record.

Mr. Haycraft: You can't unless you are under oath.

Mr. Freeman: Oh, as an attorney anything I say on the record goes.

Trial Examiner Sheppard: You know how?

Mr. Haycraft: Not if I object to it it doesn't.

Trial Examiner Sheppard: Do you know how the respondent does?

983 The Witness: Minneapolis-Honeywell, initially we did some business with them on a cash basis but when your credit standing is established they will ship you on open account basis.

Trial Examiner Sheppard: I get the difference. Go on, Mr. Freeman.

By Mr. Freeman:

Q. Now as long as that question has been asked, how about the other oil burner manufacturers with whom you were competing, do you know whether or not they operated on a cash basis when they sold an oil burner?

A. Well, I won't vouch for the individual policy of each of them but as a general thing they used other methods at the time I entered the business, in other words, consignment, open account, and various other costly methods of selling.

Q. And they had credit risks?

A. Naturally and losses.

Q. Did you lose any money creditwise?

A. Other than a very nominal amount of bad checks that we might have gotten we had no losses.

Trial Examiner Sheppard: Do I understand you, Mr. Peters, to say—I want to be sure about that—that you were the only man in the burner field that conducts your business on a c.o.d. basis?

The Witness: Not today. As a matter of fact, most
984 manufacturers followed my merchandising and price methods after they found that they were successful. The only manufacturers today that are really doing the job are doing it the way I started doing it.

Trial Examiner Sheppard: All right, I think I get the point there.

Mr. Freeman: Just a moment or two.

That is all.

Redirect Examination by Mr. Haycraft.

Q. What other manufacturers, Mr. Peters, follow your example in manufacturing and policy?

A. For instance, one of the successful examples of manufacturers who followed my policy is a dealer of mine who was here yesterday, a Mr. Toker. You will probably hear from him.

He decided instead of buying burners from me he would follow suit and as a result in the last three years he has been in business he has become one of the most successful manufacturers following the identical methods of doing business that I have been following and his volume has doubled and tripled each year now I think for three years that he has been in that business.

Of course there are a great many others such as Korth.
They attempted to follow my footsteps and as a result
985 they have been very successful themselves as myself, much more so than they were when they started out first. They spent about a year or two knocking my policies. Then decided to go along with them and they did very well.

One of the most outstanding examples of a manufacturer who worked along the lines that I did was Aldrich in Peoria, Illinois, and he probably next to myself d[illegible] the largest business in the industry.

It appears to me by studying the manufacturers in the business that there is a clearly defined line between those who made the grade and those who did not. The ones who made the grade worked along the lines that I indicated and the others just stayed where they were or folded up, or went out of the picture.

Mr. Haycraft: That is all.

The Witness: At the time that I got in the picture a certain change was taking place in the industry. Formerly

oil burners were a pretty hazardous piece of business to install. You went to the finance company. They had a 10 per cent hold-back at least, or maybe more, and you always found yourself behind the eight ball. After a few months the customer would complain; the finance company would adjust the complaint, deduct it from your hold-back and finally you found that you owed the finance company money so you could never get anywheres in the oil
986 burner business principally on account of the finance companies' attitude and the necessity for using their services, but as soon as the F.H.A. went in the picture, first of all there was Title One, which created the construction of a tremendous amount of new homes and these homes were built by builders who didn't care what the trade name on the burner was, just as long as the quality of the burner was there. They bought in mass and quantity, and so immediately opened up a volume market.

Secondly, the individual home owner could go out and buy oil burners at strictly low rates. The manufacturer could sell to the dealer and the dealer sell to the customer on a non-recourse basis and those two words "non-recourse" made all the difference in the world in the oil burner industry.

A lot of oldtimers did not recognize what was taking place. They considered that the oil burner was still a specialty that needed a lot of high pressure selling and an extremely high margin of profit, a tremendous amount of service. They didn't see what was going on.

Now the ones that did, made the grade. The ones that didn't, started hollering that their competitors were getting special price concessions, their competitors were selling controls at low prices. A lot of that was not justified. Of course, a certain amount of it was done. There was a big margin at that time in Minneapolis-Honeywell
987 controls, a big difference between the list and your net cost.

Nothing in the world could justify making 100 per cent for instance on an item simply because that was the difference between the list and your net cost, so you sold at what you considered a reasonable price.

If a customer wanted a control and he was buying burners from you and if he had originally paid a little less to a competitor of yours for the extra control, why you sold it to him. You had a reasonable profit. There was no use in trying to get everything out of the picture.

The average small manufacturer incidentally could get along and buy in Bracket One or Two and still could do very well because the majority of them did their own installation so they got the benefit of a wholesale price on controls and a wholesale purchaser in other fields and still carried on. That is why there are still a tremendous large amount of small manufacturers in business when there should be every reason for them stepping out of the picture. They had the easiest time of it.

Trial Examiner Sheppard: All right. Is there anything further from this gentleman?

Mr. Haycraft: No.

Mr. Freeman: Just one moment.

Nothing further.

Trial Examiner Sheppard: You are excused.

988 (Witness excused.)

Mr. Haycraft: May we have a five-minute recess?

Trial Examiner Sheppard: Take a ten-minute recess.

(A ten-minute recess was taken.)

Mr. Haycraft: I will call Mr. Rodler.

H. F. RODLER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Trial Examiner Sheppard: Mr. Reporter and gentlemen, this is Mr. H. F. Rodler, 334 Plymouth Road, Union, New Jersey. Is that right, Mr. Rodler?

The Witness: That is right.

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Rodler?

A. Why, I am general manager of the Linden Plant of Hubeny Brothers.

Q. They are engaged in what business?

A. Originally, prior to the war, sheet metal products manufactured to specifications.

Q. Are they engaged in war work?

A. Entirely in war work.

Q. How long have you been with that firm?

989 A. Oh, about three to four years.

Q. Before that what did you do?

A. I was in the manufacture of oil burners.
Q. Under what firm were you established?
A. Oil Equipment Laboratories, Inc.
Q. Where was it located?
A. Elizabeth, N. J.
Q. And what type of burner did that company manufacture?
A. It originally manufactured a rotary, gaseous rotary and atomizer rotary type burner, and then we got into the high pressure type burner manufacture.
Q. What position did you hold in connection with that firm?
A. General manager and chief engineer.
Q. Where did you sell your products?
A. In the Eastern Seaboard primarily.
Q. To dealers?
A. Yes, sir, to dealers and distributors.
Q. What was the name under which that was sold?
A. Rotaflame, Silent Gem Spotlight.
Q. Over what period of years was it engaged in the sale of oil burners?
A. Approximately seven to eight years as Oil Equipment Laboratories.
Q. What controls did you use in the burners?
A. Minneapolis-Honeywell, Mercoid, Perfex, United States.
990 Q. Did you use them all at the same time or over different periods of time?
A. Mercoid, Minneapolis and Perfex we used pretty consistently throughout. United States controls we tried and did not like very well, so we discontinued their use.
Q. Did you have a contract with the Minneapolis-Honeywell?
A. Yes, sir.
Q. Do you know what bracket you were in?
A. The brackets varied according to our purchases as the years went by. They were increasing steadily each year and I believe our last contract was in the third bracket if I am not mistaken.
Q. What year was that?
A. That was in '40 or '41. I would not want you to pin me down on that.
Q. About how many burners did you sell at that time?
A. Our best year was about 1400 burners, 14- to 1500 burners.

Q. How would you say the equipment, the controls were divided, more to Minneapolis-Honeywell, Mercoid and Perfex, what percentages?

A. The majority was Minneapolis controls.

Trial Examiner Sheppard: You mean by that that you did buy from others?

Mr. Freeman: Yes, he testified that he bought from
991 Perfex, Mercoid and also some controls from United States Controls.

The Witness: 95 per cent of the controls was Minneapolis and Mercoid, 5 per cent was Perfex. Perfex were trying to introduce their controls and their limit controls were all right but in the primary controls there were some defects and it did not warrant us to use them.

By Mr. Haycraft:

Q. Did you ordinarily sell your burners equipped with controls?

A. Yes, sir, in every case we endeavored to sell them where we could equipped completely with controls.

Q. Did you ever have any instances in your experience where the dealers tried to buy the burners without controls?

A. Yes. There is two categories there. One is where you had a replacement, that is, of the burner proper. It is where the controls were good and already were on the job; both primary and limit controls that were on the job were in good shape but the burner was in bad shape. The burner was sold for replacement purposes.

That is the only consideration the Underwriters' Laboratories would take as to a manufacturer. If he played the game on the square they would recognize the fact that a manufacturer did have the replacement program with
the primary control where it could not be sold with
992 the burner, and they recognized those facts and you had to have proof of any burner that you sold without a primary control if they cared to investigate you because it was the Underwriters' insistence that the primary control be sold with each burner. But they did recognize the fact that on replacement bases it was necessary to sell the burner less the complete set of controls.

Then the other category falls in where there could be a lot of sales that could be made without controls.

Q. What was the cause of that?

A. The major cause as far as I know is that we had to ask too much for the controls that we sold with the burner

and that they liked our burner better, but could buy the controls in the market cheaper than we could sell them to them.

Q. Where could you buy these controls cheaper than you could sell them to them?

A. Well, that is what I tried to find out in seven years of business where that source of supply was coming from but I could never get any written proof to that.

Q. The dealers, did they—

A. (Continued.) But they were buying them.

Q. Did the dealers ever tell you where they got them?

A. They mentioned names but there is no written proof that I have of anything of that nature that went on. The only fact that I know is that the controls were pur-
993 chased for less money than I could sell them for and handle controls.

Q. What was the source of that that was told you by the dealers?

A. A certain Mr. La Pidus in Newark, N. J. That is known as Quiet-Make.

Mr. Freeman: Quiet-Heet.

The Witness: That is right, Quiet-Heet.

By Mr. Haycraft:

Q. During what period of time did you find that, or experience that?

A. I believe the gentleman in question there came into business in about 1939, if I remember right or '38, somewhere around in there. Up to that time us old fellows never ran into that type of business.

Q. What effect, if any, did it have on your business?

A. Well, the first six months it drove the dealer price of oil burners down at least $25.00. The second six months it drove the average price in the country down another $25.00, that is, I am speaking of wholesale prices from manufacturer to dealer.

Mr. Haycraft: That is all. You may cross-examine.

Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Freeman.

Q. What did you personally do to get the so-called
994 lowdown basic facts with respect to Quiet-Heet in its sale of controls?

A. Well, I will put this in the record: the boys of Min-

neapolis-Honeywell and the boys of Mercoid and myself, we all came up together. I have been in this game since the inception of the control business in the oil burner business.

I never registered any complaints against either a control company or any control company, or any motor manufacturer or any pump manufacturer as far as that is concerned, regarding practices that was evident that was going on. Whatever it was I don't know.

However, I did to the representatives of both control companies.

Q. That is Mercoid and Minneapolis-Honeywell?

A. Mercoid and Minneapolis-Honeywell in this on this basis: how in the world, if these are your brackets and that is your lowest possible price, can these items be sold at the prices they are being sold at, and the reply to that was, "Get me some written proof that that occurrence is going on and we will immediately put any kind of a stop to it", and that written evidence I was never able to obtain.

Q. And those were the requests made to you by both Mercoid and Minneapolis-Honeywell?

A. That is right, sir.

Q. And so far as these practices or the troubles that you had were not only with Minneapolis-Honeywell controls 995 but also with Mercoid Controls, that is, the selling at low prices as you testified?

A. Well, let me put it this way, taking out a pencil, we so-called manufacturers of oil burners of the high pressure type actually were not manufacturers. We were assemblers because we bought 95 per cent of all the equipment that went on the burners, pumps, controls, motors, couplings, etc., so it was a matter of purchasing.

Trial Examiner Sheppard: You were a big manufacturer?

The Witness: We were a small manufacturer.

Trial Examiner Sheppard: A small manufacturer?

The Witness: Yes, sir; a high pressure type burner from the standpoint of engineering, as 95 per cent of us made that type of burner, one could interchange all the parts from one to the other and you would have identically the same thing. It was an assembly proposition.

When you buy 95 per cent of the equipment that is engineered and manufactured by your suppliers and put

it together, it comes down to your cost analysis on the basis of what you buy that equipment for.

Now you take your five major items, your set of controls, your motor, your fuel unit, your transformer, your blower wheel, and your coupling thereto is the major part of the burner. Put those all together at the prices
996 that were quoted to us, maximum prices, and not adding one dime for labor, overhead, cost selling and service, it proved on paper to us that the burners that were being sold with controls could not be sold at that price and the man stay in business.

That is why we always suspected that there were lower prices than what were being quoted to us as general by all manufacturers in the trade.

Trial Examiner Sheppard: That in your judgment; was that because of any change in the prices of the controls but in the burner itself?

The Witness: All items we bought put together, on the maximum quantities that we asked for in quotations could never give us a cost item, leaving all other items out, or price where we could sell a burner at $39.50 to the trade.

Trial Examiner Sheppard: That is what I am talking about. Your trouble seems to be with the burners and we are interested in this case with the controls, and I have not been impressed that there is any change much in the price of controls during these years by any of these companies.

The Witness: Well, I put all the rest of it in because that is your basis of cost analysis.

Trial Examiner Sheppard: All right. Go ahead, Mr. Freeman.

997 By Mr. Freeman:

Q. Following up what the Examiner just asked, in other words, the troubles were not alone with the control prices but also with the prices of pumps and motors and transformers and all of the component parts that went in to make up the burner, correct?

A. Yes, I would say that, putting everything together we could not arrive at a cost item that we could add overhead and profit to and sell in competition with our neighbor in Newark, at the very best prices that were quoted by Minneapolis-Honeywell in their top brackets as listed in their sheets.

Q. In other words, the best prices that you could have

gotten from Minneapolis-Honeywell assuming that you were one of the largest users of Minneapolis-Honeywell controls would still have not enabled you to compete with a $39.50 burner?

A. That is right, sir.

Q. As a matter of fact, you never paid any more than $25 ever for a set of controls? I mean as a manufacturer or as an assembler starting with 1936?

A. You are asking me to remember complete figures of four years ago. Whatever our contract bracket called for that is what we paid for controls.

Q. Well—

A. (Continued) I don't know what our contract 998 called for offhand.

Q. In 1940, if you will take the Minneapolis-Honeywell statement for it, your company was in Bracket Two.

Trial Examiner Sheppard: Referring to what exhibit?

Mr. Freeman: I am referring to the stipulation.

Trial Examiner Sheppard: Exhibit 1?

Mr. Freeman: Exhibit 1.

By Mr. Freeman:

Q. And your net price for a set of controls that year was $17.25, and when I say a set of controls I am talking about the primary, the thermostat and the limit of the standard kind. I am not talking about chronotherm or any of the special.

A. Standard control, plain thermostat, limit and primary.

Q. And the lowest price that year to the largest user was $14.65. Now that difference of $2.65, even if you would have gotten $2.65 off of your price would not have enabled you to meet Quiet-Heet competition, correct?

A. Yes, I will say that is correct. $2.65 would not have made the difference necessary. It would have made part of the difference but not enough.

Q. But not enough to go out and really compete, correct?

A. That is right, sir.

Q. I understood you to say that the prices of burners were dropped or down the first six months about $25.00?

A. That is right.

999 Q. And—

A. (Continued) It began with Eveready.

Q. Eveready?

A. The Eveready burner was the first one to break the market. Who made it at that time I don't know.

Q. You mean they were the first to lower their price?

A. To lower the market price at that particular time. They sold the burner there for $75 complete with Minneapolis-Honeywell controls. I believe that was made by Braden Associates in Rock Island, if I am not mistaken, in that period of time.

Q. He was a large manufacturer, Mike Braden, correct?

A. Yes, Mike Braden, I would say he was comparatively a large manufacturer.

Q. And I take it you have been in the oil burner business for the last twenty years or so, you have been associated with that business?

A. That is right, sir.

Q. And Mike Braden, the gentleman you spoke of, likewise was in the oil burner business?

A. He was from the inception. He was originally in Oilomatic. He cut off there and started his own burner.

Q. And Mike Braden you say came on the market first, you say with a $75 burner?

A. I believe with a company known as Oil Heat
1000 Utilities, and marketed a burner at $75 that year and that year we were getting $96 to $105.

Q. As a matter of fact, if your company had gotten Minneapolis-Honeywell controls for nothing you still would not have been able to compete with the $39.50 price of the Quiet-Heet Company? It might have helped but it would not have enabled you to actually compete, is that correct?

A. You are taking $14.65 in there. I believe that is rather a broad statement because if you got them for nothing on a $14.50, it would be possible on that basis, but not possible on a 2.65 differential.

Q. In other words, you added your overhead to the $17.25, the price you paid?

A. We always tried to endeavor to make a profit on the controls that we sold. Before we sold out the business we were giving controls away with the burner in order to try to meet competition. What I mean by giving away I mean we did not have any mark-up on the controls themselves.

Q. You say you did not have any mark-up on controls?

A. Not when it went with the burner.

Q. So that when the mark-up or the addition of your burner, whatever it cost you—

A. Was on the burner proper.

Q. (Continued) Was on the burner proper, so that $17.25, since that was the only amount that was
1001 added because it was the cost of controls to you, would not have of itself enabled you to meet competition where the burner price went down $25 and then another $25, correct?

A. That is right, at that period of time.

Q. So that my statement that if you got the controls for nothing you would still have had tough going is correct?

A. You are confusing two facts. The $39.50 burner was not available at the time the $75 burner was being sold. It came two years later.

Q. There was a drop down of $25 you said in the first six months?

A. That is right.

Q. From $95 to $70, correct?

A. That is right.

Q. And at that time you were paying $17.25 for controls?

Mr. Haycraft: Wait a minute. I object to that. What year was that.

Mr. Freeman: 1940, that is what we are talking about.

Mr. Haycraft: That is not the year. He said the drop came in 1937.

The Witness: This is before. This is before the advent of La Pidus in the business. The first break was made by Eveready.

By Mr. Freeman:

1002 Q. I now understand it was not Quiet-Heet that first brought the break in the market, that it was Mike Braden?

A. Mike Braden was the first one.

Trial Examiner Sheppard: That was in what year?

The Witness: I could not give you it.

Trial Examiner Sheppard: Was it before 1938?

The Witness: It was before La Pidus's manufacture.

By Mr. Freeman:

Q. And Mike Braden used Mercoid Controls as standard equipment, is that correct?

A. I could not say. They were available, both Mercoid and Minneapolis-Honeywell.

Q. And in 1937, if you were in the second bracket, the price of controls was $22.60 to you?

Mr. Haycraft: It does not show that he was in the second bracket at that time.

By Mr. Freeman:

Q. I will ask you what bracket you were in at that time?

A. I could not give you that, sir. You should have that information as to what brackets we were in.

Q. I will tell you in a minute if you will accept that as a fact?

A. I will say this, as far as your brackets are concerned and our company is concerned, you never deviated from the brackets. In other words, if we bought
1003 whatever the bracket value shows we were never in the second bracket unless we got there.

Q. And you got what was coming to you always business wise from Minneapolis-Honeywell, correct?

A. I will say that, sir.

Q. And you got a good control always?

A. Correct, you always had a good control.

As I put this plea up, I will add this: that I put this plea up, owing to the facts that we were and that I personally was a very old contact with the Minneapolis-Honeywell Company, that not from the standpoint of my lower purchasing power but from the standpoint of old friendship, and the fact that I believed it was myself and a few others like us that materially assisted Minneapolis-Honeywell in developing a control from our field experience, and in their reports, why we should be entitled to an equivalent break in prices but I never got it.

Q. According to our records in 1937 you were in the third bracket and that is, you bought more than 350 sets of controls.

A. Yes.

Q. So that your price was $21.30.

A. Your records are accurate there. They can be substantiated by the contracts that may still be in the files of the Oil Equipment Laboratories. I can't re-
1004 member the details off-hand.

Q. As a matter of fact, you do not attribute the real dropping in price of the overall oil burner complete,

that is with controls, castings, burner, nozzles, transformers, pumps, fans, etc., all to the Minneapolis-Honeywell's price structure in connection with controls, do you?

A. You want my own honest personal statement in regards to this?

Q. Oh, certainly. All we want are facts here and that is all I have ever asked for.

A. There is Mr. Jensen over there, who called on me many a time and he can bear out the fact that we sat down at our desk there and argued from morning to night how it is possible for a man like La Pidus to sell burners.

Q. I was talking about 1937, which is prior. Now if you want to get over to another year, I will move over and put you in that bracket where you belong for that year.

A. We did not have these discussions in 1937 because it wasn't detrimental a fact at that time. In other words, a $75 proposition, you could make oil burners and sell them at that price and make some money.

Q. At $75?

A. That is right.

Q. But that was still a lowering of price over what the old line manufacturers prior to Mike Braden had been charging?

1005 A. That is right, sir.

Q. In other words, you could absorb, take out or squeeze out some of your profit back there in the 1937 period?

A. That is right.

Q. And still meet Mike Braden's price of $75.00?

A. That is right.

Q. So that your company then I take it just followed the usual practice, you squeezed out a little profit and continued to sell burners?

A. Continued to manufacture burners.

Q. When did you have this conversation with Mr. Jensen because what I want to do is put you in the proper year because as prices change conditions change and I want to be talking to you on the basis that we each understand each other as to years?

A. These discussions with Mr. Jensen came about six to seven months after Mr. La Pidus went into the oil burner business and it became quite argumentative in the following twelve months because the situation became steadily worse. What I mean by that is that the burners

sold by La Pidus were steadily dropping in price, continually, and they were still being sold with the best equipment available that was on the market as the controls and the fuel units.

Q. Would you say that these conversations that you had with Mr. Jensen about Quiet-Heet, about the
1006 Quiet-Heet situation occurred within six months or within a year after Quiet-Heet came on the market?

A. It continued to occur every time I saw Mr. Jensen.

Q. But it started about the time that Quiet-Heet—

A. Six to eight months after Quiet-Heet came on the market.

Q. Quiet-Heet came on the market in the early part of 1936?

Mr. Haycraft: The latter part of 1937.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Freeman: I happen to have here a record and my memory tells me that when Mr. Peters testified yesterday that he started in business in the early part of 1936; he signed the contract with Minneapolis-Honeywell on January 11, 1936 for 350 sets, and then on July 20th of that year he, having attained enough controls to get him in the next bracket, signed a contract for a thousand sets and that is the—

By Mr. Freeman:

Q. And that is the time that you had these conversations with Mr. Jensen?

A. That is right.

Q. And at that time Mr. Peters of Quiet-Heet was selling his burner at around $65 to $70, correct?

A. No, it was $65 or less.

Q. And it was the $65—

1007 A. And the bigger ones. It was considerably less than $60, even at that time within twelve months after he was in business.

Q. So that this $60 or $65 price that you have referred to that gave you this trouble that you relayed on to Mr. Jensen?

A. That took the account away from us.

Q. As a matter of fact, your company during the first half of 1936 was in the same bracket price-wise with the Quiet-Heet Company, that is, you were in Bracket Three,

having bought more than 350 sets and Mr. Peters of the, Quiet-Heet up to July 1936 was likewise in Bracket Three?

A. Yes, I don't know what he was in. That information was never given to me.

Q. So that when Mr. Peters came on the market, that is, Quiet-Heet, you were confronted with competition in connection with the sale of your oil burner complete, correct?

A. That is right, sir.

Q. That that competition continued?

A. That is right.

Q. And then you testified that there was a general drop of $25 by the overall industry following this initial drop of $25 during the first six months of the Mike Braden?

A. It was a steadily decreasing price of the burners wholesale.

1008 Q. And that steadily—

A. (Continued.) Also retail.

Q. And that steady decrease in the price of burners, both wholesale and to jobbers and to retail continued from 1937 on down?

A. That is right.

Q. And—

A. (Continued.) Till burners reached the unheard of figure of $122 completely installed, by one La Pidus.

Q. Also the low price for the oil burners complete with controls to dealers as low as around $40?

A. Or less.

Q. Well, at least as low as $40?

Trial Examiner Sheppard: Was there a corresponding decline in controls, Mr. Rodler? I want you to put me straight there. I am interested in controls and not so much in burners. Most of the testimony this morning has been in reference to burners.

Mr. Freeman: That is because they sell their burners complete with controls and they do not sell their controls apart from burners.

Trial Examiner Sheppard: I understand that too, but was there a decrease in the price of these controls during these years?

The Witness: Sir?

1009 Trial Examiner Sheppard: Read that?

(The last question by the Trial Examiner was read.)

The Witness: Well, I believe if I remember correctly there was a decrease and then an increase due to increased manufacturing costs but in what particular years that occurred I don't know. The bracket came down and then came up again. All brackets went up and down in proportion.

Trial Examiner Sheppard: You don't make any complaint in reference to the prices of controls?

The Witness: No, I have never registered a complaint outside of my discussions here with Mr. Jensen where we argued it pro and con and as I asked the attorney here whether he wanted to have me give my personal opinion of my discussions had with Mr. Jensen.

Trial Examiner Sheppard: You are all interested and I gather it from the testimony this morning, in the low price of burners which made it impossible for you to do business along that line?

The Witness: That is right. We could never get down to that basis.

By Mr. Freeman:

Q. But you did not blame Minneapolis-Honeywell for that?

A. Well, the thing that, as I said to you before—

Mr. Haycraft: Let the witness finish.

Mr. Freeman: I am not stopping him.

1010 Mr. Haycraft: You stopped him twice.

A. (Continued.) My discussions here with Mr. Jensen were exactly these—and he will verify that—I said to Chris, "You know and I know that controls are being sold by La Pidus by the barrel fulls and it is ruining your distributing organization that you spent many years here to set up in this territory. Your distributors cannot sell your controls at retail to their dealers because they can go and buy them from Quiet-Heet irrespective of whether they buy a burner or not and the whole structure is changing. We used to have a beautiful business on clock thermostats, aquastats and all the rest of the control business as a separate item. Today we have not got it and the reason we have not got it is because that stuff is being bought from La Pidus, and I know it is but I can't prove it." I said, "The men are coming in to me" and I even had a dealer there one day when Chris was there admit that he bought them there but he would not

sign his name to the fact that he did buy them from him and what he paid for them.

Q. Do you know as a matter of fact that once Minneapolis-Honeywell sells controls and parts with the title to them that it has no way legally to control what the resale price of that control is going to be, what it is sold at? You know that, do you not?

Mr. Haycraft: I object to that.

1011 Trial Examiner Sheppard: That can go out. That is asking for an opinion of this witness of something he does not know about.

All right, is there anything else?

Mr. Freeman: Yes, I am not through.

Trial Examiner Sheppard: Go ahead.

By Mr. Freeman:

Q. You talked with Mr. Jensen. Did you ever talk with the representative of Mercoid about the same thing?

A. About the same thing.

Q. And did you ever talk to the representative of any of the motor manufacturers about the same thing?

A. Identically the same thing.

Q. And did you talk to the blower manufacturers and the transformer manufacturers?

A. Blower manufacturers, no, because we made our own wheels.

Q. And by the way—

A. (Continued.) The manufacturers of transformers, the identical same thing.

Q. In other words, you had the same problem?

A. The same problem outside of fans with everything we put on the burner.

Q. And I take it, as you said, about 95 per cent of what went into the burner you bought from other companies?

A. That is right.

1012 Q. And of course you recognized that you paid the overhead of each of those companies and that had to be included in the overall price?

A. So did this Quiet-Heet.

Trial Examiner Sheppard: You bought everything except the burner, didn't you?

The Witness: No, sir, everything that went into the burner was purchased in the open market, 95 per cent of

the burner we made and also the burner Quiet-Heet made as manufacturers. That is the name that is given to us. We were actually assemblers of that piece of equipment.

Trial Examiner Sheppard: I see.

The Witness: In other words, the castings were purchased whether die castings or cast iron casting. We did not have foundries.

By Mr. Freeman:

Q. You know as a matter of fact that Quiet-Heet make their own die castings?

A. Quiet-Heet make their own die casting? I don't know.

Q. Did you ever check in to find out?

A. Yes.

Q. That Quiet-Heet made their own castings?

A. No, I was not interested.

Q. If Quiet-Heet made their own castings or cases they would save that amount of overhead?

Mr. Haycraft: I think that is assuming. There is 1013 nothing in the record.

By Mr. Freeman:

Q. Just tell me whether you ever went to the trouble to find out what Quiet-Heet was doing that enabled Quiet-Heet to sell at a lower price?

Trial Examiner Sheppard: I would like him to answer that.

A. No, I did not make any personal investigation into his method of doing business outside of what I came in contact with out in the field. However, I did know that he purchased. I don't know about his die castings at all.

I do know about his cast iron castings. Those were purchased outside the same as ours were with the only difference between his and ours that we machined ours down to plus or minus five and he didn't machine his at all. That is the only difference.

Q. You made a better job?

A. Not to hear him tell it.

Q. But, as a matter of fact, if he didn't do any machine work on his and you did you were working to closer tolerances, is that right?

A. That is right, but we had only $3 direct labor to our burner. We could not take a hell of a lot off there and could not get to first base on the price he was selling at.

Q. In other words, a $3.00 saving would not help you any.

1014 A. Not that one $3.00.

Q. So that $3.00 would be no different than the price at which you bought controls in 1940 and the price which Quiet-Heet paid for controls in 1940?

A. Well, you see gentlemen, I don't know what Quiet-Heet paid for their controls.

Q. Assuming now that—and I will state this as a fact as a lawyer—

Mr. Haycraft: I don't accept that on the record.

Mr. Freeman: I would have that much courtesy if I were you.

Mr. Haycraft: Not on the record. We can't do that.

Mr. Freeman: I took my oath a good many years ago as a lawyer and I am still living up to it, and I will present the facts as conscientiously as I can to the Commission, and that is what I am doing now.

Mr. Haycraft: Then we would not need any witnesses at all. All we would need to do would be to call the attorneys.

Trial Examiner Sheppard: Go ahead, gentlemen. It is too small a matter to argue about.

By Mr. Freeman:

Q. I am asking you if you got Bracket Five, which price in 1940 was $14—

Mr. Haycraft: Let us take 1941 where we have evi-
1015 dence in the record. For 1941 there is plenty of evidence in the record what Quiet-Heet paid.

By Mr. Freeman:

Q. In 1940—

Mr. Haycraft: I object to 1940.

By Mr. Freeman:

Q. In 1941 the best price that Minneapolis-Honeywell had for its Bracket Five account was $13.75 per set, and I now ask you if you recall what Bracket you were in in 1941?

A. No, sir, I can't give you that.

Q. According to the Minneapolis-Honeywell records your company was in Bracket Two in 1941, and your price for a set of controls was $16.45 or a difference of $2.70, and I take it that if you could have knocked the hell out

of that difference, as you said, with respect to the cost of the machine work on your product it would not have spelled the answer that you could have competed with a $39.50 oil burner made by Quiet-Heet, correct?

A. Well, you put $2.75, $2.69—

Q. $2.70 is the difference.

A. $2.70, if you put $2.70 plus a few other items down the line you would have the collective difference.

Q. I wish you would just answer the question: if you could just reduce that $2.70 to nothing that would not have been the answer?

1016 A. Not the complete answer.

Q. That is all I want.

Redirect Examination by Mr. Haycraft.

Q. Would it have helped?

Mr. Freeman: We concede it would of course.

A. It would have.

Mr. Haycraft: That is all.

(Witness excused.)

Trial Examiner Sheppard: Take a little recess.

(A short recess was taken.)

Trial Examiner Sheppard: Come to order.

Mr. Haycraft: I will call Mr. Brown.

HARRY BROWN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Trial Examiner Sheppard: Mr. Reporter and gentlemen, this is Mr. Harry Brown of Electrical Oil Burners, Inc., 433 Kingsland Road, Nutley, New Jersey.

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Brown.

A. I operate a retail installation and service organization on oil burners and heating equipment as an

1017, authorized dealer for Electrol, Inc.

1018, Q. How long have you been in that business?

1019 A. I have been in business for myself since May of

1941, but I have been associated with the oil burner business since 1926.

Trial Examiner Sheppard: Are you a dealer?

The Witness: I am a dealer.

By Mr. Haycraft:

Q. Do you make installations of oil burners?

A. Yes, just Electrol burners, being an authorized agent for that one piece of equipment.

Q. How long have you done that?

A. For myself since May of 1941, and prior to that, starting as of 1930, I had charge of installation and service for the Electrol, Inc., in the metropolitan area. That varied at times with their dealers.

For example, if a dealer that happened to be in New York City went out of business for one reason or another, the factory took over that operation to take care of the maintenance and see that the customers in that area were taken care of.

Q. You say since 1930 you have had experience in the installation of Electrol oil burners?

A. That is right.

Q. What type of a burner is the Electrol?

A. The Electrol is a pressure atomizing type 1020 burner, not a straight gun burner, modified burner.

The flame principle is the ball type of fire. The oil is all burned in suspension. It is not just a straight shotgun burner. We term it as a modified burner. It is a pressure atomizer, the same as the run of the mine, straight shotgun burners, but the methods of mixing air and oil are different from the mixing of any of your other gun burners on the market.

Q. How much of that burner does the Electrol make and sell?

Mr. Freeman: That is objected to unless this man has said he was a manufacturer. This man stated I understand he is a dealer. He has not said he is a manufacturer.

Mr. Haycraft: He said for ten years he worked for the company in installing.

Trial Examiner Sheppard: Clear up first what the facts are on that.

A. Well, to the best of my knowledge the castings of the oil burner are made outside and brought into Electrol's factory and there they are machined by Electrol

and also painted by Electrol. The motor is purchased outside from either Emerson or Ohio.

The blower wheel is also purchased outside. The pump and pressure regulating valve is built by Electrol. The ignition transformer is purchased outside. The firing head and the cutoff valve is made by Electrol.

The safety mechanism, the wheel itself, made up
1021 of air tubes, air carrying tubes known as side tubes and a heat loop to the best of my knowledge the material is purchased outside and the machining is done by Electrol.

The panel part is purchased from Penn Electric Switch, and the Mercoid tube in it is purchased from the Mercoid Corporation and the balance of the control, that is, all the parts that go to make up the assembly other than those that I mentioned are made by Electrol.

Put the whole thing together and that is your oil burner.

Trial Examiner Sheppard: Do they get anything from the respondent company?

The Witness: From who?

Mr. Haycraft: Minneapolis-Honeywell.

Trial Examiner Sheppard: Do they get anything from the Minneapolis-Honeywell?

The Witness: The controls are purchased from control manufacturers.

Trial Examiner Sheppard: I thought you said the Mercoid. They are purchased from both?

The Witness: They are purchased from both? No, let me get it straight there. Their primary control, their safety control that shuts the burner down in the event of ignition failure is made by them and the parts that go to make that up are purchased outside as those that I mentioned.

In other words, the mercury tube in that safety
1022 tube is purchased from Mercoid Corporation. The panel that absolutely shuts the burner down and has a switching mechanism on is purchased from Penn Electric Switch. That is assembled onto a frame or bracket and cover, and the necessary screws and what not, those are made at the Electrol factory, assembled and tested there.

By Mr. Haycraft:

Q. In other words, the built-in primary control?

A. That is right.

Q. Where do you purchase thermostat and limit controls?

A. As a dealer purchasing from Electrol where we could purchase?

Q. I am asking where does Electrol purchase?

A. We could purchase any control from them. It might be Minneapolis-Honeywell. It might be Perfex. It might be Penn. It might be Mercoid.

Q. Did they equip their burners with all four devices if the dealers asked for it?

A. The dealer could purchase any controls he wanted. That was up to the dealer.

Mr. Freeman: As to kind?

The Witness: Yes.

By Mr. Haycraft:

Q. In your experience since 1930 to what extent have you interchanged or installed different makes of 1023 thermostats and limit controls to perform the same job?

A. Well, for example, from time to time Electrol, of the standard burners shipped through, would box the equipment one time with Mercoid 110 thermostat. Another time it might be equipped with a Penn Electric Switch 110 electric thermostat. Another time it might be equipped with a Mercoid 110 volt thermostat.

Mr. Freeman: You have already answered that.

By Mr. Haycraft:

Q. You said Mercoid once. Do you mean Minneapolis-Honeywell?

A. No, because to the best of my knowledge Minneapolis-Honeywell did not manufacture a 110 volt thermostat.

Now I correct that because I do remember the T42 Minneapolis thermostat could be used with that. In other words, the tube rating with the two-ampere tube.

The standard 110 volt thermostat that Minneapolis-Honeywell made to work with circulators, etc., was not quite heavy enough electrically to work on Electrol's burner and as a result it was not used there but the standard article that would come through in the packing case with their equipment it could be any one of those four instruments that I mentioned, in other words, Minne-

apolis T 42, Mercoid 855T, Penn Electric Switch 802C70 or Perfex 200D.

Q. Those are thermostats. How about limit controls?

1024 A. Limit controls could be also the same. For Minneapolis it could be 404 or Perfex I think 700D or Penn Electric Switch, the number of which I don't recall.

Mr. Freeman: 607.

The Witness: I don't recall the number to be quite honest with you because Electrol had not used Penn Electric pressure controls for quite some time.

By Mr. Haycraft:

Q. What was the Mercoid?

A. I believe that was the Figure 31.

Q. Have you ever had occasion, or have you in your experience ever interchanged these thermostats on the same burner as it is installed or after it has been installed, or on a repair job?

A. You mean have I ever used any one of those four thermostats on the Electrol burner?

Q. Where some other had been used before.

A. On Electrol's burner, yes.

Mr. Freeman: You are talking high voltage now?

The Witness: That is right.

By Mr. Haycraft:

Q. What about the low voltage? Could you use the Minneapolis-Honeywell low voltage thermostat?

Mr. Freeman: The T 11.

A. On a burner?

1025 Q. Yes.

A. Not without relay.

Q. Was the relay necessary and what is the relay?

A. The electrical primary control system is 110 volt, the T11A. The thermostat is a low voltage thermostat. In order to control the 110 volt circuit from a low voltage station you must have an intermediate device known as a relay which permits that step-up in current through the relay device itself. In other words, the low voltage part is to the secondary of the transformer pulling in a clapper which pulls in a pair of 110 volt contacts; through that intermediate device you start the burner.

Q. Does Minneapolis-Honeywell furnish such a relay for such a burner?

A. Yes, they do.

Q. What is the number of that?

A. R19A, I believe.

Q. Have you had occasion to use it and install it for that purpose?

A. Yes, I have.

Q. What has been your experience in the repair or installation of burners other than the Electrol where such control devices were used?

A. Prior to my going into business for myself?

Trial Examiner Sheppard: When was that?

1026 The Witness: Which was May of 1941. In working for Electrol we serviced nothing but Electrol equipment.

Since I have been in business for myself and also since the war has started we have had calls on many other make burners due to the fact that their service men either have been called in the Army or gone into war work.

We more or less felt it was our duty to help out and we answered the call. That could be any make of burner

By Mr. Haycraft:

Q. And what has been your experience then in interchanging of thermostats, limit controls and primary controls of other makes of burners?

Trial Examiner Sheppard: Tell me all about that. I am interested in that subject. Tell me your experience.

A. Here is the only way I can answer that: Supposing I got a call at your home and there was no heat and we will just assume that. We will say the thermostat had been stolen from the job. Well, I could for example —well to go further—say it was a three-wire Minneapolis-Honeywell control and you needed heat right away.

What you mean by your question is what could I use to make that work, is that the idea?

Q. That is right.

A. Well, I could use the T11A Minneapolis-Honeywell thermostat—

1027 Mr. Freeman: The three-wire job?

A. (Continued.) Three-wire job, or I could use any electrical thermostat that would close the white and blue wires.

Trial Examiner Sheppard: All right, how would that work? Suppose on that same outfit there was a Mercoid primary and limit control?

The Witness: If there were a Mercoid primary and Mercoid Limit Control what type of thermostat would I have to put on?

Trial Examiner Sheppard: That is right.

The Witness: Any two-wire thermostat would work on that.

Mr. Freeman: I think, Mr. Examiner, you would not start there. Your assumption was a little erroneous because he was talking about taking off the three wire. You would never start with Mercoid limit and Mercoid Primary with a two-wire in the room. Your assumption was a little erroneous, if you will pardon me.

Trial Examiner Sheppard: All right, go ahead.

Mr. Freeman: I just wanted to straighten you out.

Trial Examiner Sheppard: I wanted to see if this gentleman was experienced. From your experience you could tell me how the use of one of these controls with the make of another control would work?

We have had something to do with that in this 1028 case. Some people said something about the sets that they ought to use the same make for each of the same installations.

The Witness: To answer that question honestly and correctly, if you take that from the standpoint of the original installation, which is what I assume you mean now—

Trial Examiner Sheppard: That is what I mean now.

The Witness: That would mean if you put on a Minneapolis-Honeywell stack switch you would use a Minneapolis-Honeywell three-wire thermostat. I know I would. That does not necessarily mean though that if you got stuck on a cold winter's day and I didn't happen to have the three-wire thermostat there that I could not give you heat. In other words, if your Minneapolis-Honeywell thermostat broke for some reason and I was called in there and I didn't happen to have a Minneapolis-Honeywell thermostat to start I would take your Minneapolis-Honeywell thermostat and return it to be repaired and fixed up like new, on which they do a good job, and I might take a shop thermostat, a two-wire. It would work. You would have heat but I would put your thermostat back on when it would come back.

By Mr. Haycraft:

Q. How about the limit controls?

A. The limit control can be, that is, a 110 volt proposi-

tion and it is line-break on live wire and anything would work there. That as I see it would not make any material difference.

1029 Q. You could use any make of limit control?

A. I would say yes. As far as safety is concerned and proper operation any two-wire 110 volt limit control would work satisfactorily, yes.

Q. Where you had a Minneapolis-Honeywell thermostat and Minneapolis-Honeywell primary?

A. Yes, because the 110 volt pressure or limit control, that might be either hot air furnace, hot air control or aquastat for hot water heating system, or steam control for steam system, breaks the live line before it gets to the primary control.

Q. That is its function?

A. That is its function, yes. It is set at a predetermined setting to cut the plant down in cold weather operation when steam or excessive temperatures are generated in water or the warm air system prior to the thermostat being satisfied.

Q. Have you as a matter of fact ever installed a different make of limit control with a thermostat and primary?

A. Will you ask me that again?

Q. For instance, suppose you had a Minneapolis-Honeywell thermostat and Minneapolis-Honeywell primary control?

A. Yes.

Q. Have you ever installed a different limit under those circumstances?

A. Yes, I have.

1030 Q. Was it satisfactory, do you know?

A. Yes, it will work satisfactorily, yes.

Mr. Haycraft: You may cross-examine.

Cross-Examination by Mr. Freeman.

Q. This example that you gave about getting heat, in other words, when you had a three-wire thermostat, a Minneapolis-Honeywell cooperating with a three-wire primary and then due to some unforeseen accident the thermostat went wrong, you could get heat as you say by operating from a two-wire thermostat?

A. That is right.

Q. That is very much like taking care of an emergency which might arise when a fuse blows out and you do not

have another fuse. You merely take a penny and insert it in lieu of the normal fuse, right?

A. Well, I would put the penny in but that is the same thing. In other words, the idea is to get the job running.

Q. Temporarily?

A. Right.

Q. And not as a permanent proposition?

A. I would not leave it there as a permanent proposition, and primarily because I know for example from a standpoint of temperature control in the rooms, take a Minneapolis-Honeywell three-wire thermostat. You
1031 have adjustable differential. You have a fixed heater element that works in conjunction with the primary control itself and that heater element varies with the different primary controls or the different intermediate controls where there would be a relay or what have you.

We will assume something about that instrument broke down which meant I could not fix it on the job right there, which meant it had to come off and go back to the Minneapolis-Honeywell plant to be repaired. Well then it could be supplanted by any control that would close the white and blue circuit to the primary switch.

Q. But you would not get the proper functioning, that is, you would not get that fine degree of temperature differential between the on and off that you would get with the normal thermostat that is made to cooperate with the electrical characteristics of the primary, correct?

A. Well, the heater element function and the adjustable differential in the three-wire thermostat make it possible to give you finer regulation, that is, you can satisfy the customer a closer differential setting than you can with a two-wire setting which has a built-in differential which is usually not adjustable.

Q. So, as a matter of fact, the three-wire primary and the three-wire thermostat known as Minneapolis-Honeywell's series 10 serves a function in obtaining close differential?

1032 A. That is true.

Q. Of temperature in the room?

A. That is right.

Q. And that eliminates the so-called cold 70?

A. Well—

Q. It eliminates the over-run to a certain extent?

A. It enables you to get finer adjustment. That cold

70 is something we have still got to lick, to be quite honest with you.

Q. As a matter of fact, you can get more even or uniform heat in the house when you have that?

A. You can satisfy your customer because you do have adjustable differential where you can satisfy whims and do a better adjusting job, yes.

Q. That is brought about by the three-wire?

A. By the combination of two, by the fact you have the combination working and the heater element built in you can pretty much adjust that yourself.

Q. So the electrical characteristics of the make-up of the thermostat are that it cooperates with the electrical characteristics or structural makeup of the primary in the Minneapolis-Honeywell situation, is that correct?

A. Yes.

Q. And usually thermostats of the same manufacturer go on an oil burner with the primary?

1033 A. When you install the job originally, yes.

Q. Electrol makes their own primary?

A. Yes.

Q. And that is a special primary different from the one that you can buy from Perfex or Penn Electric Switch or Mercoid, or M. H.?

A. You can't purchase it anywhere but from Electrol.

Trial Examiner Sheppard: Is that patented?

The Witness: To the best of my knowledge I really don't know, sir.

By Mr. Freeman:

Q. That is an Electrol job?

A. Right.

Q. And when Electrol sent out a thermostat to go out with that job I take it they have tested their particular primary to know that the particular thermostat that goes with the burner when it is sold as original equipment will work properly?

A. They furnish, as I said before, any 110 volt thermostat that would pass their laboratory test because I do know—

Q. When you say any 110 volt thermostat, it has to have even then the electrical characteristics sufficient to take care of the load?

A. That is right.

Q. So that every—

1034 A. (Continued.) In other words, you could not use a three-ampere.

Q. Thermostat.

A. (Continued.) On a thermostat on an Electrol because it is a 10 ampere load.

Q. So we have to qualify what Mr. Haycraft endeavored to show.

Mr. Haycraft: I object to that.

Mr. Freeman: All right, I will withdraw that.

By Mr. Freeman:

Q. So you can't just answer the question point blank that any 110 thermostat would work with the 110 volt Electrol Stack Switch or Electrol Safety?

A. Provided it is or has the proper electrical characteristics.

Q. The question I asked you is you cannot just use it because it is 110 volts, it does not spell success between the thermostat and the primary of the Electrol?

A. No, it must have a 10 ampere rating. It must have that otherwise the tube just won't take the gaff. You will start about 50 times and the contacts are gone.

Q. In other words, the contacts will weld or burn out?

A. Yes, because—

Q. The electrical load is too much at the start?

A. That is right.

1035 Yes, the starting load it won't take the gaff.

Q. And when you say "take the gaff" electrically speaking that means that the electrical current that passes through the wires at the initiating of the operation of the burner is much more than what it would be after we get into a running condition?

A. That is right, yes.

Q. So that you have to have a thermostat that is able to take that additional load which we sometimes refer to as a starting load, is that correct?

A. That is right.

Q. So that if you were buying a Penn thermostat of the high voltage type you have to be sure that the electrical characteristics of that particular thermostat are sufficient to meet the load when the burner is first started, correct?

A. That is correct.

Q. So that my statement is correct that you just cannot use any 110 volt thermostat?

A. When you put it that way, no.

Mr. Haycraft: That was not the question.

By Mr. Freeman:

Q. How many other oil burner manufacturers that you know of use 110 volt thermostats in oil burners for domestic household heating?

A. That is kind of a hard question to answer right
1036 offhand. When you mention it just like that I can't think of any.

Q. As a matter of fact, you don't know of any other company that now or during the last three or four years use as standard equipment 110 volt thermostats other than Electrol?

A. I can't think of any right at this minute, but I will answer your question this way: there must be others or otherwise the control manufacturers would not just make thermostats for Electrol.

Q. That is only a supposition on your part?

A. That is right.

Q. You don't know that as a matter of fact?

A. That is right.

Q. You do know that Mercoid will sell certain parts of its equipment to go into the Electrol safety control?

A. Mercoid tubes can be purchased.

Q. And you know that the Penn. Company is making a panel that becomes a component part of the Electrol safety device?

A. That is right.

Q. So that there are control companies that will make something special for Electrol?

A. I presume so otherwise they would not be able to procure the parts.

Q. You know, as a matter of fact, that there are thermostats of the 110 volt type used in controlling unit heaters and the like?

1037 A. That is right.

1038 Q. So that the same 110 volt thermostat used in controlling unit heaters could be used in connection with Electrol's specialized burner?

A. Provided the electrical characteristics were correct, yes.

Q. Now as a matter of fact, you don't know of any company in the domestic oil heating field outside of Electrol that uses 110 volt thermostats?

Mr. Haycraft: That is objected to as it has been answered once. The witness has not to my mind qualified to answer that whether they are.

Mr. Freeman: I think he is.

Trial Examiner Sheppard: I will leave it to you.

Mr. Haycraft: If counsel for the respondent wants to prove that as a fact, not by cross-examination of this witness who has a limited knowledge of all the manufacturers.

Mr. Freeman: Are you willing to say this man has limited knowledge? You yourself qualified him as an expert.

Mr. Haycraft: He is an expert.

Mr. Freeman: And he has done a swell job.

Mr. Haycraft: You are trying to make him an expert in another line.

Mr. Freeman: I am asking what he knows.

Mr. Haycraft: He should not be on the witness stand.

1039 Trial Examiner Sheppard: Answer that question, if you can.

The Witness: What was the question?

Mr. Haycraft: He asked him once and it has already been answered.

Trial Examiner Sheppard: I think it has been answered but I will let you go back and repeat it.

Mr. Freeman: If you will recall, Mr. Examiner, he answered that it must be because they would not make it especially for Electrol and I called his attention to the fact that these same thermostats are used with unit heaters, and that refreshed his memory.

Now I am asking him whether or not he knows of any domestic oil burner that uses a high voltage.

A. I can't think of any right at this moment, no, sir.

Q. That is the answer.

A. But there may be some. I would not want to be quoted as there being none.

Q. You know of none?

A. I don't know of any at the moment.

Q. You have been in this oil burner business since 1926?

A. That is right.

Q. You have not run into any that you can recall right now?

A. Not that I can recall right now.

Q. You have been rather active in the metropoli-
1040 tan area in behalf of Electrol since 1936?

A. That is right.

Q. So your answer is predicated at least upon thirteen

or fourteen years of actual experience in the oil burner field?

A. That is right.

Q. This burner made by Electrol that is a sort of a specialized type of burner, it differs from the conventional gun type?

A. Well, their TCV and TVU, TM and their X1 and X2 are straight shot models as we call them, yes.

They actually make five model burners, the TCV and the TUV, which are the one that I described before, the ball flame type and then make the X1 and X2, which are the straight shot jobs, and incidentally which they don't use the master control with either one of the three.

Well, I am sorry the TM, the larger job, has again a different principle of safety but the X1 and X2 use a primary control such as yours or Perfex's; that is the only two that I have ever purchased them either with M. H. or Perfex.

Q. When you use M. H. primary you use M. H. thermostat?

A. Yes.

Q. When you used a Perfex primary they sent a Perfex thermostat?

A. That is right.

1041 Q. And again you are speaking from actual experience, your own personal experience?

A. That is what actually comes through in the packing case. You specify whether you want Minneapolis-Honeywell or whether you want Perfex controls.

Q. You could not use the Minneapolis T11 thermostat with the primary made by Electrol?

A. No.

Q. And as a matter of fact what would happen in this emergency case where you were trying to give the customer heat on a cold winter day when something went wrong with the Minneapolis-Honeywell T11 or three-wire thermostat? Could you then use a thermostat that had slow moving contacts, that is, the make and break would be of the walking on and off type of contacts?

A. You are referring now to model burners that have—

Q. Minneapolis-Honeywell primaries on them.

A. All right, now would you ask that question once more?

Q. Can you use a make and break type of thermostat

where the thermostat blade or the movable contact walks slowly on or off from the fixed contact?

Mr. Haycraft: I am going to object to that unless he indicates what thermostat he is talking about.

Mr. Freeman: I think he understands.

Mr. Haycraft: I want the record to show that. We
1042 certainly have got some different manufacturers here.

By Mr. Freeman:

Q. Can you use a thermostat other than the snap acting type?

Mr. Haycraft: I have the same objection. I think we should have for the record and for the Commission the name of the manufacturer he is talking about so that it will show.

Trial Examiner Sheppard: Can you give us such a name? Can you give us the manufacturer's name?

A. Well, offhand, is there—

Q. I am just asking what I would really like to know. This is not a trick question, Mr. Brown.

A. Wait a minute. I will answer it.

Q. Could you use a thermostat where the contacts did not snap when they went on or off?

Mr. Haycraft: The same objection unless he indicates what thermostat he is talking about. Unless he does it will certainly have no probative value.

Trial Examiner Sheppard: Go ahead, I will let you answer.

A. The only way I can answer that as I interpret it in my own mind, if you had a Minneapolis-Honeywell R116 or 17 primary control and the thermostat went bad to a point where you could not do a thing with it, then I
1043 could give that customer heat by using any type of thermostat that would close the white and blue wire, the white and blue circuit to that relay.

Now I say further that as far as actually A No. 1 temperature control, to do your job the way it ought to be done, that won't give you as satisfactory results as the original thermostat that was on but it will work with either one.

Q. As a matter of fact you spoke about a relay and you spoke about a clapper on the relay?

A. That is right.

Q. And that is nothing more than when the solenoid is energized the clapper pulls in by the creating of the electromotive force, is that correct.

A. Yes.

Q. Isn't it desirable that when that clapper is pulled in that it be pulled in and held there as distinguished from merely touching it and chattering?

Mr. Haycraft: That is objected to as to the form of the question what is desired. If he wants what is required that is something else.

Trial Examiner Sheppard: This is technical stuff. I want to let it go on and get what I can out of it. I don't see much use to it though.

A. Well, for example, when you close the white and blue circuit that will hold the clapper in until the white
1044 wire is actually opened.

Q. What happens in the event that your thermostat which moves slowly in response to the temperature drop from its closed position?

Mr. Haycraft: I am going to object to that until the question indicates what thermostat we are talking about.

By Mr. Freeman:

Q. Could you use the Minneapolis series 20 to do the job?

A. No, because you have no differential. On series 20 equipment you must make a circuit to start the equipment and make a circuit to stop the equipment.

Q. And the series 20 thermostat has only two wires?

A. No, it has three wires.

Mr. Haycraft: I am going to object to that as it has absolutely no probative value because he is talking about another Minneapolis-Honeywell and we were talking about a competitive product.

Mr. Freeman: A little while ago I talked about the Mercoid and you objected. Now I am talking about our own and you object.

Mr. Haycraft: I am not.

Mr. Freeman: I can use the same yardstick both ways. I will withdraw that question.

By Mr. Freeman:

Q. You could take two wires of the series 20 ther-
1045 mostat of Minneapolis-Honeywell and get temporary operation, could you?

Mr. Haycraft: I object to that on the same grounds as my last objection to the last question. It is of no probative value. He is talking about or arguing one will work and one won't work. There is no probative value in that.

Mr. Freeman: I am saying it will work.

Trial Examiner Sheppard: Go ahead. Let the witness answer.

Mr. Haycraft: Suppose it does or does, what of it?

Trial Examiner Sheppard: I will give it whatever value it has.

A. Electrically a series 20 thermostat will close and open the blue and the white wires, but it would not be at all satisfactory because walking across the floor, any slight vibration would pull the clapper in and allow it to immediately fall out again. So I would not use one of them.

Q. That is exactly what I tried to bring out, that when the clapper moves to the closed circuit position, that is, when the relay is energized it is desirable that you have something that will eliminate vibration in order to eliminate chatter of the relay?

A. That is right. I see what you are driving at now, but see the point that I was trying to make before was a standard two-wire thermostat would—

1046 Q. Would have snap action?

A. Would have that built-in differential which gives you the lag. They accomplish the lag in a different manner by building it in mechanically while you with your red circuit actually do it electrically with a third contact.

Q. A wire?

A. That is right.

Q. So you would have—

A. (Continued.) But you could not take a series 20 thermostat, put it on R116 or 117 relay and get anything; you could not even give the customer decent heat.

Q. So you have to have something more than what merely makes or breaks the circuit?

A. You have got to have a thermostat that either has a built-in differential or a thermostat such as your T11, that as the temperature builds up the blue circuit opens, the red is held through an additional contact and your primary control gets the differential.

Q. So that a walking contact or slow moving—

A. Like the series 20.

Q. Would not work?

A. That is right, it would not work.

Q. You have to have some snap action?

A. Yes.

Q. Some snap action or built in action?
1047 A. That is right.

Redirect Examination by Mr. Haycraft.

Q. Does not Mercoid or the others have that?
A. They have built-in differentials.
Q. Those are the ones you used?
A. You can use them, yes, sir.
Q. I say you have used them?
A. As a temporary measure.

In other words, if I went to your home and the thermostat there was a three-wire thermostat and was not functioning properly and I could not make the necessary repair in the field then I would if I didn't have a T11 to replace it or one exactly like the one I removed, and it does not necessarily have to be a T11, I would make the replacement with whatever I knew would do the job satisfactorily.

Q. Do you have any idea as to the number of burner manufacturers that you are familiar with in your experience?

A. Well, offhand I would say probably, you mean that I have worked on?

Q. Yes.
A. Probably 75.
Mr. Freeman: Different manufacturers?
Mr. Haycraft: Different manufacturers.
The Witness: Yes.

1048 By Mr. Haycraft:

Q. All on low voltage?

A. As I can answer that question now I must say yes because I can't think of any offhand but Electrol that are straight 110 volt to the best of my knowledge. The rest of them are. They use a primary control either manufactured by Minneapolis-Honeywell or Mercoid, or Perfex, or Penn Electric Switch, depending on the different manufacturers.

As you put that question right to me I can't think of a machine that I worked on that has a straight 110 volt high voltage thermostat as we call it.

Q. Do the Mercoid make both for high and low?

A. Yes, they do. Their 855T is a high voltage 10 ampere rating thermostat at 110 volts.

Q. What is the low?

A. The low voltage is their Sensatherm and actually I don't know what the card rating is on that because I have never had occasion to.

Q. But they sell that for low?

A. Yes, they do.

Mr. Haycraft: That is all.

Recross Examination by Mr. Freeman.

Q. Just one question. In all your experiences in your field have you ever run into Winthrop's thermostat or 1049 control?

A. I have not. I have seen it advertised in the American Artisan and other trade papers but have never seen one of the instruments and put my hands on them.

Trial Examiner Sheppard: You are excused, Mr. Witness.

(Witness excused.)

Mr. Haycraft: Mr. Examiner, I want the record to show that I also have one other witness that I want to excuse this morning, a Mr. Ander.

Trial Examiner Sheppard: Is there anything further before we adjourn for lunch?

Mr. Haycraft: I move we adjourn for lunch.

Trial Examiner Sheppard: We will take an adjournment until two o'clock.

(Whereupon, at 12:30 a. m. a recess was taken until 2:00 o'clock p. m. this day.)

1050 Afternoon Session.

2:00 p. m.

Trial Examiner Sheppard: Come to order. You may proceed.

Mr. Haycraft: I will call Mr. Hart.

AL HART was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Trial Examiner Sheppard: Mr. Reporter and Gentlemen, this is Mr. Al Hart, 169-11 Jamaica Avenue, Jamaica, Long Island, New York. Is that correct, Mr. Witness?

The Witness: Yes, sir.

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Hart?

A. Dealer in oil burners and in the fuel oil business.

Q. Under what name?

A. Oil burners under the name of Automatic Home Appliance Company; fuel oil under the name of Hartson Oil Company.

Q. How long have you been selling oil burners under the name of Automatic Home Appliance Company?

A. About 12 years.

Q. During that period of time were you engaged in any other business besides selling oil burners?

1051 A. We manufactured oil burners, not under the name of Automatic though.

Q. Under what name?

A. Mohawk Oil Burner Manufacturing Company.

Q. When was it that you manufactured oil burners?

A. I believe it was prior to '38. I think it was '37.

Q. For how long a period of time?

A. Three years.

Q. What type of oil burner did you manufacture?

A. Pressure gun type.

Q. During that time were you also a dealer?

A. Jamaica was opening up. Home Appliance was always there.

Q. Did you have anybody associated with you?
A. My son and a Mr. Harry Clark.
Q. Did you sell out or did the business discontinue?
A. I sold out; the business continued on for about a year or year and one-half and then folded up.
Q. To whom did you sell out?
A. To Jack Hart and Harry Clark. He is dead now by the way, Clark is.
Q. Did they continue under the name "Mohawk"?
A. Yes, sir.
Q. Did they fold up or sell out?
A. They did not sell out but folded up. It was later taken up by Mr. Toker.
1052 Q. How did he take it up?
A. Through bankruptcy or sale of assignee.
Mr. Freeman: But you don't know?
The Witness: I don't know. Mr. Toker took it up only for one reason. He came to us and sold us burners.

By Mr. Haycraft:
Q. When did Mr. Toker come to you?
A. I believe it was in 1940.
Q. While you were in the manufacturing business where did you buy your controls?
A. I didn't buy any of them. Harry Clark did all the buying but I do know he bought some from Minneapolis-Honeywell, some from Penn Controls and some from Mercoid. Just how much I can't say.
Q. While you were acting as a dealer what make of oil burner did you handle?
A. Well, we handled everything from the start. We handled Gold Star from the beginning. Originally, pardon me, it was the Marr Oil Burner through Westinghouse Electric.
Mr. Freeman: Marr?
The Witness: M-a-r-r, and following that we handled the Gold Star. After that came the Mohawk, and then we had a burner made for ourselves under the name of Mazda. When I say made for ourselves it was somebody's burner. We had the trade name. The Board of
1053 Standards and Appeals gave us permission to put our name on it.

By Mr. Haycraft:
Q. Is the Mazda the name?
A. Mazda was the name of the oil burner.

Q. Is that the name of the oil burner that you are now handling?

A. Yes, sir.

Q. Did you ever handle the Quiet-Heet Oil Burner?

A. Yes, sir, but not under the name of Quiet-Heet.

Q. Not under the name of Quiet-Heet?

A. Always under the name of Mazda. These burners were sent to us without any labels. We labelled them.

Q. Did you ever buy any burners from Toker without the Mazda label on them?

A. We certainly did, not many but a few.

Q. Did you ever buy any from the Herco Oil Burner Company out in Lancaster, Pa.?

A. If I remember correctly when Mohawk went out of business Mr. Herr got in touch with me from Herco and I went to Lancaster. We tried to come to some sort of a deal. Nothing came of it. He only shipped me if I remember two, three or four burners.

Q. Do you remember when about that was?

A. No, sir, I don't really remember.

1054 Mr. Haycraft: Will you mark this for identification?

(The document referred to was marked Commission's Exhibit 152 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 152 for identification and ask whether or not that refreshes your recollection as to when it was when you had any conversation with Mr. Herr with respect to purchasing oil burners?

A. Definitely.

Q. When was it?

A. August 24, 1937.

Trial Examiner Sheppard: Do you want to offer that?

Mr. Haycraft: Not yet.

Mr. Freeman: Don't examine him any more on that either.

Mr. Haycraft: I will take my instructions from the Trial Examiner.

Mr. Freeman: I object to any further examination until he offers it in evidence.

Mr. Haycraft: Won't you wait until I do it?

Mr. Freeman: That is tit for tat.

By Mr. Haycraft:

Q. At the time that you were negotiating with Mr. Herr had you gone into any negotiations with the Quiet-Heet?

1055 A. I don't remember if it was the same time or not. It may have been.

Q. Do you have any recollection when you first began to buy oil burners from the Quiet-Heet?

A. After Mohawk, or when Mohawk was in the process of going out of business, or when they were about to go out of business, or when they went out of business. It was in that vicinity and at that time we did a big builders' business.

I mean by that we supplied builders with these burners and we had to have quite a stock. Somebody had to sell to us, whether Herco, Tom Jones or Jack Smith; it was a question of price with us.

Q. Was it about that time around 1937 that you were looking for a source of supply?

A. It may have been. We were always looking for a source of supply.

Q. Have you produced here at the hearing at my request invoices of purchases of oil burners from Quiet-Heet?

A. These are not all of course but I brought a number of them from the years that you requested, '38 to '41.

Q. And they are typical?

A. They are typical.

Trial Examiner Sheppard: This Quiet-Heet that you are talking about, is that Mr. Peters?

The Witness: Yes, sir.

1056 Trial Examiner Sheppard: I just wanted to identify that.

Mr. Haycraft: Will you mark these for identification?

(The papers referred to were marked Commission's Exhibits 153, 154, 155, 156, 157, 158, 159, 160-A, 160-B, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibits 153 to 194 for identification and ask if you will identify these exhibits as invoices of the Quiet-Heet Manufacturing Corporation for oil burners and controls purchased during the years 1938, 1939, 1940 and 1941, that you produced at my request?

A. Yes, sir.

Q. And would you say that these are all the invoices covering all your purchases or just a portion of them?

A. No, sir, a portion of them.

Q. And would you say that they are a cross-section so that they indicate the difference in prices?

A. Practically all the same.

Mr. Haycraft: With that understanding, Mr. Examiner, I offer the exhibits in evidence.

1057 Trial Examiner Sheppard: Is there any objection?

Mr. Freeman: Just a minute.

Might I ask the witness just a couple of questions with respect to these?

Trial Examiner Sheppard: Yes.

Mr. Freeman: Are these invoices for burners known as Quiet-Heet burners or for burners which you bought and sold under the name Mazda as your own burner?

The Witness: They were bought and sold under the name of Mazda, bought from Quiet-Heet.

I want to make this clear so I don't do anything wrong. On each burner there is a tag which says "Quiet-Heet". We would take that tag off, destroy it.

Mr. Freeman: And you would put the name "Mazda" on?

The Witness: We would put a metal plate on.

Mr. Freeman: With the name "Mazda"?

The Witness: Yes.

Mr. Freeman: So the purchasing public would buy that as a Mazda burner?

The Witness: Strictly Mazda.

Mr. Freeman: The purchasing public did not know whether it came from the John Smith Company or Quiet-Heet?

The Witness: Yes.

Mr. Freeman: It was your responsibility if anything went wrong? It had your name on it?

1058 The Witness: Right.

Mr. Freeman: With the understanding these covered burners with the name "Mazda"—

Mr. Haycraft: But bought as Quiet-Heet.

The Witness: They were never bought as Quiet-Heet. There was a Quiet-Heet tag on them but they were never bought as Quiet-Heet.

Mr. Freeman: I have no objection.

By Mr. Haycraft:

Q. They had the Quiet-Heet tag?

A. We would not dare sell them as Quiet-Heet.

Trial Examiner Sheppard: I think the record is clear on them.

By Mr. Haycraft:

Q. I notice on these invoices, Mr. Hart, 6 BX for instance. To what does that refer?

A. I don't know.

Q. Is that your insignia?

A. No, sir.

Trial Examiner Sheppard: Commission's Exhibits 153 to 194 inclusive are admitted into the record.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 153, 154, 155, 156, 157, 158, 159, 160-A, 160-B, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179,
1059 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, were received in evidence.)

By Mr. Haycraft:

Q. Referring to Commission's Exhibit 153, which is invoice No. 3948, dated November 29, 1938, this calls for 6 BX and under the various controls descriptions, 6 R117, 4 T11, 6 L404, 1 T45, 1 T109. What do those last two refer to, the T45 and T 109?

A. We were entitled to four controls with each burner we purchased, a relay, a thermostat, an aquastat and a pressuretrol. In other words, we got four with each burner. If we bought six burners we were entitled to 24 controls in their place but as long as we took the four controls with each burner.

Q. You got 4 T 11's, the thermostats. What is T 45 and T 109?

A. That would also be a thermostat, a high voltage thermostat. They had those in one particular development and you needed a high voltage.

Q. T 109, is that the same?

A. A day-night thermostat.

Q. Those are higher priced?

A. T 109 is higher priced than plain T 11.

Q. The total $324, does that indicate the total amount?

A. We had no account with these people. Nobody

1060 did. We picked up the burners or they shipped the burners sight draft and paid immediately for them.

Q. That would be $54 each?

A. If that is what it reads.

Q. Fully equipped?

A. Fully equipped.

Q. Referring to Commission's Exhibit 154, which is invoice No. 3839, dated November 22, 1938, this calls for 6 BX burners, 6 R 117 controls, 6 T 11, 6 L404 controls. In addition to that there are 10 L165.

A. That was an aquastat at one time. How many of those are there?

Q. Ten.

A. Are any others there?

Q. No.

A. How many burners altogether?

Q. Six.

A. Six times four would be twenty-four.

Q. You have got three times six or eighteen, and you have got ten more than that. You have got 28.

A. We ~~may have purchased~~ four more controls if that is the case.

Q. In other words you purchased four limit controls?

A. If we needed them. I don't know.

Q. What is L165?

1061 A. We are entitled to 6, 6, 6. There are four controls over on this invoice, that is 10 L165. That means there were ten limit controls.

Q. And six is what you were entitled to. Do you know what 165 is?

A. Yes, sir, an aquastat.

Q. Referring to Commission's Exhibit 165, which is an invoice dated August 30, 1939, calling for six burners, 6 R117 controls, 6 T11, 6 L404, 6– what is the next to the last one?

A. That must be an aquastat.

Q. What is the last one?

A. That is a T105. That is a clock thermostat.

Q. I show you Commission's Exhibit No. 168, which is an invoice No. 5986, dated May 25, 1939. This calls for five burners, 5 R117, 5 T11, 5 L404, 5 L170, in addition 2 T105, 4 L444. Do you know what those last two items are?

A. The two T105's would be clock thermostats and the L444's would be four limit controls.

Q. Four extra ones?

A. Yes, sir.

Q. What particular use would those have?

A. I don't know what the 444 is. It is an immersion aquastat for line voltage. We probably needed it for some job.

Q. I show you Commission's Exhibit 173, which is
1062 an invoice dated November 16, 1939, which calls for five burners, 5 R117 controls, 4 T11, 5 P404, 5 L170, 1 T109, 1 T45 and 1 R19. What is the R19?

A. R19 is a small relay.

Q. What is the T45? Is that a high voltage thermostat?

A. A high voltage thermostat.

Q. T109, what is that, another high voltage?

A. Day-night thermostat.

Q. Commission's Exhibit 178, which is an invoice dated July 2, 1940, calls for three BA burners, 3 R117 controls, 3 T11, 3 P404, 3 L170, in addition 3 T111.

A. That is a chronotherm, three extra chronotherms.

Q. Commission's Exhibit 181, invoice No. 12370, dated December 18, 1940, calls for six BD-LH oil burners. What is that LH?

A. That was a larger series burner.

Q. And it calls for 6 R117 controls, 5 T11, 5 P404, 4 L170, 1 L444, 1 L428, 1 B T42, 1 R19. What is that L428?

A. I don't know. That is a combination high and low circulator control.

Q. L444, what is that?

A. Immersion aquastat.

Q. Did you ever buy any burners equipped with controls from Mr. Toker after he took over the Mohawk Oil burner business?

A. I did.

1063 Q. Do you remember how many you bought from him?

A. I do not.

Q. Do you remember how his prices compared with those that you were paying Quiet-Heet?

A. His prices were a little higher than what we paid Quiet-Heet. At one time he came down to their prices. In fact he came down a little lower than Quiet-Heet and I purchased some burners from them. He said he could not come down to that. I still bought burners from him, and finally from Newark. Finally he said he could not make any money, he was losing money, so I stopped and continued to buy in Newark.

Q. Do you remember when about that was?
A. I believe it was in 1940.
Mr. Haycraft: That is all.
Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Freeman.

Q. This Marr oil burner that you first handled with the Westinghouse was that the gun type?
A. No, sir.
Q. The pot type?
A. Yes, sir.
Q. Did you sell that for house heating?
A. Yes, sir.
Q. And at the time you were selling the Marr oil
1064 burner of the pot type were you out competing with other gun type burners?
A. Definitely.
Q. The pot type burner serves the same purpose for heating a house as the gun type?
A. In a way.
Q. That is for a small house?
A. For a small house exactly the same.
Q. In other words, if you take a small capacity nozzle for a gun type burner it compares favorably with a pot type burner?
A. Yes, with the proper retort.
Q. I am assuming that the installations are proper?
A. All right, sir.
Q. They both serve to heat homes? They are both sold in the domestic heating field?
A. That is right.
Q. And they are sold in competition with each other?
A. Not any more. The Marr burner is not in competition with anybody that I know of.
Q. I am talking about when you were working with the Marr burner?
A. We were in direct competition with everybody.
Q. With the gun type?
A. Yes, sir.
Q. And serious competition?
1065 A. Yes, sir.
Q. Who made the Gold Star burner?
A. The Gold Star burner was made in Yonkers by an Italian, a party by the name of Esposito. It was sold to

us through Harry Clark. Harry Clark was working through Esposito. That is how we came to buy it.

Q. Then Harry Clark joined up with you in the Mohawk?

A. That is right.

Q. And later Harry Clark and your son took over the Mohawk and you continued in your Automatic Home Appliances as a dealer?

A. Automatic Home Appliance was always a dealer, all through the small field. It had nothing to do with Mohawk. It was still in Jamaica, you know.

Q. So far as the Automatic Home Appliance was concerned, you just changed burners from time to time and continued right on?

A. That is right.

Q. And then later you sold under the name Mazda?

A. That is right.

Q. Did you ever buy any burners from anybody other than Quiet-Heet that you put the name Mazda on?

A. Yes, sir, Mohawk.

Q. Mohawk?

A. That is right, but that didn't carry a Mohawk 1066 label either. The burners that we got from Mohawk came to us without any labels on them.

Q. And you put the Mazda on?

A. We put our own label on, that is correct.

Q. So that everything you sold under the name "Mazda" so far as the origin of that burner was concerned, it was immaterial to you?

A. That is correct.

Q. You were interested in price and quality?

A. We were interested in the name particularly because we had the sad experience with Westinghouse and we know of other people that had sad experiences with others in their lines. We didn't want to lose face, our name, so we created a name.

Q. And decided that you were going to sell under the name of Mazda?

A. That is right.

Q. And you were going to put your reputation as service dealers, as operators back of Mazda?

A. That is correct.

Q. When you sold a burner you did not tell the customer that this was a burner made by Quiet-Heet?

A. Definitely not.

Q. You did not tell them it was one made by Mohawk or anyone else?

A. No, sir.

1067 Q. I notice you bought a couple of burners from the Herco Company in Lancaster when you had a little trouble?

A. No, sir, there were just four burners sold by the name Herco. There was a metal plate, a label on that, that came right on that which we could not change.

Q. These burners that you sold under the name "Mazda" did you buy them from any other company besides Mohawk and Quiet-Heet?

A. Yes, sir, we did.

Q. And who were they?

A. We bought some from Michael & Goldberg. They made a Radiant oil burner. We bought them without any label. It was Mohawk made, made by Mohawk after they closed. Michael and Goldman sold them the idea of making burners.

Q. How did their price compare?

A. It was cheaper than Newark or I would not have bought it.

Q. Cheaper?

A. When they could not meet competition I stepped out and went back to Newark again.

Q. As far as you were concerned you were just interested in a burner that you could put your name on and sell it as your burner?

A. Yes, sir, that is right, at a price.

Q. And I take it from the invoices that you have here, Commission's Exhibits 153 to 194, that as a dealer

1068 you did a pretty good job in selling oil burners?

A. We think we did.

Q. And your dealers' shipments in the Jamaica territory, how would those compare with the other dealers in the territory?

A. I don't think it is necessary to bring this out, but in accordance with a poll taken by our trade paper—what is it, the News, what is that journal?

Q. Fuel Oil.

A. We were fourth, the fourth largest distributor of any oil burners in Kings, Queens and Nassau Counties, including Manhattan for certain years. They had a poll each year.

Q. And I take it in the sale of these burners under the name Mazda?

A. They listed it as Mazda. They never listed it as Quiet-Heet, of course.

Q. These burners that you sold under the name "Mazda", you sold them in competition with many other companies?

A. All other companies.

Q. About how many companies would you say you were in competition with?

A. Twenty, twenty-five.

Q. I am talking now about the territory that you covered?

A. Locally, that is right.

Trial Examiner Sheppard: What territory did you
1069 cover, Mr. Hart?

The Witness: Within the five boroughs. Never out of the five boroughs.

Trial Examiner Sheppard: Local?

The Witness: Strictly local.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. These prices that you have here for oil burners that you purchased from Quiet-Heet are not broken down so that you can tell just exactly what you paid for the burner?

A. They never were.

Q. In other words, if you got a burner with a T111 thermostat you paid a little more for it than you did for one with T11?

A. There would be a deduction made from T111 to T105. The T111 cost more than the T105.

Q. Was that true of the controls when you changed?

A. True of all controls.

Trial Examiner Sheppard: What makes that difference in price?

The Witness: Well, sir, we all, everybody in this business has a Minneapolis price sheet, a cost price sheet, and we go according to that sheet. In other words, if T105 has a list of $35 and T11 has a list of $6.75 we know there
is a difference and we are entitled to it the difference
1070. between the two thermostats. One can be $30, or there can very nearly some odd twenty dollars difference. One is a clock type and the other is a plain thermostat.

By Mr. Freeman:

Q. I might ask a few questions in order to straighten the Major out on that clock thermostat. Is that one that automatically sets back at night in order to conserve some of the fuel?

A. Yes, sir.

Q. It does it automatically?

A. Both do it automatically.

Q. As far as the set back?

A. The set-back is the clock thermostat.

Q. Of course in that case you have not only a clock but you also have the function by which you get night set back?

A. That is right.

Q. In other words, just by way of example and for the purpose of clarification, if you operate a temperature say of 70° during the day, say at 10 o'clock at night the clock thermostat automatically pushes the temperature down so that it holds the room say at 65° or 60° or whatever you want to set it at?

A. You can set it for a certain hour and also to come on again at a certain hour.

Q. So you thus economize in the use of fuel?

1071 A. Yes.

Trial examiner Sheppard: And the simple thermostats do not have the clock on them?

The Witness: No, sir.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. So that these variable prices that we find here in the invoices, Commission's Exhibits 153 to 194 are brought about by the variable controls that are used in connection with the burners?

A. That is correct.

Q. And did you likewise get the same kind of a variable price when you bought from the Mohawk, when you bought different controls?

A. I don't know, sir. We have the invoices.

Q. May I ask this—

A. (Continued) Maybe they are listed there. I don't know. I am not sure.

Q. I am not interested whether they are listed or not but if you bought a Mohawk with a clock thermostat you paid more than when you got it with T11?

A. Yes, of course. In proportion you paid about the same.

Q. So that the variable prices we find in the invoices, Commission's Exhibits 153 to 194, were likewise applicable to oil burners with different controls that you
1072 bought from your other companies?

A. That is right.

Q. Did you ever handle any Mercoid controls?

Mr. Haycraft: That is objected to as irrelevant and immaterial and not proper cross-examination.

Trial Examiner Sheppard: I don't remember whether he went into that or not. I don't know that it makes much difference.

I will support the objection. I don't want to go into anything that has not been brought out on direct.

By Mr. Freeman:

Q. Were all of your burners that you sold equipped with the respondent's controls, and by the respondent I have reference to the Minneapolis-Honeywell?

A. I understand some were not equipped with Minneapolis-Honeywell controls.

Q. Who did you buy them from?

Mr. Haycraft: That is objected to as irrelevant and immaterial.

Trial Examiner Sheppard: I will let you state that.

A. I bought some of them from Toker, that is Mohawk. I never bought any other controls from Newark, Quiet-Heet.

Q. And?

A. And we bought some Mercoid controls direct.

Q. And what did you do with these Mercoid con-
1073 trols that you bought direct?

Mr. Haycraft: I kept out and you ruled out that and I move this be stricken and this last question.

Trial Examiner Sheppard: I want to know what you mean by direct?

The Witness: I mean direct from the people. If we bought Mercoid controls we bought direct. We had an account with Minneapolis-Honeywell, so we could get controls direct from Minneapolis-Honeywell.

Trial Examiner Sheppard: It makes little difference. I will let that stand.

By Mr. Freeman:

Q. You bought some controls direct from Minneapolis-Honeywell?

A. That is right.

Q. And was that for the purpose of replacement or repairs?

A. For purposes of replacement and of repairs.

Q. But usually when you bought an oil burner it came equipped with the necessary controls?

A. With four controls, yes, sir.

Q. That is the way you bought them standard?

A. In every case.

Q. If a thermostat or primary went haywire in the field you then went out and picked up a repair or replacement part?

A. We had to because we could not get burners.
1074 Anything that went bad went to Minneapolis, Mercoid or Penn, or wherever else it may have been.

Q. And isn't it true that in some cases you used more than one limit control on the job?

A. Yes, sir.

Q. And did you ever make any installations where you used more than one thermostat?

A. Yes, sir.

Q. So that in buying your oil burner you took into consideration the particular installation that you might have to meet?

A. On a hot water system you had to have two hot water controls. In fact, in some three.

Q. Then I notice also that there is reference here to an R19 relay?

A. R19 is a relay which you change from high to low voltage.

Q. That is different than a primary control?

A. That is correct.

Q. That is merely to convert low voltage into high voltages?

A. Low into high. It has nothing whatsoever to do with the burner.

Q. When you bought that kind of control you likewise had to take that into consideration with respect to the burner you were buying with the job you had to do?

A. That is entirely separate from the four ordinary controls which you had to buy for the ordinary job.
1075 In some cases you had to have R17 or R19.

Q. R-19?

A. That is right.

Q. Did you ever have the situation where a customer bought an oil burner equipped with a T11 thermostat and then decided he wanted a little better refinement and then got a clock thermostat?

A. In many cases.

Q. And in that case you removed the T11?

A. In some cases we removed the T11 and in a great many they don't let us remove the T11. It remains with the customer.

Q. You simply added the other control?

A. Yes.

Q. And gave him the additional service which a T111 would give?

A. It is an entirely different hookup. You had a five-wire.

Q. When you put in then a T111 you just left the old control there?

A. Not in all cases.

Q. But in some cases?

A. In some cases the people want them to be left, to remain.

Trial Examiner Sheppard: That would make two thermostats in some setups?

The Witness: In some cases.

1076 By Mr. Freeman:

Q. Where would you pick up the additional clock thermostat?

A. In the same place or from the same people we purchased our thermostats as a rule.

Q. Did you ever take any of the burners that you bought from Quiet-Heet and remove the Minneapolis-Honeywell controls where a customer wanted perhaps Mercoid controls?

A. We had no occasion to.

Q. Did you ever have any objection from any of the purchasing public with respect to your using Minneapolis-Honeywell controls?

A. No.

Q. Did you have any customers who ever stated a preference for the use of controls?

A. Yes, definitely.

Q. And of course when a customer wanted a particular control you gave him that control?

A. In our particular field as we catered chiefly to builders, that you will understand it, we had to supply Minneapolis-Honeywell controls. They would not have anything else.

Q. Do you know why?

A. Well, I don't know.

Mr. Haycraft: That is objected to.

By Mr. Freeman:

Q. In some of these burners that you bought from
1077 Mohawk equipped with Mercoid controls did you ever have to take off a set of Mercoid controls and install a set of Minneapolis-Honeywell controls in order to sell a burner?

A. No, sir.

Q. And so far as you know service-wise the Mercoid controls did just as good a job as the Minneapolis-Honeywell?

A. As far as we were concerned, yes.

Q. Did you say that you sometimes used Penn controls?

A. We at one time used some Penn controls, not many. We used a few of them. We had a lot of difficulty with them and so stopped using them entirely.

Q. Did you ever use any Perfex controls?

A. Yes, sir, some.

Q. So insofar as controls were concerned you used practically all of the different types or different kinds that are on the market?

A. We did.

Mr. Freeman: That is all.

Mr. Haycraft: Nothing further.

Trial Examiner Sheppard: Thank you, Mr. Hart.

(Witness excused.)

Mr. Haycraft: May we have a short recess?

Trial Examiner Sheppard: Show a ten minute recess.

(A ten-minute recess was taken.)

Trial Examiner Sheppard: On the record.

1078 Mr. Haycraft: I will call Mr. Toker.

HARRY A. TOKER, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Trial Examiner Sheppard: Mr. Reporter, this is Mr. Harry A. Toker, American Mohawk Corporation, 580 Hudson Street, New York City.

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Toker?

A. Why our principal business is the fuel business in Elizabeth, N. J. As a subsidiary we have the American Mohawk Company, and still have the American Mohawk in New York City.

Q. Where is the American Mohawk Company?

A. It is located at 580 Hudson Street, New York City.

Q. What does it do, what business is it engaged in?

A. We are engaged in the manufacturing of fuel oil burners.

Q. How long have you been associated with that company?

A. I took that company over in April of 1939.

Q. From whom did you purchase it?

A. It was purchased from Mr. Harry C. Clark.

Q. Is it a private enterprise, an individual enterprise or a corporation?

A. It is a private enterprise that was incorporated 1079 in 1939. The corporation was dissolved in 1940 because of the fact that it was simply the partnership of my brother and myself.

Q. And you have run it since then?

A. That is right.

Q. And during 1939, 1940 and 1941 did you manufacture and sell oil burners?

A. That is correct.

Q. Under what trade name, American Mohawk?

A. Under the trade name of American Mohawk.

Q. Where did you sell them principally?

A. All over the United States.

Q. Approximately how many did you sell during those years each year?

A. In 1929—

Mr. Freeman: 1939.

A. (Continued.) 1938 rather, Mr. Clark had a production of 245; in 1939 I took that over and we had a production of 780; 1940 we had a production of 2100 and in 1941 we had a production of 3900.

Q. Then the war came along?

A. Then the war came along and business stopped.

Q. What class of trade did you sell?

A. Distributors, builders and fuel oil dealers.

Q. Do you remember when you sold to Al Hart, the man who preceded you on the stand?

1080 A. We sold Al Hart under the name of Automatic Heating Company of Jamaica immediately upon our taking the company over.

We had very few sales at that time as indicated from the production record of Mr. Clark and Mr. Hart having been in that business before, came to me and volunteered the information that he would purchase burners from us.

We sold Mr. Hart burners for about four months of that year 1939.

Q. Then what happened?

A. Then we discontinued selling him.

Q. And why?

A. I could not meet the price competition of other companies.

Q. And what other companies do you have in mind?

A. As indicated to me, I was told by him that he was going to Quiet-Heet.

Q. And thereafter you did not sell him any more?

A. Thereafter I definitely discontinued selling him.

Q. Did you have any similar experience with any of your dealers that you were selling to in 1939 and 1940?

A. Similar in what respect, sir?

Q. That you were selling them and that you were told your price was too high and you discontinued selling?

A. I believe we had another experienc in 1940. If my memory serves me correctly I think it was in the Bos-

1081 ton area with Metro Supply Corporation. I believe it is Mr. Conchonsenti. I think it is 5 Henderson Street, Everett, Mass.

Q. Can you think of any others?

A. We sold another company up in Boston. I don't know whether the discontinuance was because of price. I was told it was. That was I believe even before these two incidents. That was in 1939.

Mr. Clark, who formerly was engaged by myself in this company, sold the Tower Manufacturing Company in Boston.

Mr. Freeman: Tower?

The Witness: Tower.

Trial Examiner Sheppard: That was after you took the company over?

The Witness: That was immediately after I took the company over and he was in our employ. There was a discontinuance of the business immediately after the second shipment. I presumed it was on the matter of price.

By Mr. Haycraft:

Q. Did you make any sales to Rackliffe Oil Company in New Britain, Conn.?

A. Never.

Q. Did you ever try to?

A. Yes, I think I solicited their business in 1940. I am not quite sure of that date. It might be '40. I think it was '40 that I solicited the Rackliffe Oil Co.

1082 Q. You did that personally?

A. That is right.

Q. Were you able to make a sale?

A. No.

Q. What was the reason?

A. Apparently our prices were out of line.

Q. From whom were they buying at that time?

A. I believe the Quiet-Heet Company.

Mr. Haycraft: You may cross-examine.

Cross-Examination by Mr. Freeman.

Q. Before you took over the American Mohawk you were an oil burner dealer selling oil burners?

A. That is correct.

Q. And whose oil burner did you handle just prior to your taking over the American Mohawk Company in April of 1939?

Mr. Haycraft: That is objected to as irrelevant, immaterial and not proper cross-examination.

Mr. Freeman: I think that is very proper. This man said he has been in the oil burner business and took over the company.

Mr. Haycraft: I very carefully kept my examination to a particular period and particular subject.

Trial Examiner Sheppard: I think you did and I don't

want to transgress my rules not to have any cross-
1083 examination on something which has not been brought out on the direct examination.

Over and above it all, gentlemen, I have been listening here to this testimony by this gentleman and these other people here this morning in reference to the sale of burners, etc., and I don't know, I may have a wrong slant on this thing here, but I don't think it has much to do with the issues. I think it is all extraneous to the issues in this case.

These people come in here and testify that they went out of business and all that sort of thing but the respondent company is not connected with it. Certainly this morning the testimony shows that competition of other people did it and I think we are just sort of wasting time here on this proposition.

I don't care if you do not cross-examine this witness at all.

Mr. Freeman: With that statement I will have no further cross-examination.

Trial Examiner Sheppard: I sat here all yesterday and all day today—

Mr. Haycraft: Mr. Examiner, I think it is only fair that I should make a statement for calling this testimony so that counsel for the respondent will not put themselves in a position that they may want to change their line
1084 of examination.

Trial Examiner Sheppard: I want some testimony connecting the respondent with these things.

Mr. Haycraft: The respondent is connected with these things by the testimony of all preceding witnesses certainly, if not by this witness, because this is one step farther down the line, but the previous witnesses I would like to point out have testified with respect to their particular.

If you heard the testimony of—

Mr. Freeman: You mean the old line manufacturers.

Mr. Haycraft: Will you please let me make my statement?

Mr. Freeman: I just want to—

Mr. Haycraft: You are about as helpful as the seven year itch.

Mr. Freeman: Except I am a damn sight faster than that.

Mr. Haycraft: Mr. Gillis testified yesterday.

Mr. Freeman: That is the man I referred to.

Mr. Haycraft: He testified as to their inability to pur-

chase controls from Minneapolis-Honeywell Regulator Company at prices which enabled them to compete with Quiet-Heet Manufacturing. There was definite testimony as to that. There is also testimony that they lost business as a result of that.

1085 There is the purpose of all this testimony. This business was an oil burner manufacturer.

Mr. Freeman: That is not even a fair statement of what Mr. Gillis testified to.

Mr. Haycraft: He testified as to his sales of oil burners equipped with Minneapolis-Honeywell.

Trial Examiner Sheppard: Mr. Haycraft, I may save you a little time. I am not considering Mr. Gillis at all. When I come to consider his testimony I will take that up in due course, but a gentleman like this, whose testimony, and like Mr. Hart—

Mr. Haycraft: Let me ask the witness two or three more questions?

Trial Examiner Sheppard: All right.

Mr. Haycraft: Perhaps I can bring it a little closer.

Redirect Examination by Mr. Haycraft.

Q. What temperature controls did you put on your oil burners that you sold under the American Mohawk in 1938 through 1941?

A. We have always sold—

Mr. Freeman: 1938 is one year earlier, which you very carefully endeavored to bring out on the first examination.

By Mr. Haycraft:

1086 Q. 1939?

A. We have always sold Minneapolis-Honeywell controls and Mercoid Corporation controls.

Q. During 1939, 1940 and 1941?

A. Ever since I have been in the business.

Q. In what bracket were you in 1939, 1940 and 1941 with respect to the purchase of temperature controls from Minneapolis-Honeywell?

A. I believe it was 3-A.

Q. Up to what time was it 3-A?

A. Beg pardon?

Q. At what time?

A. 1940 and 1941.

Q. What does the A mean, do you know?

A. I don't know how they regulate that.

Q. Do you know what bracket you were in in 1939?

A. It must have been two.

Mr. Freeman: I don't want you to pay any attention to what I said.

By Mr. Haycraft:

Q. Can you testify as to the proportion of the cost of an oil burner that is made up of the controls that are attached to it?

A. You are asking me whether the selling price is a certain proportion of the cost and what that cost proportion would be?

1087 Q. Yes.

A. I would say that the cost of controls that go with the sale of an oil burner is approximately one-third the selling price.

Q. And any advantages that your competitors might have in the purchase price of temperature controls would they have any effect upon your ability to compete?

A. If there were a wide discrepancy I guess there would.

Q. What was your price of oil burners? What were you getting for oil burners in 1939, 1940 and 1941?

A. In 1930 we sold our oil burners—

Q. What year, 19 what?

A. 1939 we sold our oil burners at a price of $55 per oil burner to the dealer. Naturally the quantity brackets got a better price and they may have ranged down to $50.

Q. In 1940?

A. In 1940 our prices were the same.

Q. 1941?

A. Definitely the same.

Mr. Haycraft: Now, Mr. Examiner, I think perhaps I have made it a little clearer as to the purpose of the examination.

Trial Examiner Sheppard: Is there any further cross-examination?

Mr. Freeman: No cross-examination.

1088 Trial Examiner Sheppard: All right, thank you, Mr. Toker.

(Witness excused.)

Trial Examiner Sheppard: We will take a ten-minute recess.

(A ten-minute recess was taken.)

Trial Examiner Sheppard: On the record.

Mr. Haycraft: I will call Mr. Gannon.

JOHN GANNON was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Trial Examiner Sheppard: Mr. Reporter and Gentlemen, this is Mr. John Gannon, Clinton, Mass.

Is that right, Mr. Gannon?

The Witness: Right.

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Gannon?

A. Now?

Q. Yes.

A. I am doing defense work. I have converted my shop to defense work.

Q. In what business were you engaged prior to the war?

A. Manufacturing oil burners.

1089 Q. How long were you engaged in the manufacture of oil burners?

A. Since 1929.

Q. Under what name did you manufacture?

A. Standard Products Company.

Q. At Clinton, Mass.?

A. Clinton, Mass.

Q. What type of oil burner did you manufacture?

A. We made both the range burner for household use, kitchen range and the power burner.

Q. The power burner, what is the power burner for?

A. Beg pardon?

Q. What use was made of the power burner?

A. Well, for heating homes.

Q. Was that a pressure type, gun type?

A. Gun type, pressure gun type.

Q. When you first manufactured oil burners where did you sell them?

A. Mostly in New England.

Q. Did you expand your business from time to time?

A. Yes, I did.

Q. How far did you expand it?

A. Well, I have sold a few export. I sold them probably in a dozen states in this country.

Q. Including New York?

1090 A. Yes.

Q. What make of control did you put on your oil burner when you first started?

A. When we started off we used Mercoid.

Q. How long did you use Mercoid?

A. Probably for three or four years.

Q. Then what did you use?

A. Then we used Perfex. I mean United Controls made in Boston.

Q. How long did you use those?

A. We used those the first four years. I don't know whether for the whole four years but we used United for probably two to three years. I would not dare to tell you the dates. I don't know just when we started using United. I have not got a record.

Q. Did you use Perfex?

A. Beg pardon?

Q. Do you remember whether you used Perfex or not?

A. Yes, we did use Perfex.

Q. When did you use Perfex?

A. I can't tell you the exact years I have used them.

Q. If I should suggest 1936, 1937 would that be correct?

A. That would sound correct.

Mr. Freeman: What are you making that suggestion for Mr. Haycraft so we get the record straight?

Mr. Haycraft: That is in your transcript.

1091 Mr. Freeman: You mean the testimony of some other witness?

Mr. Haycraft: Yes.

Mr. Freeman: All right, that is 1936?

Mr. Haycraft: '36, '37 and some in 1938.

Mr. Freeman: Let us get it accurate anyway.

By Mr. Haycraft:

Q. Did you ever use any Minneapolis-Honeywell controls?

A. Yes.

Q. When did you start using the Minneapolis-Honeywell?

A. You will have to suggest the years. I have no record of it. I did not bring any record.

Q. Well, were you using more than one control when you were using the Perfex control, do you remember?

A. No, I might have used some United with Perfex.

Q. Do you remember whether you used any Minneapolis-Honeywells at the same time?

A. Very few if I did.

Q. Do you have any way at all of refreshing your recollection as to when you started using Minneapolis-Honeywells?

A. No, I could not honestly say the date when I started using them.

Q. Do you have any recollection as to the number of oil burners you were manufacturing about that time?

A. Well, I believe the most we ever made, the
1092 biggest year I have a recollection of manufacturing about 3100, something to that effect.

Q. Do you remember what year that was?

A. No, I don't.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: We did probably use a few Minneapolis-Honeywell controls previous in the early days because I remember paying as high at $36 for a set of them. That would signify that that was quite a few years ago.

By Mr. Haycraft:

Q. Do you remember the last year that you handled or used Minneapolis-Honeywell controls?

A. Probably '38.

Q. Did you make any contracts with them with respect to controls?

A. Yes, I believe I made contracts with them every year I sold them.

Q. Do you have any of those contracts with you?

A. I have one, yes.

Q. That is the last one?

A. Yes, it is January 25, 1939.

Mr. Haycraft: Will you mark that for identification?

1093 (The document referred to was marked Commission's Exhibit 195 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 195 for identification and ask if that is the contract you just referred to between Standard Products Company and the Minneapolis-Honeywell Regulator Company for the year 1939?

A. That is correct.

Q. Whose signatures are those? Who signed the contract?

A. Well, that is Mr. Jennings. He was resident vice-president I guess in the Boston district and Mike Ware. He was the treasurer.

Q. Jennings was connected with what firm?

A. Minneapolis-Honeywell.

Q. And Ware was connected with what firm?

A. Standard Products Company.

Q. What was your position in the firm?

A. President.

Q. Well, was it prior to this year 1939 that you sold as high as 3100?

A. Yes.

Mr. Haycraft: First I want to offer this in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: No objection.

1094 Trial Examiner Sheppard: Let Exhibit 195 be accepted.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 195, was received in evidence.)

By Mr. Haycraft:

Q. You say it was prior to that?

A. Yes.

Q. How many years prior?

A. Probably two or three years.

Q. Do you have any recollection as to the quantity, the largest quantity, the number of sets of controls that you bought from Minneapolis-Honeywell?

A. No, I haven't.

Q. If I should refresh your recollection in that respect and suggest to you that in 1936 you bought approximately 1450 sets amounting to approximately $50,000, would that refresh your recollection?

A. Well, I could not tell by the amount but I believe we did do close to $50,000 or so in amount of money. I would not know how many sets of controls.

Q. Does that refresh your recollection as to the year?

A. Yes, I would say that was the year.

Q. Then in 1937, if I should suggest that you purchased about 550 sets, costing about $15,800, does that re-

1095 fresh your recollection? Would that be for that year?

A. It would sound reasonable, yes.

Q. And if I should suggest that in 1938 your purchases were approximately or were 147 sets at $4,330, would that refresh your recollection as to the purchases in that year?

A. I believe that would sound pretty near right. I have no records of it with me.

Q. In 1939, 142 sets at approximately $3,000?

A. Yes, I would say that sounds reasonable.

Q. How do you account for this sharp decline in the business of the firm beginning 1936, from 1937 on down to 1939?

A. I believe we lost two or three good big accounts on account of price propositions entering into the oil burner business and lost two or three good accounts.

Q. What were the accounts, if you recall, that you lost?

A. One was the Brooklyn account over here that went under the name of the Standard Iron Burner Company, but it had no connection. They used our burners.

Q. Did you have any information as to what burner they purchased after they discontinued buying yours?

A. I believe they bought the Quiet-Heet and the Kelley.

Q. Where is the Kelley?

A. That is the Boston burner. It was probably the Quiet-Heet when they started. They started under the name of Kelley and they built their own burner afterwards.

1096 Q. What price did you sell your burner at back in 1936, along in there? And in 1937?

A. Well, we did get $69 at the highest price for them and we got down to $55. Some may have been sold as low as $50, not under that.

Trial Examiner Sheppard: Including the controls?

The Witness: No, it did not include the controls.

By Mr. Haycraft:

Q. Did you sell your burners without controls?

A. We were not supposed to but we did in some cases for replacements where they had controls.

Q. What was your price that you got for burners with controls?

A. We sold a package unit for $98 with the tank, controls and the burner. I believe our tank cost was $11.50. We were getting $24.75 I believe for controls.

Q. That is the price that you figured them?

A. Yes.

Q. Did that—what did you get for your complete burner with controls when you sold the burner for $50?

A. When we sold we figured the burner at $50. That was without controls and we added the controls to that.

Q. What total would that bring it to?

A. That would bring it up to $89.

Q. I see. Do you have any recollection as to when
1097 your last sales of burners were made?

A. I don't.

Q. What year?

A. I think it was 1939.

Q. Since that time what did you do, between 1939 and the time that you went into war work?

A. I faded out of the picture. I had the Minneapolis-Honeywell cancel my contract and I got out of the business slowly, died a slow death and went into receivership and I bought out the assets and continued it under the name of the Standard Burner Company as an individual, John J. Gannon doing business as Standard Burner Company, and it still exists that way.

Q. What have you done, do you sell burners as a dealer then, do you?

A. No, I did not.

Q. What did you do?

A. After 1939 I ceased to sell burners.

Q. I see.

Mr. Haycraft: You may cross-examine.

Cross-Examination by Mr. Freeman.

Q. Do you remember why Minneapolis-Honeywell cancelled its agreement with you?

A. I think I do.

1098 Q. Go ahead and tell us?

Mr. Haycraft: Mr. Examiner, if there is anything to show that correspondence I will certainly be glad to have that put in evidence. I don't see how this witness can read Minneapolis-Honeywell's mind unless we have something or somebody told him.

Mr. Freeman: This witness said on direct examination it was cancelled. I asked if he knew why. He said he does.

Mr. Haycraft: He thinks he does.

Trial Examiner Sheppard: If you can enlighten us—

Mr. Haycraft: Did Minneapolis-Honeywell ever tell you either orally or in writing why they cancelled?

The Witness: No.

Mr. Haycraft: I object to any conjecture as to why it was.

By Mr. Freeman:

Q. Will you give me your best recollection or your opinion as to why it was cancelled?

Mr. Haycraft: I object to opinion or conjecture as to why it was cancelled.

Mr. Freeman: Half of your testimony is conjecture of the worst kind.

Trial Examiner Sheppard: I am not going to allow your testimony unless you know. If you tell me you don't
1099 know, then of course I can't let you testify to that. Do you know?

The Witness: I believe I know.

Mr. Freeman: That is all I want to know, Mr. Examiner.

Trial Examiner Sheppard: All right. It depends upon whether he had knowledge.

Mr. Freeman: He knows and I know he knows.

A. It was sort of an unwritten law that we were not supposed to sell burners to dealers, I mean sell controls to dealers without selling them burners. I sold controls to dealers without burners. I sold them with burners, but I sold them more controls than I did burners and for that reason my contract was cancelled. I believe that was so.

Mr. Haycraft: I move to strike the answer in as much as the witness states that purely as opinion. He has nothing in writing or orally from the respondent as to why it was cancelled. It was merely his opinion and conjecture.

Trial Examiner Sheppard: No, Mr. Haycraft, I am going to let that stay in. I asked the witness before I heard his testimony whether or not he knew and he said he believed he did and I think it is testimony from the witness which, to say the least, is due whatever weight I want to give it or the Commission. So I am going to take what you said and give it whatever weight I think it is worth.

By Mr. Freeman:

1100 Q. The Underwriters do not approve selling an oil burner without controls unless it is specifically going in as a replacement, is that correct?

A. I had a letter from the Underwriters that I can ship in burners without controls.

Q. For replacement?

A. No.

Q. Have you that letter with you?

A. No, I have that letter and it is a positive fact because you people could not ship controls fast enough at one time and it was holding up my shipments and I wrote the Underwriters Laboratories and told them that I had that difficulty and I wanted permission to sell burners without controls.

Q. During that emergency?

A. I told them the cause of it, why I was asking that and they sent me a letter to that effect that I could.

Q. That you could sell burners without controls all the time?

A. Ship burners without controls. I would not say that that stipulation was all the time.

Q. You still have that letter?

A. I don't have it. I want to tell you something about why I don't have these records, that I destroyed them of the firm of Standard Products Company when I took over. I destroyed most of the records.

1101 Q. You want to tell us here that you got special dispensation from the Underwriters Laboratories for the sale of oil burners without controls?

Mr. Haycraft: Mr. Examiner, I object to the form of that question. There is nothing in this record to show that that is necessary. This is just simply counsel's assumption and I object to it because it is not in the record.

Trial Examiner Sheppard: The objection is sustained there because this man does not have anything to back it up.

By Mr. Freeman:

Q. I will ask you this question: when you wrote to the Underwriters to get approval for the shipment of oil burners without controls you knew then that the Underwriters did not approve the sale of a burner without a primary thereon?

Mr. Haycraft: I object to that, Mr. Examiner, because that is something that is not on the record. If he wants to put in the question he had been told that the Underwriters said so, that is all right, but the Underwriters themselves have not testified in this case yet and there is nothing to show that there was such a rule.

Trial Examiner Sheppard: I think so. The objection is sustained on that.

By Mr. Freeman:

Q. You knew that the Underwriters did not approve the sale of an oil burner without a primary control?

1102 A. I don't know whether they did not approve but I knew that you should, that it was customary to ship controls with the burner and when they would come to visit the factory for inspection they would often have me open up burners being shipped to show that the controls were shipped with it, but I got this letter from them and it was through the inspector that I got the letter.

When I told him the case he advised me to do it and I had the letter to ship burners without controls.

Now whether that was a special, anything special and nobody else had it I don't know, but I had a letter to that effect.

Q. Well then, did you then sell more controls than you sold burners or did you merely outfit the burners that you sold with the proper set of controls later on?

A. I sold more controls than I did burners.

Q. And you represented to Minneapolis-Honeywell when you purchased its controls in accordance with its manufacturer's agreement that you were going to use Minneapolis-Honeywell controls as part of your original equipment, is that correct?

A. Yes, which I did.

Q. And you likewise sold those controls over and above your original equipment, correct?

A. Yes, I am allowed that.

Q. And what price did you get for a set of controls

1103 when you sold them apart from the burner?

A. In some cases, I would not dare say, swear to any exact but in some cases I sold them for $27 and $28, and in other cases I sold them as low as 25 per cent margin.

Trial Examiner Sheppard: Mr. Gannon, I will ask you a question right there. What constituted the controls that you referred to?

The Witness: A primary control, and a limit control and a thermostat.

By Mr. Freeman:

Q. Did you sell oil burner controls separately for use in connection with someone else's oil burner, that is an oil burner other than the one you yourself made?

A. I would not say. I would not say that. I did. In all

probability it found its way to be used on other burners in replacements.

Q. I take it that you are familiar with the phrase in the agreement, and I now read from Commission's Exhibit 195 the following: "The purchaser agrees to use the controls listed herein as part of or in conjunction with his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except for use in conjunction with such products"?

A. Yes, I am acquainted with that.

Q. And then as a matter of fact weren't you informed when the agreement was cancelled that it was cancelled because you did sell controls separately?

1104

A. No, the only letter I got that my contract was cancelled.

Q. Did you only talk to any representatives of Minneapolis-Honeywell with respect to your sale of controls separately and apart from products manufactured by your company?

A. If I did talk with them they were not talking from the Boston office. They were telling me on the side that I was selling controls; that is why it was cancelled but nobody officially told me.

Q. I am asking you now whether any representative of Minneapolis-Honeywell, whether in business hours or where, told you that you were selling controls apart from products of your manufacture and that is why the agreement was cancelled?

A. No, I don't believe they did.

Q. Who called on you from the Minneapolis-Honeywell Company?

A. Hoyt.

Q. And you want to say under oath that he never told you?

A. I would say under oath that I have no recollection, no recollection of him ever telling me because it would be in the letter I believe, the cancel letter which you have, cancelling the contract. You have a copy of it evidently.

Q. And we will have it.

A. That is all right.

Q. In 1936 I understand you bought some $50,000 worth of controls or about 1400 sets from Minneapolis-Honeywell. You actually manufactured about 3100 oil burners that year?

1105

A. That is right.

Q. And whose controls did you use on the other 1700 oil burners?

A. I used some Perfex. I also used a few United and some of those controls were sold in addition to the amount I should have sold with the burners.

Q. That is you sold them separately?

A. Yes. They were only sold to my dealers, understand.

Q. And the controls that you purchased from Mercoid you paid less for them per set than you did those that you purchased from Minneapolis-Honeywell?

A. No, I believe I paid more because I didn't use enough of them.

Q. Well now, you used some 1700 sets of controls from other companies in the year 1936. About how many did you use made by Mercoid?

A. I would not dare set a figure.

Q. Well, do you know how many you used from Perfex?

A. No, I don't know.

Q. And you said something about making the price of a burner with controls $69.50, is that correct?

A. I sold both retail and wholesale.

Q. Well, what was your wholesale price with controls?

1106 A. $69.50.

Q. And I understood you to say that you had a separate package for controls and that the price was $24.75?

A. I don't believe I ever got below $45 for a burner alone and the burners were in addition to that price.

Q. So when you said you sold as low as $50 for the burner alone you want to qualify that as low as $45?

A. Never did I sell the burner and controls for that price of $50.

Q. But you said earlier that you sold the burner alone for $50?

A. Yes.

Q. And you now want to say that you got as low as $45 for the burner?

A. Yes, I will say I got as low as $45 on burners.

Q. And what was this Kelley burner that you spoke about made in Boston?

A. Well, I understand that was a Quiet-Heet burner but they put their own name on it first when they first put it out.

Q. And you had competition with that burner?

A. Yes.

Q. And then I understand that the Kelley burner people began making their own burners?

A. Yes.

Q. And did that competition ease up when the
1107 Kelley Company began making its own burners?

A. I don't recall. I believe it did.

Q. Did the Kelley burner people charge more for their burner than the one that they bought from the Quiet-Heet?

A. I never bought any from them.

Q. As a matter of fact you don't know?

A. I don't know.

Q. It was just competition?

A. That is all.

Q. And did you have any other competition besides Quiet-Heet Company?

A. Yes, I did.

Q. Will you name some of this other competition that you had?

A. I can't name them offhand but they were New York burners.

Q. Well, do you have any idea of their names? We will be glad to help you out if we can.

A. If you mention them I may recall them.

Q. Did you ever have any competition from the Mohawk, the American Mohawk?

A. No.

Q. You did have competition from companies other than Quiet-Heet or Kelley Company?

A. Yes.

Q. And what did you do to meet that competition?
1108 A. Well, at the end I discontinued business. I could not meet the competition.

Trial Examiner Sheppard: You just sold your burners, Mr. Gannon, around New England there?

The Witness: Yes.

Trial Examiner Sheppard: Around in the States of Massachusetts and probably outside?

The Witness: Well, New York, from Maine to New York.

Trial Examiner Sheppard: Albany?

The Witness: Yes.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Your starting price when you started in this business was $69.50?

A. Burner alone.

Q. When you used Mercoid controls for the first three or four years of your burner business what price did you get for burners?

A. I don't believe I could tell you that.

Q. I understood you to say that you thought you paid more for Mercoid controls than you did for Minneapolis-Honeywell controls?

A. At the first Mercoid controls was all the controls I used.

1109 Q. And how about these United Controls manufactured in Boston?

A. They were less expensive than Minneapolis-Honeywell.

Q. And you left the United controls and went over to the Minneapolis-Honeywell?

A. Yes.

Q. So you paid more money for Minneapolis-Honeywell controls than you did for United?

A. I believe I left United to go to Perfex and from Perfex to Minneapolis-Honeywell.

Q. Did the United control sell for less money than Perfex?

A. Yes.

Q. Just why didn't you continue with the cheaper control which would have helped you meet this competition?

A. They put out a faulty control.

Q. You wanted a better product so you went with Perfex?

A. Their product was all right until they came out with a new control. We had trouble with it and left it.

Q. And went to Perfex. When you went to Perfex you stayed with Perfex how long?

A. Two or three years.

Q. Did your burner business get as low as 100 burners in one year while you were in business with Perfex?

A. No.

Q. Were Perfex's prices higher or lower than
1110 Minneapolis-Honeywell's?

A. At one time they were higher. At the end we were buying in a lower bracket which made them lower than Perfex.

Q. When you started buying from Minneapolis-Honeywell did you buy at a price higher than what you had paid for Perfex?

A. Yes, because I used a few of them.

Q. And why did you pay the higher price? What brought about the necessity for going to a higher priced control?

A. If I had a customer that insisted on a Minneapolis-Honeywell control with the burner I had to buy Minneapolis-Honeywell controls.

Q. According to the testimony of Mr. Tate, and I want to refresh your memory, you bought about $2400 worth of Perfex controls in 1936, is that about right?

A. I would not say. It sounds reasonable.

Q. And you bought about $3300 worth of Perfex controls in 1937?

A. Yes.

Q. And in 1938 you bought about $500 worth of Perfex controls, is that about right?

A. I will have to say yes because I don't know.

Q. You said that you bought Minneapolis-Honeywell controls when a customer wanted Minneapolis-Honeywell controls, correct?

A. That would be at the first before I started using Minneapolis-Honeywell controls altogether.

1111 Q. You did not use any Perfex controls prior to 1936 because they were not in business. You used Perfex controls first as standard, correct?

A. I used United controls first.

Q. As standard equipment?

A. Yes.

Q. And then went over to Perfex as standard equipment?

A. Yes.

Q. And your business with Perfex grew in 1937 over 1936?

A. Yes.

Q. And in 1937 Perfex was standard?

A. Yes.

Q. Now I understand—will you correct me if I am wrong—that when someone wanted a Minneapolis-Honeywell control in 1937 even though Perfex was standard you gave that customer a Minneapolis-Honeywell set of controls, correct?

A. Yes, I would say yes to that.

Q. Did you make any differential in charge or charge more when there was a set of Minneapolis-Honeywell controls used?

A. By all means.

Q. You charged more? That is you paid more and you charged your customer more?

A. Yes.

Q. What brought about your leaving Perfex, because it sold to you a cheaper control at a good price?

1112 A. Your good salesmanship.

Q. As a matter of fact, in 1937 when you bought $3300 of Perfex controls you actually gave Minneapolis-Honeywell $15,894 worth of business, correct?

A. I will have to say yes.

Q. So that while you say that you gave a Minneapolis-Honeywell set of controls when someone wanted it, as a matter of fact—

A. Don't get me—

Q. (Continued.) Wait until I get through. As a matter of fact the majority of your business was done with Minneapolis-Honeywell controls in 1937?

A. I told you first that when I used Minneapolis-Honeywell controls and I charged more; it was when I started off I was using United or Perfex, starting off, and I even talked against using Minneapolis-Honeywell, but when they insisted I would buy Minneapolis. I had to pay a higher price so I charged them a higher price, but it was only in those instances starting off.

At the end when the price of controls were the same, practically the same, I didn't charge them any different.

Q. Now isn't it a fact that you used Minneapolis-Honeywell controls in large volume in 1936 prior to the time you began buying Perfex controls of any kind?

A. Prior to the time?

1113 Q. Yes.

A. I didn't say that I didn't use Minneapolis-Honeywell controls in excess of Perfex.

Q. Well, as a matter of fact, you did use Minneapolis-Honeywell controls in excess of Perfex in the year 1936?

A. Well, if the records are there it must be so.

Q. The records show that you bought $50,313 worth of Minneapolis-Honeywell controls in 1936 and you bought $2400 worth of Perfex so you must have used more M. H. controls, correct?

A. Yes.

Trial Examiner Sheppard: Will you accept those figures?

The Witness: Yes.

By Mr. Freeman:

Q. How does it happen that you have the 1939 agreement with Minneapolis-Honeywell and you do not have any of the preceding years?

Trial Examiner Sheppard: He said he destroyed a good deal.

The Witness: I will tell him why.

Trial Examiner Sheppard: All right, go ahead.

A. We paid 50 cents for each set of controls we used. We did not have a license from the Zoro Estate, so Minneapolis-Honeywell charged us 50 cents for every set of controls we used in addition to their regular price and
1114 they in turn I suppose paid the Zoro Estate, the Cleveland Trust.

I have got a letter from the Mercoid people telling me later on that that Zoro patent was not upheld in court and I figured that I paid a number of thousands of dollars in fees that I should have returned to me. So I gave this contract to my lawyer.

Mr. Freeman: The witness is referring to Commission's Exhibit 195.

A. (Continued) And the only record I have is that that the lawyer had and that is why the one contract. I got that before I left town.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Well, when when you got this letter from Mercoid about the Zoro—

Mr. Haycraft: I am going to object to going into that matter. This matter was brought out on cross-examination. It relates to something not bearing on this case.

Mr. Freeman: I can trace this down as far as I want to go.

Mr. Haycraft: I object to that. Look what we are up against? The cross-examination goes into something which is foreign. Now he wants to cross-examine on that.

Mr. Freeman: I did not ask why he had this complaint but why he had this agreement and not the others.
1115 Mr. Haycraft: You are asking why he did that

and why he is doing this. Why drag all that in? I move to strike the answer. What difference does it make why he happened to have that agreement?

Trial Examiner Sheppard: The question was why he had that and not the others.

Mr. Freeman: And the man made an explanation.

Mr. Haycraft: It is in the hands of his lawyer.

Trial Examiner Sheppard: I think the record is straight now where it is, right this far, but I don't want to go any further into it because it is not important.

I am not interested in reference to that 1939 contract and you say you have not got the others?

The Witness: No.

Trial Examiner Sheppard: That settles it. I don't want anything along that line.

By Mr. Freeman:

Q. Did you bring any other documents or papers in response to the request of the Commission?

A. I did not have them.

Q. Commission's Exhibit 195 is the only document that you have?

A. The only one I have.

Q. Do you have any letters from Minneapolis-Honeywell or any others?

1116 A. Not one other than those that pertain to that.

Mr. Haycraft: He has a letter which refers to that exhibit transmitting the exhibit. Do you want to see it? Hand it to him.

By Mr. Freeman:

Q. Do I understand that these two letters that you have just handed me from Minneapolis-Honeywell to your company, one dated January 30, 1939 and another dated February 14, 1939, were in the hands of your attorney?

A. The attorney.

Q. What is the name of that attorney?

Mr. Haycraft: I object to that.

A. It is right on there, I believe, on one of those letters.

Q. No, it is not, and if you will give it to us.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

All right, gentlemen, let us get on.

Mr. Freeman: I didn't have an hour or two to prepare with this witness as Mr. Haycraft did.

Mr. Haycraft: An hour?

Mr. Freeman: Yes, you were with this witness an hour.

Mr. Haycraft: There is something wrong with your time.

1117 Mr. Freeman: No, there is not.

Trial Examiner Sheppard: I am going to give you all the time you want.

By Mr. Freeman:

Q. After Minneapolis-Honeywell cancelled its agreement with you from whom did you buy controls?

A. I bought very few. I bought them from Perfex.

Q. What is your best recollection?

A. Perfex.

Q. And that would be in the year 1939?

A. Yes, sir.

Q. Incidentally, Mr. Haycraft just showed me a record prepared by the Perfex to the effect that you bought $44 worth of controls from the Perfex Company in the year 1939, is that all the controls you used fter Minneapolis-Honeywell cancelled its agreement?

A. I stopped doing business.

Q. You told us that the two letters which I referred to were with the agreement of 1939, which was the one which was cancelled by Minneapolis-Honeywell?

A. They were not with it. I gave those two letters with that contract to the lawyer.

Q. The cancellation of the Minneapolis-Honeywell agreement took place in 1939, did it not?

A. I don t believe so. I believe it was cancelled in 1938.

1118 Q. The agreement was cancelled in 1938?

A. No, it could not have been with that contract there.

Q. Well, you were under contract in 1939 with Minneapolis-Honeywell in accordance with Commission's Exhibit 195?

A. It must have been in 1939.

Q. When you took the agreement to your attorney, Mr. Austin J. Kittredge of Clinton, Mass., you did not take along any notice of cancellation of the agreement?

A. No, sir.

Q. Although you did take to him with the agreement a couple of letters of transmittal?

A. That one was in all probability with the contract.

Q. And how about the second letter then of February 14, 1939?

Let me see it please? Well, those were in all probability the only mail I had at the time I gave it to him or he asked for it.

Q. You think the attorney asked for those letters?

A. No, I gave him those letters without him asking for it. They were I believe with the contract.

Q. Do you know how many oil burners you sold in the year 1939?

A. No.

Q. And when Minneapolis-Honeywell cancelled its contract you just folded up in business, is that correct?

1119 A. Yes, I would say I practically folded up.

Q. As a matter of fact you could have bought controls from the Penn Electric Switch Company, could you not?

A. Yes.

Q. And you could have bought controls from the Perfex Company?

A. Yes, but I had been advertising your controls in all my advertising and that cost me money to put your name on my literature.

Q. Well, you sold controls separately, did you not?

A. No, I did not other than to my own dealers. I sold them additional controls.

Q. How did the percentage of controls sets that you sold compare with the number of burners that you made?

A. When you ask that question it sounds as if I sold them to others than my own dealers.

Q. No, I am asking now how many you sold to your own dealers apart from oil burners?

A. I don't know. I could not say.

Q. Would you say about 50 per cent?

A. Oh, I don't know. I would not dare say.

Q. In rather large quantities?

A. Yes, I would say in fairly good quantities.

Q. And you didn't require your dealers to state whether it was for replacement or not, or what?

1120 A. No.

Q. In other words, a dealer could order as many controls as he wanted and would get them from you?

A. Yes, they could.

Q. What was that?

A. They could.

Q. Did any of your dealers handle other makes of oil burners?

A. No, I don't believe so.

Q. Who were some of your dealers in the time when you were at your peak in 1936?

A. Standard Iron over here in Brooklyn was probably the largest, Lowell Supply in Boston.

Q. The Standard Iron that was your largest dealer: What happened to that company? Why did it discontinue?

A. They bought more reasonable burners.

Q. At a lower price?

A. At a lower price.

Q. So you lost that business without regard to Minneapolis-Honeywell's cancellation of your agreement?

A. Yes, I would say that that is right.

Q. How about this other pretty good-sized company that you sold to in Boston that left you on account of price?

A. I don't believe that had anything to do with the controls, losing them. It was more of a question of the cost, the price of the controls and the burner together.

1121 They were buying them cheaper than I could sell them.

Q. As a matter of fact, your customers could buy oil burners from competitors of yours at lower prices than you sold to such customers?

A. That is right.

Q. And as a result of not meeting that kind of competition your business petered out?

A. Yes, that had a lot to do with it.

Mr. Freeman: That is all.

Redirect Examination by Mr. Haycraft.

Q. When you say oil burners do you mean oil burners with controls?

A. Yes, I will say oil burners and controls.

Mr. Haycraft: That is all.

Mr. Freeman: Thank you, sir.

Trial Examiner Sheppard: You are excused.

(Witness excused.)

Trial Examiner Sheppard: In order to have a witness who is coming from out-of-town, I will recess the hearing now to reconvene in this room at eleven o'clock in the morning on September 18, 1943.

(Whereupon, at 5:00 p. m. September 17, 1943, the hearing in the above entitled matter was adjourned.)

1122 Room 505,
45 Broadway,
New York, New York,
Saturday, September 18, 1943.

Met, pursuant to adjournment at 11:00 a. m. E. W. T.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and B. R. Shute, Esq., 15 Broad Street, New York, New York, and Bair & Freeman, by Will Freeman, Esq., 135 South La Salle Street, Chicago, Illinois, attorneys for the Respondent.

1123 Proceedings.

Trial Examiner Sheppard: Mr. Reporter, you can convene the hearing in the Minneapolis-Honeywell Regulator Company Case, Docket No. 4920, pursuant to the adjournment taken yesterday.

Mr. Haycraft: I will call Mr. Bork.

GEORGE H. BORK, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Trial Examiner Sheppard: Mr. Reporter and Gentlemen, this is Mr. George H. Bork, 10 Lexington Avenue, Holyoke, Mass.

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Bork?

A. I am War Manpower Commission, Assistant District Representative, District No. 1.

Q. Where do you live?

A. I live in Holyoke.

Q. How long have you been with the War Manpower Commission?

A. About 18 months.

Q. Before that what did you do?

A. I was with Harvey Whipple, Springfield.

Q. What business was that company engaged in?

1124 A. The oil burner manufacture.

Q. What was your position in the firm?

A. I was vice-president and chief engineer; for about ten years prior to that I had charge of service and installation.

Q. Did they manufacture and sell oil burners?

A. They did.

Q. Domestic oil burners?

A. That is right.

Q. When did you say they began to manufacture oil burners?

A. The latter part of '30.

Q. What type of control, what make of control did you sell on those early burners during those early years?

A. Well, we used some Mercoid but I would say the bulk of the controls were Minneapolis.

Q. Beginning with about 1936, approximately how many oil burners annually did you sell at that time?

A. 1936 I would say around 3,000.

Q. And you bought your controls for them?

A. Beg pardon?

Q. You bought your controls from Minneapolis-Honeywell?

A. Yes, that is right.

Q. At that time?

A. That is right.

Q. To refresh your recollection on that, if the records of the Minneapolis-Honeywell indicated that you

1125 bought about 3500 sets of controls in 1936, how many burners would you say that would require?

A. Well, about 3500 sets would represent about 3500. That does not mean the sets we bought.

Q. It would not mean that?

A. We might have more sets than burners at that time. That is a good estimate.

Q. You might have carried some over to next year?

A. That is right.

Q. Then in 1937, about how many burners did you sell that year?

A. Well, I would not think the figure changed a great deal. It might have increased 500, 300 or 400.

Q. In 1938?

A. 1936 you are talking about?

Q. 1936.

A. I would like to make a correction on 1936 if I may.

Q. Yes.

A. At that time we came out with the Bork control. We did a lot of advertising on that. We did have an increase. We might have increased 600 or 700 burners that year.

Q. 1936?

A. That is right.

Q. Now in 1937, what were your sales of oil burners?

A. Not over 4,000.

1126 Q. In 1938?

A. I think we dropped off a little in 1938.

Q. 1939?

A. Well, I would still think we were off a little. '38-'39, I think we dropped off a little during that period.

Q. In 1940?

A. 1940, my best recollection is that we probably came back a little in there because we went into some pretty heavy advertising in that period.

Q. In 1941?

A. I would say about the same.

Q. During this period of time did you continue to buy most of your controls from Minneapolis-Honeywell or did you pick up another line?

A. We had other controls. We bought Minneapolis-Honeywell and we bought Perfex and we used very few Mercoid. We used some but very, very few.

Q. When did you start buying Perfex controls?

A. My best recollection is—sorry I have not got some records on that so that I could give you the exact dates. If I had some I could.

Is it fair to ask for any records you fellows might have to show that. I would not like to guess. I would be. I have been out of this.

1127 Q. I might refresh your recollection, from testimony in this record by Mr. Tate of the Perfex Company it is indicated that in 1936 you purchased $28 worth and in 1937 $325 worth, in 1938, $891 worth, 1939 $6,394, 1940, $4,807, in 1941 $14,694.

A. That is about right.

Mr. Gilpatric: Were you giving, Mr. Haycraft, exact

figures from some other records in evidence? Mr. Tate's figures were round figures.

Mr. Haycraft: Will you correct me on that?

Mr. Freeman: $28 in 1936, $900 in 1938, $6400 in 1939.

The figures I have just given are those taken from the record.

Mr. Haycraft: I will ask the witness if that refreshes his—

Trial Examiner Sheppard: Will you accept those figures as approximately the right ones?

The Witness: I would say so, yes. Yes, I would.

By Mr. Haycraft:

Q. How did the price that you paid for the Perfex controls compare with the price that you paid for Minneapolis-Honeywell?

A. I think we paid slightly less for Perfex that we paid for Minneapolis.

Q. And did you buy complete sets from Minneapolis-Honeywell and complete sets from Perfex?

1128 A. Yes, that is right.

Q. Do you have any recollection of the number of sets that you bought annually from the Minneapolis-Honeywell during the years 1936 to 1941?

A. No, I am afraid I would be guessing at that.

Q. If I may refresh your recollection and the records of Minneapolis-Honeywell indicated that you bought about 3500 sets in 1936, about 3,000 in 1937, about 1700 in 1938, and about 1500 in 1939, and about 1500 in 1940, and about 2800 in 1941 would that refresh your recollection on that?

A. I would say that is about right.

Q. From your testimony and from the other information that I brought to your attention it appears that your volume of business declined, your burner business declined from 1936 until 1940 and then picked up again in 1941. How do you account for that business decline and then the increase again in 1941?

A. Well, that would be due to a number of things. I am inclined to think it was the competition.

Q. What price burners did you sell your oil burners back in 1936 and 1937?

A. We had our usual bracket price at that time what we call a small dealer was $110. That is wholesale.

Q. That included what in the way of equipment?

A. That included the three controls.

1129 Q. And how long did you maintain that price?

A. Well, we went along with that price around '39 and '40.

Q. And then what happened?

A. We had to revamp our price to try to stay in the market.

Q. What change did you make in your price?

A. We got down around $90. We got down I think as low as $80 in a great many instances.

Q. During that period of time did you meet any competition of Quiet-Heet Manufacturing Company from Newark, N. J. in your area?

A. Yes, they were all over like fleas.

Q. What is that.

A. They were all over.

Q. Where did you sell your burner principally?

A. We sold them all over this part of the country.

Q. In the Eastern Seaboard?

A. Yes, sir.

Q. When did you first notice the competition of Quiet-Heet Manufacturing Company?

A. I would say around '38 we felt it probably more.

Q. About what price were they selling their burners, do you remember?

A. Well, about would be the answer.

Q. What?

A. About anything, $54, $55, $58. We never could 1130 pin anybody down on any particular price they paid. I guess they got whatever price they could get at that particular time.

Mr. Haycraft: That is all. You may cross-examine.

By Mr. Haycraft:

Q. Oh, one more question. Excuse me. Do you remember what bracket you were in in the Minneapolis-Honeywell controls purchased from 1936 to 1941?

A. I am sorry I don't.

Q. Will it refresh your recollection if I should advise you that the records of the Minneapolis-Honeywell would indicate that you were in Bracket Four during 1939, 1940 and 1941?

A. That sounds reasonable but I would not be positive.

Q. Do you know anything about the price that you paid for control sets during that time?

A. No, I would be guessing again there.

Mr. Haycraft: All right, that is all.

Trial Examiner Sheppard: It has been several years since you have been there?

The Witness: Yes, sir.

Trial Examiner Sheppard: I understand how difficult it is.

Are there any further questions?

Cross-Examination by Mr. Gilpatric.

1131 Q. Was Quiet-Heet your only competitor in the oil burner business?

A. Let me think a minute now. Quiet-Heet was not the only competitor but I would say probably they were the worst offenders.

Q. Who were your other competitors, if you recall?

A. Well, there was an Eastern oil burner made somewhere up in Maine.

Trial Examiner Sheppard: How about the Mohawk, it was there near you?

The Witness: No, we did not have very much of Mohawk. I don't remember. It might have been.

Trial Examiner Sheppard: You had Mohawk up there.

Mr. Shute: It was in New York.

The Witness: Have you got a burner list?

By Mr. Gilpatric:

Q. There were a number of other companies selling burners?

A. You are talking about two years ago. Have you got a burner list there? Tell me something? I am not going to make any statements and guess at this.

Q. What about Petroleum Heat & Power?

A. Petroleum Heat and Power, no we did not have too much competition from Petroleum Heat and Power.

Q. What about Gilbert & Barker?

A. No, they were all right.

1132 Q. What do you mean by "all right"?

A. Their price was pretty universal as far as we are concerned.

Q. When I said competition I mean other people selling oil burners to the same people that you were?

A. If your question is directed to an answer if there was anybody comparable in competition to Quiet-Heet, the answer is no.

Q. No, I don't mean that. Were there other oil burner manufacturers who were offering their burners for sale regardless of price to the same customers, the same trade that you were offering your burners?

A. No, we felt a greater competition because of price at that particular time and I guess everybody else did too.

Q. Well, was Cleveland Steel Products making an oil burner at that time?

A. Yes.

Q. And selling to the same trade that you were?

A. I would say so, sure.

Q. And isn't that true of Petroleum Heat and Power?

A. Oh, there was a number of them, you can read a list, some 13, 14 or 1500; when you are talking about meeting competition and reasons for falling off I can go into that with you in intimate detail.

Q. You mean then the term "competition" means 1133 to you someone sold below your prices, that is what you are talking about?

A. That is right, and claimed to have everything everybody else had at half the price. That is what I call competition; fair or unfair, it was competition and we all felt it definitely.

Q. But besides that type of competition there were a number of other oil burner manufacturers selling in your general range?

A. Oh, certainly. Look at the number of burners that were sold compared to the number we sold. There would have to be a number of them.

Q. I just wanted to clear up that phase of it.

Mr. Gilpatric: That is all.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Thank you, Mr. Bork.

(Witness excused.)

Mr. Haycraft: Mr. Examiner, that concludes the taking of testimony in New York and I ask an adjournment be taken to be convened in Philadelphia, Pa., Room 300, Customs Building, at 10:30 in the morning, next Monday, September 20, 1943.

Trial Examiner Sheppard: Let the adjournment be taken to the time and place above mentioned. We stand adjourned here in New York City.

(Whereupon, at 11:45 a. m., September 18, 1943, the hearing in the above entitled matter was adjourned.)

1134 Room 300, Customs House Bldg.,
2nd and Chestnut Streets,
Philadelphia, Pennsylvania,
Monday, September 20, 1943.

Met, pursuant to adjournment, at 10 o'clock a. m., E.W.T.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and B. R. Shute, Esq., 15 Broad Street, New York, New York, and Bair & Freeman, by Will Freeman, Esq., 135 South LaSalle Street, Chicago, Illinois, appearing for the Respondent.

1135 Proceedings.

Trial Examiner Sheppard: All right, gentlemen. Come to order.

Pursuant to adjournment we took in New York City on last Saturday, we will reconvene the hearing in the Minneapolis-Honeywell case, Docket No. 4920.

Let the record show the appearances of counsel for the Federal Trade Commission and for the Respondent.

Now, Mr. Haycraft, are you ready, sir, with anything you have to offer?

Mr. Haycraft: I will call Mr. Herr.

Trial Examiner Sheppard: Have you a subpoena?

Mr. Herr: Yes, sir.

Trial Examiner Sheppard: Let me have that please, sir.

Mr. Reporter and gentlemen, this is Mr. F. E. Herr, President of the Herco Oil Burner Corporation, Lancaster, Pennsylvania.

Mr. Herr, how far is Lancaster?

Mr. Herr: 68 miles.

Trial Examiner Sheppard: All right.

F. E. HERR was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

1136 *Direct Examination by Mr. Haycraft.*

Q. What is your occupation, Mr. Herr?
A. Manufacturer.
Q. Manufacturer of what?
A. Oil burners.
Q. Do you operate as an individual or corporation?
A. Corporation.
Q. What is the name of it?
A. Herco Oil Burner Corporation.
Q. H-e-r-c-o?
A. H-e-r-c-o.
Q. What name do you attach to the burner itself?
A. Herco.
Q. How long have you been in this business?
A. About 14 of 15 years—I will change that. It is longer. About—I started playing around about '25 with it.
Q. Do you have your factory at Lancaster?
A. Yes, sir.
Q. What is your territory, sales territory, where do you sell your burners, or where did you sell your burners when you were selling them?
A. California, and all over the United States.
Q. What type of burner was your burner, gun type or pressure type?
1137 A. Gun type.
Q. When you first began to sell your burners did you have automatic temperature control attached to it?
A. Yes, sir.
Q. Where did you obtain them?
A. Originally from Minneapolis-Honeywell.
Mr. Freeman: Who?
Mr. Haycraft: Minneapolis-Honeywell.
Mr. Freeman: In '25?
The Witness: Well, the first controls.
Mr. Freeman: I just wanted to get you straight. The Minneapolis-Honeywell Company was not in existence in '25.
The Witness: Well, the same company it is today, whatever it is.

By Mr. Haycraft:

Q. Was it Minneapolis?

A. I couldn't answer that. I don't know what they called themselves.

Q. Where did you get them?

A. Salesmen.

Q. I mean where was the factory?

A. I think the factory was the same place it is today.

Q. Minneapolis?

A. I think so.

1138 Q. How long did you buy it in the beginning then?

A. We first manufactured a low pressure burner. The burner was originally manufactured under the name of Gibby.

Q. How do you spell it?

A. I think it is G-i-b-b-y. Then we got in a man by the name of Johnson. We built a few during those years and the controls at that time, I am not quite positive, were Minneapolis controls I think.

Q. Well, did you buy the primary control and the thermostat and the limit control, all three?

A. Sets of three controls.

Q. Well how long did you continue to buy from Minneapolis-Honeywell, buy your controls?

A. I would say four or five years.

Q. Then where did you get your controls?

A. We started using some Mercoid.

Q. Can you give the approximate date that they began to use the Mercoid control?

A. No, I couldn't, with any degree of certainty.

Q. Well did you discontinue having the Minneapolis-Honeywell at the time you took on the Mercoid?

A. No, I wouldn't say we did.

Q. Well how did you divide your business, do you remember?

A. The business depended a little on what our customers wanted. Some customers, in some locations like

1139 New York City and around there, demanded Minneapolis-Honeywell. The other customers were satisfied with Mercoid.

Q. Well in your advertising did you advertise the type control that you would provide for your burner?

A. We advertised we would supply either control, because some customers demanded different controls.

Q. According to your recollection when did you buy most of your controls from Minneapolis-Honeywell, or was that through all the years?

A. You mean?

Q. Did you buy more of Minneapolis-Honeywell or did you buy from Mercoid?

A. It varied. Some years we bought more from Minneapolis and some years we bought more from Mercoid.

Q. Do you remember what bracket you were in in the purchases that you made from Minneapolis-Honeywell?

A. Indeed I do not.

Q. Do you remember the price you paid for the controls when you purchased them in sets?

A. Not with any degree of accuracy. I could guess at it but I couldn't accurately tell you.

Trial Examiner Sheppard: It is a long time, back in 1925 or '26.

By Mr. Haycraft:

Q. Well can you testify as to the quantity you
1140 bought during those years from Minneapolis-Honeywell?

A. The early years?

Q. Yes.

A. Very few.

Q. Beginning, say, 1935, 1936.

A. Well 1935 we didn't buy very many but we did buy a good many through '36. That came about through a contract. That required so many sets of controls.

Mr. Freeman: I would like to go off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. Do you have a copy of the 1936 agreement, Mr. Herr?

A. With Minneapolis-Honeywell?

Q. Yes.

A. No, sir, I do not.

Q. Did you continue to make contracts since that time with the Minneapolis-Honeywell?

A. I think we have had a contract each year.

Q. I show you Commission's Exhibit 7 in this case, and see if that is the type of contract you have in mind. This seems to be a contract of January 3, 1938.

A. It looks like their form of contract.

Q. Did you use that type of form?

1141 A. I think that is the type of contract that we had. If this was '37 that is the type we had.

Q. This is '38.

A. '38.

Q. I show you the signature on the contract. I ask you if that is your signature?

A. Yes, that is my signature.

Q. To refresh your recollection as to the prices you paid in 1936 I will ask you to look at this contract and see if you can pick out the automatic control you were using in that year.

Mr. Freeman: You mean '38, don't you, instead of '36?

Mr. Haycraft: Yes.

By Mr. Haycraft:

Q. And testify as to the prices you paid during 1938 for automatic temperature controls purchased from Minneapolis-Honeywell Regulator Company?

A. We used three automatic controls, boiler, combustion, and thermostat. Now they change their numbers from time to time. The combustion control—what is that number supposed to be?

Mr. Freeman: You mean limit control?

The Witness: Limit. Pressure control (indicating) R-17.

1142 We used a stack switch, boiler control and thermostat.

By Mr. Haycraft:

Q. What is the price of the thermostat you used?

A. 4.25.

Q. What is the price of the stack switch or primary control?

A. What was your number on that?

Mr. Freeman: R-116 and R-117.

The Witness: R-117, 13.75.

By Mr. Haycraft:

Q. And your limit control?

A. I presume that was the L-404, 3.55.

Q. That would come to about $21.40 a set?

A. That sounds about right, $21 or $22.

Q. Now in making your sales of burners did you always

sell the burner with the controls or were there times when you were called on to sell burners without the controls?

A. There would be times when we would be asked to sell the burners without the controls.

Q. Do you recall any such instances in your experience?

A. Why I believe that has pretty well covered every account we had, at the time we would make replacements it would have a set of controls on hand and they would order the burner without the control.

1143 Q. Do you have any recollection of having any business dealings with the Automatic Home Appliance Company in Jamaica, New York, a man by the name of Al Hart?

A. We made several burners for them and submitted them. They asked for quotations on a quantity of 300 burners. We submitted several burners to them and they bought three or four, a small quantity.

Q. Did they solicit the burner with or without the controls?

A. They asked to be quoted both ways, with Mercoid, with Minneapolis-Honeywell.

Q. And did you quote both ways?

A. Yes.

Q. Do you remember what quotations you made to that firm for your burner equipped with Minneapolis-Honeywell and equipped with Mercoid?

A. I don't know whether we actually made any quotation with Minneapolis-Honeywell. I think we did with Mercoid.

Q. Do you remember what the quotation was?

A. Offhand no.

Q. I show you Commission's Exhibit 152 for identification, which purports to be a carbon copy of a letter from you to the Automatic Home Appliance Company under date of August 24, 1937, and ask you whether or not that refreshes your recollection?

1144 A. Yes, I would say yes, we made a quotation.

Q. Is that a copy of a letter that you sent to the Automatic Home Appliance Company?

A. I believe that it is.

Q. Do you know whether it is or not?

A. Well I would say it was.

Mr. Haveraft: I offer it in evidence.

Trial Examiner Sheppard: I thought that was already in.

Mr. Haycraft: No.

Mr. Freeman: That is the one he would not let me see, if you recall, Major.

Trial Examiner Sheppard: Oh: All right. Any objection to that one?

Mr. Freeman: No, this is not a copy. This is not even a carbon copy. Let us either get the carbon copy or the original. We had the Automatic Home Appliance Company man on the stand and there isn't any showing that he was asked to produce this, and this is objected to as incompetent and not the best evidence.

Mr. Gilpatric: This is original typing, not a copy at all.

Mr. Haycraft: I asked the witness if he knew it was a copy of a letter he sent to Mr. Hart, and he said it was.

1145 Mr. Freeman: No, he did not say that.

There has been no attempt to secure the original, and the original should be accounted for. This is a copy of some copy.

Trial Examiner Sheppard: Well the original is evidently in the hands of the Automatic Home Appliance Company.

Mr. Freeman: Well he was on the stand the other day and there was no showing that he looked for it.

The Witness: I would say this in regard to the letter. I think we wrote a letter. I think this is our quotation to Mr. Hart.

Mr. Haycraft: And where did you get this piece of paper?

The Witness: Did you get that from me?

Mr. Haycraft: Well, look at it.

Mr. Freeman: Why don't you answer the question, Mr. Haycraft?

Mr. Haycraft: I don't answer the witness' questions.

Mr. Freeman: Oh, you don't?

The Witness: I think that letter was verified in our office.

Mr. Haycraft: Did you verify that against the carbon copy that you had in your office, in my presence?

1146 The Witness: I can not say that I did or not. We went over some papers there making some comparisons. But I would say that is my quotation to Mr. Hart.

Trial Examiner Sheppard: I think that is sufficient. I will let that go in.

Mr. Freeman: Is that going to be the rule from now on with respect to documents?

Trial Examiner Sheppard: I will make it as easy as I can for you.

Mr. Reporter, let this Exhibit No. 152 be received.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 152, was received in evidence.)

By Mr. Haycraft:

Q. Did you sell any more than the three or four to the Automatic Home Appliance Company?

A. They might have bought, oh, say five, three, four, five or six.

Q. They didn't buy any 300?

A. No, sir.

Q. Did you ever have any business dealings with the Southwark Plumbing and Heating Supply Company in Philadelphia?

A. Yes, sir.

1147 Q. What were your business dealings with that firm?

A. Sold to them a quantity of burners from time to time.

Q. And were these burners equipped with automatic temperature controls?

A. Not always. The rule was that they were equipped, I mean the majority of them were equipped, and they bought some burners that had no controls.

Mr. Haycraft: Will you mark these as exhibits for identification?

Trial Examiner Sheppard: Begin at 196 and mark those each with a separate number.

(The documents referred to were marked Commission's Exhibits 196, 197, 198 and 199, for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibits 196, 197, 198 and 199, and ask you if you can identify those in any way?

A. You received these from our office.

Q. What are they?

A. Copies of invoices, Southwark Plumbing and Heating Company.

Q. Who made the copies?

A. Our office.

Q. Do you know whether they are correct copies of the originals?

1148 A. I would say they are correct copies.

Q. Are your initials on them?

A. Yes, sir.

Q. Would you testify as to whether or not the merchandise described in those invoices was sold and shipped to Southwark Plumbing and Heating Supply Company on or about the dates indicated?

A. They were shipped according to the dates on the copies, yes.

Q. Do those invoices state correctly the prices received for the articles described?

A. Yes, sir.

Mr. Haycraft: I will offer these in evidence, Mr. Examiner, or have him refresh his recollection, it doesn't make any differenec to me which way.

Mr. Freeman: You are going to get an objection if you offer them, because these are copies of invoices that can very readily be produced here.

Mr. Haycraft: You mean you think they are easily produced.

Mr. Freeman: Well at least they ought to be available. This may be a copy. The question is whether it is a full copy.

By Mr. Haycraft:

Q. All right. I will ask the witness to refresh his
1149 recollection as to what items of merchandise he sold to Southwark Plumbing and Heating Supply Company, and the dates, and the articles they received.

Mr. Freeman: But they are improper as they only refresh his memory as to the dates he prepared these copies. If you want to refresh his memory get some copy that goes back to the date, not yesterday.

They are objected to if it is the purpose of refreshing this witness' memory for any time other than the time he prepared these particular papers, in the absence of our having an opportunity to see what he really is referring to.

The Commission has the power of subpoena duces tecum, doesn't it?

By Mr. Haycraft:

Q. What price did you receive for the oil burners sold to Southwark Plumbing and Heating Supply Company?

A. $45. With a little change in some. They vary a little bit. It depends on what they were, how they wanted them equipped, with what type of pump.

Q. Were these burners at that time equipped with automatic controls?

A. No, these invoices say no controls.

Mr. Freeman: We further object to that type of examination as to how this man—

1150 Trial Examiner Sheppard: They haven't been offered.

Mr. Freeman: No, I want to object to his testimony now with respect to how the Herco Company sold oil burners.

It is immaterial whether they sold them with or without the controls. This man has testified burners were sold without controls, and as long as they were sold without controls there isn't any connection at all of the transaction this witness is now referring to with respondent.

We object to that line of examination.

By Mr. Haycraft:

Q. Do you have any recollection as to the price you received for your oil burners equipped with the Minneapolis-Honeywell and Mercoid controls when sold to the Southwark Plumbing and Heating Supply Company?

A. I could not answer that question definitely. If I was to guess at it I would say it would be about 2.50 or $3 difference.

Q. That is the difference between what?

A. Between the Mercoid and the Minneapolis-Honeywell.

Q. Which class did you charge the most for?

A. Charged the most for the Minneapolis-Honeywell.

Q. How did the price which you paid for the Min-

1151 neapolis-Honeywell compare with the price you were paying for the Mercoid?

A. The Minneapolis-Honeywell price was higher.

Q. Now during the period of time 1937, 1938, 1939, along in those years, what experience, if any, did you have with competition of the Quiet-Heet Company, manufacturers of oil burners at Newark, New Jersey?

Mr. Freeman: That is objected to because it is immaterial what connection this company had with Quiet-Heet, and Quiet-Heet is not on trial in this case, the respondent is on trial.

What difference does it make what competition the Herco Company or any other company had with Quiet-Heet, or with any one of the other 95 or a hundred oil burner manufacturers?

Let us get down to temperature control.

Mr. Haycraft: Mr. Examiner, I think there is sufficient testimony in the record both oral and documentary, with respect to Quiet-Heet, and also the price at which Minneapolis-Honeywell sold to Quiet-Heet, to serve as a basis and make this question absolutely proper.

I agree if I had not put in testimony that I have put in with respect to the prices at which respondent sold to Quiet-Heet and Quiet-Heet sold to dealers, I would not have a proper foundation. With that foundation I
1152 submit it is a perfectly proper question.

Mr. Gilpatric: I want to point out Mr. Examiner no case alleges any lessening of competition. The competition referred to in the complaint is in the sale and distribution of temperature controls. Now we are getting into another line of competition here.

Mr. Haycraft: Well temperature controls are attached to oil burners and they are sold with oil burners.

Trial Examiner Sheppard: But it has not been shown here that this particular witness sold oil burners with your temperature controls. Did you?

The Witness: Yes, sir.

Mr. Haycraft: I think so.

Trial Examiner Sheppard: You did sell them?

The Witness: Yes, sir.

Trial Examiner Sheppard: Both Minneapolis and Mercoid?

The Witness: Both makes.

Mr. Gilpatric: Mr. Examiner, I want to point out Mr. Haycraft is broadening his case. It is going to introduce a lot of other lines of examination of this witness and other witnesses if we are going into competition on oil burners.

Trial Examiner Sheppard: I don't want to broaden the scope.

1153 Mr. Haycraft: This testimony is not different than was received by previous witnesses in New York, such as Mr. Gillis and other manufacturers on their experience.

Trial Examiner Sheppard: No, I don't see any difference either. We had the same kind of testimony in New York.

Mr. Freeman: You mean with respect to this competition on burner manufacturers?

Just following your suggestion that our objections should be few and far between. But it is building up that kind of evidence and it is clearly immaterial to the issues involved in this case.

Mr. Haycraft: Mr. Examiner, I don't want to burden the record with argument, but it seems like that is what we are doing this morning.

I submit with the stipulation as to these bracket prices, with the testimony of officials of respondent and of the Quiet-Heet Manufacturing Company and others that have gone before, that this is proper testimony to show the effects of the discriminatory prices, alleged discriminatory prices, upon the sale of temperature controls.

Those temperature controls naturally are sold attached to all burners. That is the way they are sold.

Mr. Freeman: You only have a couple more of those and I think we can save time just to let it go in.

1154 Trial Examiner Sheppard: I am going to let it go in. Will you read the question, please?

(The pending question was read as follows:)

"Q. Now during the period of time 1937, 1938, 1939, along in those years, what experience, if any, did you have with the competition of the Quiet-Heet Company, manufacturers of oil burners at Newark, New Jersey?"

The Witness: Quiet-Heet built a little different type of burner than we built. They built them cheaper. We considered we built them better.

When it comes down to price, Quiet-Heet got a better price to offer on controls than we could offer.

Trial Examiner Sheppard: And on burners too?

The Witness: Well, their burner was a cheaper burner.

Trial Examiner Sheppard: Well we are interested in the price of the control especially.

The Witness: Well on the price of the control—

Trial Examiner Sheppard: And they are attached to the burner?

The Witness: Yes. They could figure their controls at a lower price.

By Mr. Haycraft:

Q. What effect did that have on your business
1155 with controls attached, particularly the Minneapolis-Honeywell?

A. In the New York territory that made a big difference, because the New York territory is a strong user of the Minneapolis-Honeywell, and in some instances they refused to use other controls.

Q. Do you have any way of determining the effect in dollars and cents upon your sales in the territory?

A. No, I wouldn't. I wouldn't like to make a statement on that anyhow. Some business probably we could have secured but as to what volume or anything, I personally would not know.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Gilpatric.

Q. Mr. Herr, during the years that you used Mercoid controls, you have found the performance to be satisfactory, haven't you?

A. Mercoids?

Q. Yes.

A. Yes.

Q. The fact is that their visaflame primary is built right into your burner, isn't it?

A. Yes.

Q. And you have had contracts with the Mercoid 1156 Corporation for purchase of their controls?

A. I have always had contracts with both companies.

Q. Both companies at the same time?

A. Both companies at the same time.

Q. And you have bought whatever controls you required of Mercoid from Mercoid, and whatever you required of Minneapolis from Minneapolis under those contracts?

A. Yes, sir.

Q. Did you ever sell any controls separately from burners yourself?

A. Occasionally a man would come in and want a set of controls for replacement, yes. We sold a set of controls here, a set of controls there. No quantity of controls as a control sale.

Trial Examiner Sheppard: That applies to both?

The Witness: That would apply to both.

Trial Examiner Sheppard: Both.

By Mr. Gilpatric:

Q. In purchasing controls from Mercoid, did you buy them in sets of three controls, as a rule?

A. I don't think we purchased them from either company exactly in sets. We purchased what controls we wanted. I don't believe I purchased from either Mercoid or Minneapolis-Honeywell in matched sets of controls.

Q. In your sales of oil burners you didn't mix
1157 the controls of one manufacturer with the controls of another?

A. No, sir.

Q. Mr. Herr, in this letter addressed to you to Automatic Home Appliance Company, Commission's Exhibit 152, you quote a price of $59 including Mercoid controls. Was that the price at which you sold these few burners that you testified you sold to this company?

A. That is the price he paid for them, yes. He didn't take the 300. He paid for them at that price, on the basis. At least I think he paid for them.

Q. Do you know what Quiet-Heet's price was on a comparable burner at the same time?

A. I could not answer that definitely, no, I could not.

Q. Was this price about the same as your line of burners was carrying at this time?

A. That is the price we would have quoted to any company in quantity.

Q. I see. Were you solicited, Mr. Herr, by other control manufacturers such as Penn or Perfex to buy their controls?

A. Yes, sir. We were solicited by all of them.

Q. Throughout this period of '36 or '41?

A. I would say yes.

Q. Am I correct, Mr. Herr, that your own prices of oil burners varied according to quantities purchased by your customer?

1158 A. They varied some.

Mr. Gilpatric: All right. That is all on cross-examination.

Trial Examiner Sheppard: Anything else?

Mr. Freeman: Maybe. Just a second.

Trial Examiner Sheppard: Yes.

Mr. Gilpatric: May I ask one more question, Mr. Examiner?

Trial Examiner Sheppard: Yes.

By Mr. Gilpatric:

Q. It is true, isn't it, that a Minneapolis-Honeywell thermostat can not be used on a burner equipped with a Visaflame primary?

A. It can not be used.

Redirect Examination by Mr. Haycraft.

Q. How long have they been making this Visaflame?

A. I think Mercoid brought that out in '40, '40 or '41.

Q. Prior to that you could use controls that were manufactured by either the Minneapolis-Honeywell or Mercoid?

A. Prior to that we could use any make of controls.

Q. Did you ever discuss with the officials of Minneapolis-Honeywell this matter of prices of controls that you were paying compared with what Quiet-Heet were paying?

A. Well—not with Quiet-Heet.

1159 Q. What did you discuss with them?

A. I made the statement I thought the quantity of controls we were buying at that time were entitled to a better price.

Q. With whom did you discuss it?

A. Their sales representative.

Q. Who was that?

A. Mr. Dorsey and Mr. Lockrae.

Q. What did they say to you about it?

A. They said I was not entitled to it. They said I had never used a quantity of controls before that would justify that type of a contract.

Q. Did you mention to them anything about the competition you were encountering with the lower priced control?

A. Yes, I did. I said that we were forced to handle other controls because other manufacturers offered the price—a lower price—on controls than we could sell them for and make any money on it.

Q. And what explanation did they make of that?

A. They had none.

Mr. Haycraft: That's all.

Trial Examiner Sheppard: Anything else?

Mr. Freeman: No.

Trial Examiner Sheppard: All right, Mr. Herr. Sign your name right there just like I have got it referred to in the subpoena.

1159-A (Witness excused.)

Mr. Haycraft: May we have a five-minute recess.

Trial Examiner Sheppard: Yes, we will take a five-minute recess.

(There followed a short recess.)

Trial Examiner Sheppard: On the record.

Mr. Reporter, this gentleman is Mr. E. C. Stauffer, President of the Penn Boiler and Burner Manufacturing Company, Lancaster, Pennsylvania. All that is right, Mr. Stauffer?

Mr. Stauffer: Yes, sir.

E. C. STAUFFER was thereupon called as a witness by the Commission and, having been first duly sworn testified as follows:

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Stauffer?

A. Manufacturer.

Q. What do you manufacture, and what did you manufacture prior to Pearl Harbor?

A. Well '32 to about '35 I manufactured oil burners. From '35 for about a year oil burners and boilers, oil burning boilers. From then on to the present oil burning boilers.

Q. By that you mean a furnace?

1160 A. Oil furnace.

Q. Fully equipped?

A. Fully equipped. Assembled.

Mr. Freeman: I wonder if I could have those answers re-read?

(Record read.)

By Mr. Haycraft:

Q. Since 1935 where did you get the automatic temperature control that you used in connection with your furnace, used in your furnace?

A. Mercoid and Minneapolis-Honeywell, Perfex and Penn.

Q. Where in the United States do you sell or did you sell your furnace?

A. Mostly on the Seaboard from Maine to South Carolina, and a few spots West as far as the West Coast.

Q. Where did you buy the temperature control that you used on your burner and on your furnace?

A. Well we dealt with traveling salesmen for Mercoid and Minneapolis, both out of Philadelphia.

Shipments were made to us from Minneapolis on Honeywell and Chicago and Philadelphia on Mercoid.

And Penn and Perfex came from their respective manufacturer. I think Perfex is in Milwaukee and Penn in—

Mr. Freeman: Goshen, Indiana.

The Witness: That's right.

1161 By Mr. Haycraft:

Q. Well during that period of time since 1935, what type of control have you principally used, used mostly?

A. Well our boilers were shipped out assembled and there were three different controls commonly known as a set of control, but we used on our equipment at least four.

Q. What were they?

A. Well, you mean the number of the control?

Q. The type of control.

A. Well the Minneapolis-Honeywell, it was a combustion relay, or—117 combustion relay, thermostat, and a limit switch.

When we used Minneapolis-Honeywell our fourth control, for instance on a hot water boiler, was used to operate a circulator, and it was used I would say on 90 per cent of the jobs we used to handle. That was high voltage.

On the Mercoid we used relay, thermostat and limit switch, and the fourth control remained Mercoid.

Sometimes the fourth control was Penn or Perfex.

Q. To what class of trade did you sell your furnaces thus equipped?

A. To the electrical trade, heating trade, oil burner distributors, and dealers, and heating supply houses or jobbers.

Q. Did you have a contract with the Minneapolis-
1162 Honeywell Regulator Company during any of that period of time?

A. Practically every year, yes. We had contracts with Minneapolis-Honeywell practically every year from 1932 to date—I mean until the war.

We didn't have any in '42 or '43.

Mr. Haycraft: Will you mark these please?

Trial Examiner Sheppard: Mark those exhibits beginning with 200, for identification, please?

(The documents referred to, were marked Commission's Exhibits 200, 201, 202 and 203 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibits 200 and 201, and ask you if those are contracts that you had with Minneapolis-Honeywell Regulator Company?

A. Yes.

Q. What is the date of 200?

A. Is this 200?

Q. No, the other one.

A. The date it was signed?

Q. Yes.

A. January 4, 1939.

Q. You signed it?

A. Yes, sir.

Q. What is the date of 201?

1163 A. December 28, 1939.

Mr. Haycraft: Now I offer those two in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Freeman: No.

Mr. Gilpatric: No objection.

Trial Examiner Sheppard: Let the Exhibits No. 200 and 201 be accepted.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 200 and 201, were received in evidence.)

By Mr. Haycraft:

Q. I now show you Commission's Exhibit 202 for identification, which purports to be a letter from Minneapolis-Honeywell Regulator Company under date of January 3, 1940, and ask you whether or not that letter accompanied Commission's Exhibit 201, the contract signed in December, 1939?

A. Right.

Mr. Haycraft: I offer that in evidence.

Trial Examiner Sheppard: Any objection to that?

Mr. Gilpatric: No objection.

Trial Examiner Sheppard: Let it be accepted as Commission's Exhibit 202.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 202 was received in evidence.)

1164 By Mr. Haycraft:

Q. Now I call your attention to the fact that the contract, Exhibit 200, calls for 50 sets or more at a price of 3.95 for T-11 Acratherm, T-44 or T-45 thermostat; at a price of 3.05 for L-404 Pressuretrol, L-409 Surface Aquastat, and L-419 Airstat; and $11.10 for an R-117 or R-123 Protectorelay.

Were those the prices which you paid for those items during the year 1939 when purchased from the Minneapolis-Honeywell?

A. I lost track of your statement. Is this the one (indicating)?

Q. Yes.

A. I bought a few, very few.

Q. At those prices?

A. Yes. I would be more familiar with them if I knew the total on the three pieces.

Q. $18.10.

A. Yes.

Q. And that was the price you paid during 1939?

A. Yes.

Q. Now again 1940, under Commission's Exhibit 201 where the contract provided for the purchase of 50 control units rather than sets, and the letter of January 3,

1165 1940, Commission's Exhibit 202, which calls attention to the prices that would exist if you bought in sets. I will ask you whether or not you as a matter of fact purchased any controls at higher prices during the year 1940 than you had been paying in '39, or whether you were able to make adjustment on your prices in 1940 to conform to the prices you paid in 1939?

A. I couldn't, except to make purchases outside.

Q. I show you Commission's Exhibit 203, and what identification you can make, if any, of that?

A. This was a price that was given to me, left with me, rather; this is a price that was wrote down that was given to me orally by Mr. Dorsey.

Q. Who is Mr. Dorsey?

A. Representative of the Minneapolis-Honeywell.

Q. What time did he give you these prices?

A. That was the time he took the previou contract back with him with my signature.

Q. What year was that?

A. Well that was for the—this covered the prices for 1940.

Q. What I am trying to get at is, what prices did you pay in 1940 for these particular—

A. I bought a very few controls from Minneapolis on this basis immediately after the execution of the contract, and then ceased buying from them.

1166 Q. What is the basis? Is that covered in this memorandum?

A. Yes.

Q. Refresh your recollection as to what they are?

A. R-117-A was 11.10, and T-11- —is that a thermostat?

Q. Yes.

A. That is 3.95. And the immersion Aquastat 3.50.

Q. That totaled $18.10.

A. That was $18.95.

Q. $18.95.

A. Wait a minute. 18—

Trial Examiner Sheppard: Add it up. Be sure about it.

The Witness: 18.55.

By Mr. Haycraft:

Q. Well now what was your reason for discontinuing buying at those prices in 1940?

A. Well, my competitors could quote their oil burners complete with controls at any price—I mean—my competitors offered a price lower and did not distinguish or have a price difference on account of a particular make of control.

In other words, they offered them at a certain price—the oil burner with Mercoid at a certain price or the oil burner with Minneapolis at the same price.

I could not do that at the prices I was paying for the Minneapolis-Honeywell. Under the depression con-

1167 ditions profits were very close and I could not cut into them and absorb that myself. So I had to differentiate in my wholesale price to my dealers between Mercoid and Minneapolis.

Then I discovered my dealers were buying the Quiet Heet oil burner, taking the control off of my oil burner and putting them on the Quiet, and taking them off the Quiet and putting them on mine, and recommending the other as a competitive job. That would be dealers that would be representing the Penn. They purported that the Penn burner was better than the Quiet-Heet. They could get the price on Quiet-Heet down further and divide the

cost difference over a Penn with the Minneapolis unit where the customer demanded it.

So I did that—I wrote to the Quiet-Heet manufacturer, and in the New York area and the Long Island area particularly there was quite a big volume of business going on through FHA. Everything was price. They didn't care what you had to offer or what you didn't have to offer so long as your price was lower than your competitors. And the burner that was underselling the market at the time was the Quiet-Heet, so I thought I would kill poison with poison. I bought Quiet-Heet oil burners and put them in stock. The Quiet-Heet oil burners were in a box and the controls were in a separate compartment. The same make with the other oil burner that we bought
1168 at the time, they went in a stock bin, and the Mercoid controls went into a stock bin.

Now when we sold them we didn't care whether we pulled out the Mercoid control and put them with the Quiet-Heet or a Penn.

Mr. Freeman: You say Penn?

The Witness: The one we had made for us. I designated it as Penn.

Mr. Freeman: Just so you are not referring to the Penn Electric Switch Company.

The Witness: No. They didn't enter into our picture at all.

In that manner we could cut the overall prices on both burners, on the Quiet-Heet burner and on our own burner, by using Quiet-Heet oil burners.

Trial Examiner Sheppard: It didn't make any difference what the controls cost, did it?

The Witness: That's right. Then we—I attempted to buy some controls from Quiet-Heet because I assumed—well, being a manufacturer, the price on a motor is about $7 if you buy 500, and it is about $7.11 if you buy a thousand—I mean, it would be $6.95 if you bought a thousand. And in a bracket of 500 to 1000 electric motors the difference is five to ten cents.

It was that way with the transformers. The dif-
1169 ference was four or five cents. A lot of items there was no difference.

Therefore any manufacturer familiar with his cost realizes the control governs his price. And when I know a manufacturer can offer an oil burner at less than the

market price I realize that it must come in their control. So went to Mr. Lapidus and bought his control. That is, the Quiet-Heet Manufacturing Company. He would not sell me controls separately unless I bought his burner. So I had to buy his burner to get the controls.

By Mr. Haycraft:

Q. What did you pay for the controls when you bought them that way from Quiet-Heet?

Mr. Freeman: He just got through saying he never bought the controls by themselves.

Mr. Haycraft: Until he bought the burners.

The Witness: I never bought controls separate.

By Mr. Haycraft:

Q. You never bought them separately?

A. No.

Q. When did you pay for them when you bought them with the burner?

Mr. Freeman: He didn't pay for the controls. Why don't you reframe your question?

Mr. Haycraft: Mr. Examiner, am I going to be 1170 interrupted—

Trial Examiner Sheppard: Let us not have any interruptions.

Mr. Freeman: Your Honor, I object to it as an unfair question and I would like a ruling on it.

Trial Examiner Sheppard: All we want is the facts here.

Mr. Freeman: That is all anyone wants.

Trial Examiner Sheppard: We just want to get the facts as quietly and peacefully as we can. Put your question to him again.

Mr. Haycraft: Will you read the question?

(The pending question was read as follows:)

"What did you pay for them when you bought them with the burner?"

Mr. Freeman: Why not ask a fair question? We object to the question as an unfair question. It sort of assumes that this gentleman bought controls without the burner.

Mr. Haycraft: I didn't say so and the question does not mean so.

Trial Examiner Sheppard: I don't know what you gentlemen are talking about, really I don't. Just put the entire question again.

The Witness: I paid $40 and $41 for the oil burner
1171 with three controls.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. Well from your knowledge of the items that go into the manufacture of the oil burner, what did you pay for the controls?

Mr. Freeman: That is objected to because he bought these complete as a package, a burner and controls.

Now I don't see any justification for any question as "what did you pay for controls?" any more than asking someone "What did you pay for your pants?" when you buy a suit. And I think it is an unfair question.

Trial Examiner Sheppard: If you can give us the information I will let the answer in, if it is something you know; if you know what the controls cost outside of the connection with the burner.

The Witness: What the controls cost, you mean?

Mr. Freeman: No, what you paid for them. In other words, what you allocate.

The Witness: I don't know. I would not know.

By Mr. Haycraft:

Q. Well do you know what went in to make up the oil burner?

A. Yes, and I bought oil burners without controls, using practically the same components. That was the way I
1172 arrived at what I was paying for the oil burner.

Q. Where did you buy oil burners without controls?

A. York Oil Burner Company.

Mr. Freeman: Is that the York?

The Witness: York.

By Mr. Haycraft:

Q. What items went in to make up an oil burner aside from the controls?

A. Well a basic casting which is constructed to include a part of a tube and scroll for a blower, to which is attached a motor, a pump, transformer, nozzle, ignition wires and so forth.

Q. And what did you have to pay for a motor without controls?

Mr. Freeman: From what company?

Mr. Haycraft: From the York Company.
The Witness: $28.

By Mr. Haycraft:

Q. What were you having to pay for temperature controls from Minneapolis-Honeywell during the time?

A. 18.55.

Q. Did you buy an oil burner equipped with Minneapolis-Honeywell control for $40 from any other manufacturer of oil burners than Quiet Heat?

A. No, sir.

1173 Q. What was it you said you did with the oil burners and automatic temperature controls that you bought from the Quiet-Heet? What did you do with the temperature controls that were on the Quiet-Heet burner?

A. I kept them in stock for sale with my own burner to customers who demanded Minneapolis controls.

Q. How much did you receive for the controls when you sold them that way?

A. Well about $4 more. In other words, I absorbed—I am very sure that the difference in price of Minneapolis was about $6 more than I had to pay Mercoid, so in making that transfer I dropped $2 from the price and held my price to $4. I recall that distinctly. Instead of asking $6 more which is what I would have had to pay Minneapolis if I had bought them directly, in this manner I tried to get as much as I could, as much as the traffic would bear, to compensate me, which was about $4. I had trouble getting that.

Q. $4 above what?

A. Above my Mercoid prices. You see, if I may offer—there are certain items that are very highly advertised in periodical magazines that the general public becomes very greatly sold on.

There is a certain amount of trade that doesn't offer any selling resistance. You can sell the customer whatever the customer asks for.

1174 We had dealers that liked Mercoid better than Minneapolis, but they can not sell what they like, they have to sell what they have a demand for. We would tell them it was all right, but if he went down the street to call on some doctor or dentist that was influenced by the periodical magazines or newspapers and a doctor or dentist would demand Minneapolis-Honeywell controls, he could not resist the sale of that type of equipment.

Q. You mean the dealer couldn't?

A. That's right. Then he would come back to me and say over a period of years he hadn't sold any Minneapolis-Honeywells, and I would come along and tell him he has to pay 4.57, and I would get into an argument.

In addition to that fact, I was one of the few companies that had to distinguish in my price between Minneapolis and Mercoid, and they accused me of everything under the sun, told me it was gyp game, a racket, so that I lost a lot of business—I could not obtain it.

Q. You had to charge more?

A. I had to charge more. They thought it was some kind of a racket I had worked out.

I either had to mark my Mercoid prices up, which my prices would not permit; or either to mark my Minneapolis down, which my profit would not permit.

That was back in the depression days when we were 1175 very glad to get business.

Mr. Haycraft: Give each one of those a separate number, please.

Trial Examiner Sheppard: Beginning with Exhibit 204 for identification.

(The documents referred to were marked Commission's Exhibits 204-A, 204-B, 204-C, 204-D; 205, 206-A, 206-B, 206-C for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibit 204-A, B, C and D, and ask if you can identify that as correspondence which you had with Minneapolis-Honeywell?

A. They are copies from our files.

Mr. Haycraft: I offer these in evidence.

Trial Examiner Sheppard: Any objection, gentlemen? Take a look at them.

Mr. Gilpatrick: It is immaterial. We don't object.

Trial Examiner Sheppard: Let it be accepted, Exhibit 204.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 204-A, 204-B, 204-C and 204-D, were received in evidence.)

Mr. Haycraft: I should have described them, Mr. Examiner, so let the record show it is a carbon copy of a 1176 letter from Penn Boiler and Burner Manufacturing Corporation to Minneapolis-Honeywell Regulator Company under date of September 5, 1940, an original let-

ter of Minneapolis-Honeywell Regulator Company under date of September 9, 1940, 204-A, and 204-C.

204-C and 204-D are installation instructions for Series 10 and Series 30 relays and types L-144, L-244 and L-444 immersion Aquastats.

Trial Examiner Sheppard: All right. Let them be accepted.

By Mr. Haycraft:

Q. Mr. Stauffer, did you ever discuss with representatives of the Minneapolis-Honeywell Regulator Company those prices that you were paying for their controls as compared with the prices of other—that other burner manufacturers were paying?

A. That was a ten-year fight with Mr. Dorsey.

Q. Mr. Dorsey was the manager?

A. He wasn't all the time. He was the latter part, the last round he was.

Q. I show you Commission's Exhibit 205, which purports to be a carbon copy of letter from yourself to Mr. Dorsey dated January 10, 1940, and also 206-A, which is a carbon copy of letter from yourself to Mr. Dorsey dated May 10, 1940, 206-B an original letter from Mr. Dor-
1177 sey to yourself under date of May 14, 1940, and 206-C which is just an advertisement attached to the letter.

Mr. Freeman: Can't you put that first one in? It just clutters up the record.

Mr. Haycraft: I will leave 206-C off of that, Mr. Examiner.

Trial Examiner Sheppard: All right. The Examiner authorizes the cancellation of Exhibit 206-C.

The Witness: (Examining paper.) This is a bit of sarcasm of which Mr. Dorsey raises complaint.

By Mr. Haycraft:

Q. Is that an original letter?

A. It is a copy from my files.

Q. How about A and B, is that correspondence from Mr. Dorsey on the same subject?

A. More sarcasm. That is from my file also.

Mr. Haycraft: All right. I offer these in evidence.

Trial Examiner Sheppard: Any objection, gentlemen? Take your time and read them.

Mr. Gilpatric: No objection, Mr. Examiner.

Trial Examiner Sheppard: Let the Exhibits 205 and 206 be accepted.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 205, 206-A
1178 and 206-B, were received in evidence.)

By Mr. Haycraft:

Q. I notice you state in your letter Commission's Exhibit 205, letter to Mr. Dorsey:

"However, I found a source of supply for controls where I actually can buy a set of controls that you charge me $21 for at a price of $13."

What did you refer to there?

A. I am very sure I was referring to Mercoid.

Q. That is, the Mercoid controls?

A. At $13.

Q. $13.

A. What I meant by that was corresponding controls, type for type.

Q. And that was the controls they had on the burners when you made this deal with Quiet-Heet?

A. That's right.

Q. And substituted Minneapolis-Honeywell for the Mercoid?

A. That's right.

Q. Now in the third paragraph of your letter of May 10, 1940, you say:

"In checking over the prices quoted some dealers who handle our boilers and competitive burners, we find
1179 that they can buy oil burner controls cheaper than we can with the results that on this basis it would be practically hopeless for us to sell them controls. In fact comparing our dealers' prices with your prices to us, we could still purchase controls cheaper from our own dealers than from you."

Now what dealers did you have in mind there—or what competitive burner did you have in mind there?

A. We had a dealer in Providence, Rhode Island that told us that he would sell me controls at a certain price, and that price was less than I was paying Minneapolis-Honeywell, so I just told him he should just buy my product without controls if he wanted Minneapolis controls. There was no use making him buy something from me that he could buy elsewhere for a dollar less or half a dollar or whatever it was.

Q. You remember what firm that was in Providence?

A. That was Petroleum Fuel Service.

Q. Did you have any other accounts, dealer accounts?

A. Yes, I did.

Q. Where the same situation existed. Will you name some of them?

A. It is a little hard to recall. There was a case in Washington and a case I think in New York. I can't recall at the moment.

Q. Was that Burner Supply Company of New York? Does that refresh your recollection?

1180 A. The one in New York was in Brooklyn, it was called the Major Homes Appliance Corporation.

Q. Major Homes?

A. Yes. They are on Fourth Avenue, Brooklyn—well, it is in the 400 block, Fourth Avenue, Brooklyn.

There was an account in Washington but I can not recall it—oh, American Heating and Engineering Company, I think. They were on New York Avenue, Northwest, 1008.

I am so full of making war materials that I have practically forgotten about oil burners. It is a little hard to recall it.

Trial Examiner Sheppard: All right. Anything else?

Mr. Haycraft: No, that's all.

Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Freeman.

Q. Mr. Stauffer, let us get your business straight. You became a boiler manufacturer, that is, a burner boiler manufacturer in 1936. Correct?

A. Approximately, yes.

Q. And from then on you sold the boilers, that is, burner boilers. Is that correct?

A. Not quite.

Q. Well, did you sell—

1181 A. For about a year after that—we didn't stop production on one item and start making another item. We added the boilers to our line of oil burner manufacture and gradually discarded the manufacture of oil burners by having them made for us.

Q. In other words then up to about 1935 you were in the oil burner business, then for the year 1936 you were both in the oil burner business and in the boiler business. Correct?

A. That's right.

Q. And then from about the latter part of '36 or the early part of 1937 down to pre-Pearl Harbor, you were in the boiler business. Correct? That is, oil-fired boilers?

A. Oil-fired boilers with the oil burners?

Q. Yes. And the oil burner from about 1936 to early '37 you purchased from others, from outside sources?

A. We had them made for us.

Q. But you didn't make them in your plant?

A. No.

Q. You made the boiler in your plant?

A. That's right.

Q. So that from 1936 or the latter part of 1936 you were really a boiler manufacturer and picked up your oil burners from some oil burner manufacturer. Isn't that correct?

A. We didn't pick them up, no, we had them made
1182 for us, the same as any manufacturer today has certain components made for him.

Q. Well, you had the whole oil burner made for you?

A. Excepting the controls, which Minneapolis claims represents a very large part of the oil burner.

Q. You bought oil burners, did you not, from Quiet-Heet, complete with controls thereon?

A. That's right. Just to get the controls.

Q. In other words, you bought the burners complete with controls, because Quiet-Heet would not sell you controls by themselves. Is that right?

A. Correct.

Q. And you were willing to pay his price of some $40 or $41 in order to get Minneapolis-Honeywell controls?

A. That's right.

Q. Of course you didn't discard or junk or obsolete the oil burner parts which you got from Quiet-Heet?

A. No.

Q. And did you take oil burners from Quiet-Heet indiscriminately, that is, whether they had Minneapolis-Honeywell controls or the Mercoid controls on?

A. They only operate them with Minneapolis.

Q. You knew that they handled Mercoid controls on oil burners?

A. But they were not interested in selling them
1183 with Mercoid controls.

Q. Isn't it a fact that you would not have taken an oil burner from Quiet-Heet if it had a Mercoid control on? That is a fact, is it not?

A. Positively.

Q. So that regardless of what Quiet-Heet was selling it was your business to see that whatever you got from Quiet-Heet had a set of Minneapolis-Honeywell controls on. Is that right?

A. Correct.

Q. And when you bought Quiet-Heet burners complete as the Quiet-Heet Company sold and advertised them, you knew at that time that you were not going to resell the Quiet-Heet burner with any Minneapolis-Honeywell controls on. Is that correct?

A. That's right.

Q. So that you took what Quiet-Heet sold and advertised and sold something less than what you bought from Quiet-Heet to the purchasing public?

A. Not less, no.

Q. Did you sell something that you considered the equivalent?

A. Better.

Q. In other words when you bought a set of Mercoid controls to control and operate the Quiet-Heet burner
1184 which you bought with Minneapolis-Honeywell controls on, did you then think that the burner with Mercoid controls operated better?

A. Mechanically, yes, sir.

Q. Was it your thought then that you were sort of a public benefactor in giving to the Quiet-Heet Burner a good set of controls by putting Mercoid controls on?

A. It wasn't a case of being benevolent at all. It was a case of bucking big business resistance that was trying to put the small oil burner business out of business, and it was the only course I had for self-preservation.

Q. Well, you weren't in the oil burner business at that time, were you?

A. Yes, sir. I sold 4,000 that year.

Q. But you sold them complete with boiler units. Correct?

A. I would say about 4,000 boiler burner units including oil burners, and about 400 oil burners just oil burners.

Q. Now when you sold just oil burners, what oil burners did you sell?

A. The one that we make.

Q. And what controls did you use on those that you made?

A. Mercoid, and some Minneapolis.

Q. And when you used Minneapolis-Honeywell controls where did you get them?

A. From Minneapolis-Honeywell.

1185 Q. All of them?

A. Most of them, yes.

Q. Do you happen to know how many controls you bought from Minneapoils-Honeywell in the year 1938?

A. No. Very few.

Q. And how did your 1939 business compare with your 1938 business?

A. I think that became less. At least if it did not become less it was proportionately less.

Q. How about 1940?

A. Still proportionately less. We were trying to get out of Minneapolis and stand on our own legs.

Q. So in starting with 1938, which was your big year, at least starting around 1938, compared with 1939 and 1940. Of those three years 1938 was your best year?

A. No.

Q. I mean of purchasing control from Minneapolis-Honeywell.

A. Oh, yes, that's right. Because we were able then not to have to depend on Minneapolis-Honeywell to exist any longer.

Q. In other words, I just want to get this straight even if it is sort of repetitious. In 1938 you bought more controls than you bought from Minneapolis-Honeywell in 1939. Correct?

1186 A. That's right.

Q. And in 1940—in 1940 you bought less from Minneapolis-Honeywell than you bought in 1939?

A. This figure is proportionate. I don't know just how many controls I bought—I don't know the relative amount of sales—or purchases—from us to Minneapolis—to us—from Minneapolis—in proportion to our business and the relationship of purchase to Minneapolis. We were buying less Minneapolis each year.

Q. The trend was downward?

A. Yes.

Q. And does it refresh your memory if I tell you you bought a total of 37 controls, not sets, but units, from Minneapolis-Honeywell in 1938?

A. I judge that's right.

Trial Examiner Sheppard: Have you the figures for 1940? You might as well put them in here.

Mr. Freeman: I haven't them here. That is why I brought out that they were less.

The Witness: You see, I couldn't buy them. I couldn't buy them and survive.

By Mr. Freeman:

Q. And 37 controls, using every control in every conceivable way, would not equip more than 12 oil burners?

A. Well, I didn't buy all my controls from Minneapolis.

1187 Q. No, I am talking about the business you did or received from Minneapolis-Honeywell.

A. That's right. I regret that there were that many.

Mr. Freeman: I move that that last answer be stricken as not responsive.

Trial Examiner Sheppard: That can go out.

By Mr. Freeman:

Q. Now you sold some 400 oil burners that year?

A. What year?

Q. 1940. And you said they were equipped with either Mercoid or Minneapolis-Honeywell.

A. That's right.

Q. And I understood you to say that of those 400 burners whatever you did equip with Minneapolis-Honeywell, you bought from Minneapolis-Honeywell?

A. No, no, I didn't.

Q. Let us get that straight. You bought them from some other company?

A. That's right.

Q. And you bought them with oil burners at $40 or $41 in order to get the complete set of Minneapolis-Honeywell controls. Correct?

A. That's right. I also bought them elsewhere.

Q. And from whom else did you buy?

A. The DeSoto Oil Burner Company in York, and
1188 the York Oil Burner Company in York.

Trial Examiner Sheppard: You bought those controls without buying the burner with them?

The Witness: Well we bought burners from them without controls and then when we wanted controls we had a coupon value, you might say, credit, but I could buy controls up to the amount of burners I had bought.

Trial Examiner Sheppard: Well in answer to a question of Mr. Freeman you said you bought Minneapolis-Honeywell controls of other people, and I want to know if that was Minneapolis control purchased without the burner with them.

The Witness: In a sense. But you see I would buy burners—I would buy perhaps a hundred burners—

By Mr. Freeman:

Q. From York?

A. Yes. But no control. Now, I needed five sets of controls, Minneapolis controls. Having bought the hundred burners would give me the right to buy a hundred sets of controls. I didn't want them at the time. And while they were perhaps in my inventory I would get an order, and then I would demand the fulfillment of the Minneapolis controls to the extent of five.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

1189 Q. Well, did you always use a Minneapolis-Honeywell control with the York oil burner that you bought?

A. No.

Q. Do you know whether the York Oil Burner people handled the Mercoid controls?

A. I think they did.

Q. Would you have taken York Oil burners with Mercoid controls on?

A. If the price would have been competitive, yes.

Q. Well you mean competitive with Minneapolis-Honeywell prices?

A. No, competitive with the Mercoid Company.

Q. You mean that if the price of the Mercoid equipped burner was the same as the price of the burner equipped with Minneapolis-Honeywell?

A. I don't mean that.

Q. You mean just the reverse of that?

A. I mean if I could buy these oil burners with Mercoid control and the cost to me would have been the same as if I had bought the burner separate and the Mercoid control separate, if that total was equal, then I would buy from York, but I would buy where I could buy the best bargain.

Mr. Haycraft: Will you let me ask a question right there?

Mr. Freeman: Yes.

1190 By Mr. Haycraft:

Q. You mean—when you say you bought Mercoid controls—you mean from the manufacturer?

A. Yes.

By Mr. Freeman:

Q. Well as a matter of fact you did buy Mercoid controls at around $13 a set. Is that right?

A. Yes.

Q. And you bought burners from the York people at $28?

A. That's right.

Q. So then you had a complete burner, so to speak, that is, controls from Mercoid direct, and the burners from York direct, making your total cost $41?

A. That's right, but the basis there is altogether different, in the first place. In other words, there was a time when oil burners retailed for $650. Pre-Pearl Harbor they retailed as low as $195.

Q. Quite a saving for the public.

A. I should say. There was a period there on a dropping market where at the time I purchased some Quiet-Heet at $41, I was likely paying $45 and $48 from York. I had them offered to me at considerably less than $41 after I quit buying, but I wasn't interested then.

Trial Examiner Sheppard: What year was that?

The Witness: I think 1940.

Trial Examiner Sheppard: I think it has come out
1191 in this record that in '39 or '40 they were at $49.

The Witness: I could have gotten them a dollar less if I had taken standard controls. 1940 their burners were considerably less than that.

By Mr. Freeman:

Q. Did I understand you to say this morning that your competitors, that is, people dealing in oil burners, made no differential or difference in price between burners equipped with Minneapolis-Honeywell controls and also equipped with Mercoid controls?

A. The larger ones. The larger manufacturers don't make any difference.

Q. How about Herco who was your next door neighbor?

A. Well I suppose he was in the same trouble I was. He didn't.

Q. You were in the room here this morning when he testified?

A. Yes, sir.

Q. You remember him saying there was about $2.50 or $3 difference in his selling price for oil burners when he equipped them with Minneapolis-Honeywell controls over those equipped with Mercoid controls?

A. I heard the figures $2.50 but I didn't catch all the conversation.

Q. Now did you ever take time enough to really
1192 check Herco's prices, that is, as to what it was when his burners were equipped with Mercoid controls and what it was when they were equipped with Minneapolis-Honeywell controls?

A. You bet I did.

Q. What did you find?

A. I found that his differential on his oil burner to the dealer trade was considerably less than my differential.

Q. No, now, just answer my question.

A. That is what you asked.

Q. I am asking you whether or not you know whether he charged the same price for a burner equipped with Mercoid controls as when the burner was equipped with Minneapolis-Honeywell controls?

A. No, I know that he didn't.

Q. He charged more?

A. He charged more for Minneapolis.

Q. About $2.50 or $3?

A. I judge that would be correct. I don't know.

Q. Well now did you check any of these other companies?

A. Automatic Burner Company in Chicago.

Q. What did they do, did they charge more for an oil burner equipped with Minneapolis controls?

A. No, they charged the same price.

Q. They charged the same price?

A. Yes.

1193 Q. How about some of these other companies that you checked, how about Williams, do you know?

A. I don't know.

Q. They were competitors of yours, were they not?

A. Yes, but if I am not mistaken they handle the Penn control. But I am very sure that Quiet May's price, and, incidentally, York, York's was the same with Minneapolis, one year. I don't know what year it was. I judge '37 or '38. Their price with Minneapolis was the same as any

control. They did not differentiate. In later years they didn't handle your control as a prime control, and I don't know what they charged.

Q. As a matter of fact you don't know of your own knowledge.

A. I don't know the specific amount.

Q. Well if I told you that Williams automatic charged $7.50 more for a Minneapolis-Honeywell equipped oil burner than when equipped with Mercoid or Penn control, does that refresh your memory?

Mr. Haycraft: I am going to object to that, Mr. Examiner, as including within it a statement that was not in the record.

Mr. Freeman: Well, it is done to refresh his mind.

Trial Examiner Sheppard: I will let you testify
1194 about it.

The Witness: I wouldn't know on Williams Automatic. The reason I wouldn't know is because they had a tight dealer organization and it didn't sell oil burners to the trade in general. For instance back in 1922—

By Mr. Freeman:

Q. Do you know whether Malleable Iron had a differential between Minneapolis-Honeywell equipped burners and Mercoid equipped burners or somebody else's control?

A. Who is Malleable Iron?

Q. The Bramford burner.

A. No, I don't know anything about Bramford.

Q. How about Cleveland Steel Products Company?

A. I don't know anything about that.

Q. You know they were in business?

A. Yes.

Q. And you know they handled Mercoid controls at the time and Minneapolis-Honeywell controls at the time?

A. Well practically any oil burner manufacturer could offer any make of controls.

Q. As a matter of fact you were solicited by all the control manufacturers?

A. Yes, sir.

Q. And did you ever buy any oil burners from any oil burner manufacturers in order to get Mercoid con-
1195 trols with the idea in mind that you could buy a burner and get a set of controls with it?

A. I didn't have to because I was classified as a manufacturer and therefore it was logical that the Mercoid

would sell me controls for less money than anyone else they had classified as a dealer.

Q. Well you were out of the manufacture of oil burners in 1936?

A. Well, that was an expediency. That was a temporary expediency, that was all. We still kept our same contract, we still had a burner called the Penn Oil Burner. It was not a discontinued item. The expediency or the fact that our finances were not sufficient to make both boilers and oil burners, and the competitive situation in the oil burner manufacturing, was so tough and the mark-up of oil burners was so low that we took our money and used it to build boilers, because every $50 would save us $15 by building our own boiler, whereas $50 would only save us about $5 by building our own oil burners.

The same $50 put through the jaws of our business would produce $15 instead of $5.

Q. In other words, you put your money to work where it could make the most?

A. That's right.

Q. Now when you bought these oil burners from
1196 Quiet-Heet, did you let them know you were removing the Minneapolis controls, or at least separating the controls?

A. Yes, sir. Mr. Lapitus saw that transaction with his own eyes.

Q. Of course when you bought them it was your property.

A. That's right.

Q. You paid and then you could do with your property whatever you wanted to.

A. That's right, but there is a rule with the Underwriters Laboratory that prohibits the changing of controls by group, so it was a general understanding in the oil burner trade that you could not change a brand or make of controls provided they were in the proper group, but if your transfer was an approved type by the Underwriters Laboratories, it was perfectly legitimate.

Q. Well now, did you sell those oil burners under the name Quiet-Heet?

A. No.

Q. So you bought just so much iron and material made up, fabricated, and used such materials as you saw fit in connection with your Penn burners?

Is that correct?

A. That is correct.

Q. And so far as standing back of the product by way of service or performance that was your own? In
1197 other words it was your reputation and not Quiet-Heet?

A. That's right.

Q. Did you tell your customers they were getting Quiet-Heet?

A. Yes, some of them.

Q. Did you tell them you were taking off the Minneapolis control and substituting Mercoid controls?

A. Some of them, yes.

Q. Would you give me the names of some of those companies?

A. Well every one of my companies knew it.

Q. Well give us just a few.

A. Pennsylvania Steel Boiler Company, 409 or 4808 Lancaster Avenue, Philadelphia.

Q. Another one or two, that is all I want.

A. There is an outfit in Washington. I can not think of that company's name.

Q. Let me ask you—

A. Wait a minute. I can think of more. Southwark bought them through the Pennsylvania Steel Boiler Company.

Q. Well you don't know whether Southwark men actually knew that you had gotten them with Minneapolis controls and had taken them off?

A. I did.

Q. Did you tell them that?

A. I was there when they were told. I was in
1198 their presence.

Q. And what would have happened if the Penn Steel Boiler wanted to get a set of Minneapolis-Honeywell controls on the burner you sold, including the Quiet-Heet chassis or frame?

A. They would simply specify they wanted it and it would cost them $7 more.

Q. That $7 more, was that your differential between Mercoid equipped burners—what did you sell the burner for?

A. Complete?

Q. Yes, complete.

A. Well, they range, depending on what size house they went into. An oil burner hasn't a very wide range. You can buy an oil burner that will heat a five-room house or a fifteen-room house all for the same price, but you can not do that with a boiler.

Q. Well let us take the average eight room house.

A. How much it would sell for wholesale or retail?

Q. What you got for it.

A. The boiler unit?

Q. Yes.

A. Hot water or steam?

Q. Well let us just take the steam then for a while.

A. About $165—wait a minute. Yes, about $165 to $185.

Q. That was the spread?

A. Yes.

1199 Q. For about an eight room house?

A. Yes.

Q. Now what brought about that differential?

A. Whether it was a hot tank—little things that are added.

Q. Did you give any quantity discount? When a company bought ten units did you give them a better price than when they bought one?

A. Yes.

Q. And what was the spread between the purchase of one and the purchase of ten?

A. One and ten?

Q. Yes.

A. About 5 per cent.

Q. So then you gave—at about $165 you gave about $8.25—in other words it was $8.25 cheaper if they bought ten units at one time?

A. That's right.

Q. Did you give them any additional discount if they got up to a quantity of 50 or a hundred?

A. They had to be designated as a distributor or dealer, and they had to be one and not just call themselves one.

Q. Well on this one to ten, that was 5 per cent?

A. Well, that was very rare.

Q. How about the one to 25?

1200 A. I would say at one to 25 we gave about 5 per cent.

Q. Now about a hot water installation, what was the price of that for a comparable house of about eight rooms?

A. That would cost about $304, including a circulator which we built into the boiler.

Q. Which would have made that price anywhere from $195 to $215?

A. That's right.

Q. And if they bought in quantities you were able to knock off 5 per cent?

A. That's right.

Q. Or about $10 per boiler burner, roughly speaking?

A. Yes.

Q. You found Mercoid controls satisfactory, did you not?

A. Generally, yes.

Q. And I understood you to say that you did purchase Mercoid controls at about $13 per set when you were paying about $18 or so for Minneapolis-Honeywell controls?

A. That's right. At that particular time.

Q. Yes. And you had a contract with Mercoid year in and year out just as you have with Minneapolis-Honeywell?

A. That's right.

Q. Did you have any contracts with Perfex?

A. Yes, we did.

Q. Did you have any contracts with Penn Electric
1201 Switch Company?

A. Yes.

Q. As a matter of fact you contracted for controls with all of the control companies, so that if you needed one company's controls you would buy that company's controls?

A. Well that was supposed to be our protection. The various manufacturers claimed that that was our protection against a set price for the season.

Q. In other words there were four control companies generally calling on you and you had four contracts?

A. When we dealt with them. One year perhaps we would not deal with Penn. The next year we would not deal perhaps with Perfex. We didn't have four contracts every year.

Q. But you dealt with those companies just occasionally?

A. Sporadically with two of them and regularly with two of them.

Q. Now did Mercoid specify the number of units that you might use in a season?

A. I don't think so. I am not sure.

Q. By the way, did you bring any of your Mercoids—did you bring it with you?

A. No. I don't like to answer that question because I want to be honest about it and I don't recall. I can telephone and find out. (Witness pauses.) Yes. They did.

Q. They specified the amounts?

1202 A. Yes.

Q. By the way, you are here in response to a subpoena duces tecum by the Commission.

A. That's right.

Q. They asked that you should produce books and records and so forth.

A. That's right.

Q. They asked you to produce books and records in connection with the Mercoid Corporation?

A. Yes.

Q. You didn't bring any of those records here today?

A. No, I didn't bring anything.

Q. You gave Mr. Haycraft these agreements when he was there a week or so ago?

A. I gave him the whole files.

Q. And he selected these. You had other Minneapolis-Honeywell contracts for other years?

A. Well I just told the bookkeeper to go out in the file for that time. It was a big file. And to pull out the Minneapolis file for '39 and '40.

Q. Do you recall those Mercoid agreements, what they specified up here for quantities?

A. Yes, I do. The brackets were something like—the first break in the price was at about 25 sets.

Q. That is Mercoid now?

1203 A. Yes.

Q. The first break was at 25 sets?

A. Yes.

Q. What about the second break?

A. That went up to perhaps 250, was the next break. The jump from 25 to 250 was very rapid. In fact the important jump was at 25.

Q. That was in sets?

A. Yes.

Q. Where did you fit into the Mercoid scheme?

A. It was about the same as it was with motor manufacturers and steel manufacturers and everybody else. When we could prove that we were a manufacturer we got a manufacturer's discount.

Q. And you also got a bracket discount?

A. Yes. Very little.

Q. In accordance with quantity?

A. That's right. For instance it might have been—the discount was 25 and 25 per cent with Mercoid—

Q. Anything under 25?

A. On anything under 25, and anything over that, providing we were in a category as a manufacturer, the discount would perhaps have run maybe 60, 55 or 60.

Q. As a matter of fact you had a contract with Mercoid that gave you good prices?

1204 A. That's right, but we knew what the discounts were.

Q. But you were still quoted net prices?

A. That's right.

Q. And you don't know whether the contracts they had with you included the form 11 or form 22 or form 33 or the form 55?

A. No, I don't.

Q. I take it that on the memo we find on Commission's Exhibit 200 for the K-M which is a Mercoid notation of one of its primary controls, it refreshes your memory as to the price you paid for Mercoid primaries at that time?

A. (Examining paper.) That's right.

Q. And what would you pay for a Minneapolis-Honeywell primary at the same time, looking at Commission's Exhibit 200?

A. What is 200?

Q. This is 200. (Indicating.)

A. I see. Well if I agreed, subject to a penalty, to taking that 50, I would have paid 11.10 plus 50 cents, or $11.60.

Q. Well the 50 cents was some royalties that was independent of any Minneapolis-Honeywell charge for the product?

A. Well, Minneapolis took it from me, that was all I was interested in. I don't know what they did with it. After they had it I didn't care.

Q. Well, taking it your way you would have paid

1205 $11.60 to Minneapolis-Honeywell, including the 50 cents Zoro royalty.

A. If I guaranteed to take that 50.

Q. Well you thought you were going to take that 50 when you signed that contract.

A. I did, but the Minneapolis-Honeywell would not accept that. That is what I had to pay until then.

Q. That is, you got a jobber's discount as long as you were in the jobber's classification and in the jobber's field. Is that right?

A. As long as they wanted to call me that, but I wasn't a jobber, I was a manufacturer.

Q. And you could have purchased controls all during this period regardless of what Minneapolis-Honeywell thought you were, for Mercoid, for $3 less; that is, a single control or stack switch, you could have brought that for $3 less.

A. That is approximately right.

Q. And I take it the set price of $14.35, which is the pencil notation on Commission's Exhibit 200, has to do with a set of Mercoid controls, which would include one primary, one limit, and one thermostat. Is that correct?

A. That is correct, but immediately after that date we had a drop in price with Mercoid.

Q. But as a matter of fact you could have bought from Mercoid for even less than $14.35 for a set of controls.

A. Yes. I think it was $13.85. I think it got down 1206 to $13.85—that is, 85 cents was thrown off.

Q. That is Mercoid threw off 85 cents?

A. That's right. That would make it $13.50.

Q. For a complete set of controls?

A. That's right.

Q. Now for a like set of controls purchased from Minneapolis-Honeywell at the same time that you purchased controls from Mercoid for $13.50, what did you pay Minneapolis-Honeywell?

A. $19.05.

Trial Examiner Sheppard: We will take a short recess.

(There followed a short recess.)

Trial Examiner Sheppard: On the record.

Proceed, Mr. Freeman.

By Mr. Freeman:

Q. Now on these burners that you bought from Quiet-Heet and removed or segregated the Minneapolis controls from, you then sold those with Mercoid controls?

A. If they were requested that way, if they were ordered that way.

Q. Well if they were not ordered that way, would you send them out with Minneapolis-Honeywell controls?

A. Well, those are always specified.

Q. What happened when the type of control was
1207 not specified, whose control did you send out?

Mr. Haycraft: I object to that. He said they were always specified.

Trial Sheppard: Have you any case where you would send out—

The Witness: Well we knew the inherent desires of our dealers. Sometimes we got a telegram to ship so many burners right away. We would know in the haste of a telegram he would not specify, and we would look back and see what he got regularly. You know a customer's requirements. That is business.

By Mr. Freeman:

Q. How about the first burner that a customer bought from you?

A. We would recommend Mercoid.

Q. You would recommend Mercoid?

A. That's right. Because this kept us in the rate competitively.

Q. Well Mercoid treated you as a manufacturer. Correct?

A. That's right.

Q Minneapolis-Honeywell treated you as a jobber, a dealer?

A. They never denied—that wasn't their excuse for raising the price on us. They just told us we were not in their bracket.

Q. You were informed by the Minneapolis-Honey-
1208 well representative that if you obtained their bracket structure you would get the bracket price you were entitled to get?

A. That's right. It would be even more than that, it would be retroactive. But I didn't want to give them my money to keep, I needed it myself.

Q. When you say you needed the money yourself, were you in any financial difficulties in the operation of your business, creditwise?

A. No. Other than a company that first starts in business without any capital doesn't have a world of credit.

Q. And you were one of those companies?

A. That's right.

Q. And as a matter of fact you have made pretty good progress from back there when you started, 1926, up to date, haven't you, business-wise?

A. Well we went into the thing as a distributor in '22 and then in '31 our bank failed and never did get back. It

wasn't one of those bank holidays, it was even worse; and we were completely liquidated financially; and then we started this business with $11.

Q. And you have continued to grow in spite of the small amount of capital you started with and in spite of the competition you had in the field?

A. That's right.

Trial Examiner Sheppard: You are in business, yet?

1209 The Witness: Yes.

By Mr. Freeman:

Q. And you have had a very nice growth, starting from '22 up to date?

A. Well, fairly. Of course right now our sales aren't very large.

Q. But you had a nice business pre-Pearl Harbor?

A. That's right.

Q. Would you give us your business in round figures?

A. About $300,000 a year.

Q. So that with practically nothing to start with you were able to build yourself up a nice figure of about $300,000 a year. Is that right?

A. That's right.

Q. And I take it you made a fair profit on that business?

A. Yes. Generally.

Mr. Freeman: That's all.

Trial Examiner Sheppard: Anything else?

Redirect Examination by Mr. Haycraft.

Q. I just want to ask the witness if the two contracts are identified as the contracts?

A. There is nothing to identify.

Q. What does it say at the top (indicating)?

A. Manufacturers control contract.

1210 Mr. Haycraft: That's all.

Mr. Freeman: That's all.

(Witness excused.)

Trial Examiner Sheppard: Mr. Haycraft, have you any more testimony?

Mr. Haycraft: Well I have one witness this afternoon at two o'clock.

Trial Examiner Sheppard: All right then, we will take an adjournment to reconvene in this room at two o'clock.

(Whereupon, at 12:50 o'clock p. m., a recess was taken until 2 o'clock p. m. this day.)

1211 Afternoon Session.

2:00 p. m.

Trial Examiner Sheppard: Come to order, gentlemen.

Mr. Reporter, this is Mr. M. H. Shapiro, Southwark Plumbing and Heating Supply Company.

M. H. SHAPIRO was thereupon called as a witness for the Commission, and, being first duly sworn, testified as follows:

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Shapiro?

A. Vice President and Treasurer of the Southwark Plumbing Supply Company.

Q. Where does that company do business?

A. In Philadelphia and surrounding territory.

Q. What is its business?

A. Supplying plumbing and heating supplies to the various contractors.

Q. Among other things do you handle oil burners?

A. We have.

Q. For how many years have you handled oil burners?

A. Ever since we have been in business, ten years.

Q. And during that time what make or makes of 1212 oil burners have you handled?

A. We handled almost any make that is sold in this area, but principally Quiet-Heet, I would say, Herco and High Point.

Q. Where is the Quiet-Heet from?

A. Newark, New Jersey.

Q. Herco?

A. Lancaster, Pennsylvania.

Q. What was the third one?

A. The High Point. That was in Ohio, Bellaire, Ohio.

Q. Are they the pressure type or gun type burners?

A. Gun pressure type burners.

Q. Do you handle any rotary type burners?

A. We do on a brokerage basis but not as a stock item.

Q. You stock others though?

A. We stock in others.

Q. Were these burners equipped with automatic temperature controls?

A. In most cases they were bought that way.

Q. What make of temperature controls did you handle on the burners?

A. Well, we handled principally Minneapolis, some Mercoid, some Penn.

Of course today we handle anything we can get.

Q. Approximately what would you say was the
1213 volume of oil burners done in this area by your firm, either in units or dollars, beginning, say, around 1937?

A. I would say right before the war we sold an average of several hundred burners a year.

Q. That would be 1940, '41?

A. Yes, '40 and '41.

Q. How about 1937, 1938?

A. '37, it wasn't quite that large. I would say about 75 to a hundred.

Q. Now are you prepared to testify to the price that you paid for oil burners equipped with controls, Minneapolis controls or Mercoid?

A. Based on these invoices—

Q. Refreshing your memory from those invoices, will you testify what you paid for burners equipped with Minneapolis-Honeywell or Mercoid controls in '37, '38 and '39, along in there?

A. Yes, '37 invoices I don't have because of the shortness of the time.

Q. Well take '38.

A. Take '38 for example, one period, it would be $62.50.

Q. From whom?

A. From Herco Oil Burner Corporation of Lancaster.

Q. And equipped with what type of control?

A. Minneapolis controls. Here is the same type
1214 of a burner with a mixture there of some Mercoid, and these are even higher, but of course there may be an extra control in that (indicating).

Mr. Gilpatric: Why don't you give the price of that?

The Witness: $65.

By Mr. Haycraft:

Q. What does the $65 include?

A. Well, if you are familiar with these numbers there (indicating)—

Mr. Gilpatric: What quantities are you testifying to being purchased?

The Witness: At that particular time it may be three, five, at a time.

By Mr. Haycraft:

Q. The first time you testified to one burner, did you not?

Mr. Haycraft: I think, Mr. Examiner, I would like to—I asked that the witness indicate. He said Minneapolis-Honeywell, but I asked the witness to give the description of the controls that came with it, because I recognize by looking at the invoice it is not a Minneapolis-Honeywell control. We are going to have to correct the testimony to that extent.

By Mr. Haycraft:

1215 Q. Will you refer back to the invoice and then give us the date and the control?

A. $62.50.

Q. What is the date?

A. January 11, 1938. J-5 burner—(indicating).

Q. I recognize that as Mercoid.

A. Mercoid?

Mr. Freeman: We will agree to it.

The Witness: On the same date there is an order for two—on the same invoice rather—I guess that would not be Minneapolis either. DA-37.

Trial Examiner Sheppard: Now wait a minute, Mr. Shapiro. I think I had better get you to go through there and get something definite first so we can put it in a short space instead of so much talking.

Show a recess of ten minutes there to let Mr. Shapiro go through his invoices there and get something definite, so we won't have to put so much stuff on the record.

(There followed a short recess.)

Trial Examiner Sheppard: On the record.

The Witness: What was the question?

By Mr. Haycraft:

Q. The question was what price did you pay for burners equipped with controls purchased from Herco or

1216 Quiet-Heet, beginning in 1938?

A. I have an invoice here in January, 1938, where we purchased one burner with three Mercoid controls for

$62.50; and on the same invoice two burners with four Mercoid controls for $66.75.

We have an invoice of January 11, 1938, apparently the same date only a different shipment, three burners with Mercoid controls, four controls, at $65 each.

You are only concerned with burners with controls?

Q. That's right. Or controls separately.

A. Yes. I have an invoice here January 13, 1938, where Minneapolis controls were purchased from Herco.

Q. What controls were they?

A. Three L-165, three T-45, three R-117, three relays, and two R-19.

Q. Give the price.

A. At that time we had the list prices here net a discount. Do you want the prices?

Q. The prices listed on the invoice.

A. On the 165 $11, T-45, $9, R-117, $32.50, and the R-19-9, less a discount of 50 plus 5 per cent as a handling charge.

On February 8, 1938 we purchased from the Herco Oil Burner Company four J-5 burners at $45.50 less controls.

1217 Trial Examiner Sheppard: You mean there were no controls?

The Witness: No controls at all on these burners.

On March 26, 1938, we purchased from the Herco Company four J-5 burners at $62.50. They were equipped with a mixture of Mercoid and Minneapolis.

By Mr. Haycraft:

Q. Will you list them?

A. My error, my error, my error. They were equipped with Mercoid controls, but on the same invoice were purchased additional controls. And they were Minneapolis.

Q. What additional controls did you purchase, and at what price?

A. There were three T-44 listed at $11.50, three R-117 relays at $32.50, and three L-165-A at $9.50, less 50 per cent, plus 5 per cent.

On April 12, 1938, we purchased two P-15 boilers from the Herco Company at $62.50 with Mercoid controls.

You say you wanted invoices with controls separately?

Q. Yes.

A. On May 13, 1938, we purchased from the Herco Company—do you want the list price of all of these?

Q. Yes.

1218 A. Two 855 high voltage thermostats Mercoid, and two DA-36 Mercoid emergency controls. The 855 was 6.38; and DA-36 was 7.01.

On the same invoice there were three P-45 Minneapolis 5.31 net and four R-117 relays at 17.81 net, and three L-165-A Aquastats at 5.75 each net.

Now, on May 25, 1938, we purchased from the Herco Company four burners at $62.50 each with Mercoid controls.

On the same invoice there were three L-165-A, 4.99 Minneapolis control. Three R-19 at 4.73; and three 409 at 4.20 each.

Now we complained to the Herco Company of the prices charged on this May 13th invoice were too high in accordance with the price we had purchased from the Minneapolis direct, and they sent through a credit memorandum to adjust the differential.

Now the credits are dated May 21, 1938. for $7.03 and May 21, which is the same date, to adjust M-H—that is Minneapolis-Honeywell—prices on 4-26-38 invoice.

On April 26, 1938, we purchased six J-5 burners less all controls at $45.08, and some Minneapolis and Mercoid controls for these burners individually at the following prices:

Six R-19 at 5.38; three R-117 at 17.81; six

1219 B-6510 at 5.75; two L-409 at 4.44; two VA-36 Mercoid at 7.01; and two 115-W Mercoid at 5.10.

On June 27, 1938, we purchased from the Herco Company four J-5 burners at $62.50 each, equipped with Mercoid controls.

Q. Will you glance through the rest of the year and see if there is any change in the price?

A. You mean in the unit price?

Q. Yes.

A. Of the burner. Well, there is—on July 21, 1939—of course that is a year later—

Q. Go ahead.

A. We purchased from the Herco Corporation three J-5 burners equipped with Minneapolis controls, purchased by paying $60.

Q. See if you can find any sales in 1939 of J-5 burners equipped with Mercoid?

A. (Examining papers.) That is all there is.

Q. You don't have any purchases of J-5 burners with Mercoid control?

A. No. We didn't handle the Mercoid control after that.

Q. I see. Now will you refer to your Quiet-Heet invoices and see if you can testify the same way?

A. Well there we have no invoices here of any purchases made for additional automatic equipment.

1220 Q. I want your testimony as to the prices you paid for the Quiet-Heet burner equipped with Minneapolis-Honeywell control?

A. From July 1, 1938 to September 15, 1938, we were purchasing Quiet-Heet burners equipped with the three Minneapolis controls for $50 a unit, and on September 8, 1938—the same unit equipped with the same controls dropped down to $46.50.

Now whether that is a price that reflects the controls on the burners I wouldn't know.

Q. Do you have the numbers or designation of the controls with which they were equipped?

A. They have their own numbers on there.

Q. Will you read those numbers?

A. What they mean, I don't know. They didn't itemize the controls but what we have been receiving is the three conventional controls, the room thermostat, the relay, and the Aquastat. I don't see anywhere along here where they itemize—

Q. See if there is any other change in price?

A. (Examining papers.) The only change in price I see here is the difference between a two stage pump and a single stage pump, that's about all.

Q. If you bought a two stage pump, you paid a little more for it?

A. Yes. The price naturally was a little higher.

1221 I can't see any change—in other words here is an example—here is one here for 49.50, but you notice there it has a long extension on the blast tube.

Q. Don't these invoices indicate the type of control?

A. No, it doesn't indicate the type of control. I don't see any of them here.

Trial Examiner Sheppard: How do you know they are Honeywell controls then?

The Witness: Well, we—at the time we placed the order—here is one here (indicating). Here is an example here. We gave them an order for ten burners and we specified Protectorelay 344 and L-165, and that would indicate Honeywell. Here they are (indicating).

By Mr. Haycraft:

Q. Will you indicate now which ones they were?

A. On December 9, 1938, we received from the Quiet-Heet Manufacturing Company six burners at $48—or rather five at $48, and one at $48, and one at $48.75. The additional was for a two stage pump, with six R-117 controls, six T-11 and four L-409.

There was one L-419 and one L-170 in a shipment.

Q. And that would you say was typical?

A. Yes, that would be about typical. Well, in that case, from what you pointed out to me, what I notice here, what I failed to see, they were all shipped, in fact they had
1222 their billheads printed with the Minneapolis code number, and I can testify that all controls received from Quiet-Heet with the burners were Minneapolis controls.

Mr. Haycraft: That's all. Cross-examine.

Cross-Examination by Mr. Gilpatric.

Q. Mr. Shapiro, I take it that your company is a wholesaler?

A. That's right.

Q. You buy from manufacturers and sell to dealers?

A. That's right.

Q. During this period covered in your testimony, '38 down through '39, did you find that the price of oil burners was going down?

A. Yes. They were getting more competitive.

Q. You mean the higher priced fellows were coming down?

A. Coming down, yes—well, I would say the higher priced fellows were trying to compete with the smaller fellows, and naturally their price would come down a little bit.

Q. You mean the smaller fellows had lower prices?

A. Take a firm like the Quiet-Heet Manufacturing Company, I would say they were pretty low, and other firms had a pretty tough time competing with this type of merchandise.

Q. Did you buy these burners pretty much on a price basis?

A. From Quiet-Heet we did.

1223 Q. How about Herco?

A. Herco was in a little different class. They were a little bit dearer and a better advertised product and it was in better hands.

Q. You were willing to pay a little more for that type then in other words that were advertised?

A. Well, naturally like all jobbers we like to handle the best, and sometimes circumstances beyond our control make it necessary for us to handle all types of equipment in order to meet competition. We liked the Herco line and it was a very good line but the price of their burners—

You see, we sold it as a package, we did not do any installation, and with mechanics, you are familiar with this line, price makes quite a difference, and we used the Herco line for the better jobs and the Quiet Heet for the more competitive.

Q. This morning we had a witness from the Penn Boiler. Which class would you fit them into?

A. Well, about in between. You see the burner market in this area is to the point where it became very very highly competitive and one company was perhaps manufacturing for two, three or four different companies. They gave them a little different coat of paint, and you didn't know what you were buying.

Q. What about Penn?

1224 A. To me it looked like a Herco burner. And sometimes people come in and insist on a certain product. Well, it is our business to get it for them. Now we may have bought ten burners from Penn, for that matter we sold 50 to 75 ABC's that we never touched, strictly on a brokerage basis.

We handled Harvey-Whipple and Bettendorf. I would say we have handled ten or fifteen different makes.

Q. Is that Bettendorf of Bettendorf, Iowa?

A. That's right.

Q. And this competition was the result of lowering the prices all the way down the line?

A. That's right.

Q. Could you give us the names of some of the other companies whose burners you handled?

A. Mastercraft.

Q. Where is it made?

A. Somewhere in New York.

Q. Is it a Harvey-Whipple product?

A. Yes. We have handled those. We also handle the Aldridge.

Q. That is from Wyoming, Illinois?
A. Somewhere out there, yes.
Q. How did Aldrich's price compare?
A. They were also competitive too.
Q. With which type now, the Herco?
1225 A. Well, he manufactured three or four different types of burners, and he had one that was very competitive, and a few that were a little better.
Q. So you were handling burners at various prices?
A. Admittedly. Depending upon what the demand was. We at one time handled the Herco, as I say, and then the demand for Herco slackened down a bit and we naturally didn't handle Herco any more.
Q. Was there any relationship between the type of control, make of control, furnished, and the prices of the burners, that you found?
A. Will you clarify that?
Q. I mean did every example of higher priced burners carry always Minneapolis-Honeywell controls?
A. Most of the burners carried Minneapolis.
Q. You have testified to some, for example, the Herco.
A. Well, we have bought some with Mercoid. But I don't have any evidence here, that is from these records here, to tell you what the difference in price would be between the Minneapolis control with the Herco burner and the Mercoid.
Q. You said that Aldrich was a competitive price burner. Did you say competitive with Quiet-Heet, in that class?
A. I would say on the same basis. They had a competitive burner. They had some at a higher price that
1226 were pretty good burners, but they did make one that was competitive with Quiet-Heet.
Q. In other words, the better burners sold for more money?
A. Well, you can't prove it by me. The mechanic on the job is the judge of that, and when those manufacturers would come in and tell us they had a better product we would try to get more money for it, but if we couldn't we would go back to the more competitive field.
Q. You just bought one you could sell.
A. We are jobbers, we carry everything in any line that is within our bounds, and we may handle 15, even 20, different makes of burner, may have bought one of this, ten of that, and fifteen of that.

Sometimes they would come in and say, like "Well, I want such and such a burner." We would get them that burner, perhaps only buy one of that particular type from those people.

Q. You have bought burners with Minneapolis-Honeywell controls?

A. Yes.

Q. And from other manufacturers?

A. Yes, we have. From Herco.

Q. Fairfax?

A. A little bit.

Q. Did you ever enter into contracts with these
1227 control manufacturers?

A. No, we have not.

Q. That credit memorandum which you referred to as being given to you on May 21, 1938, was to adjust the Herco price of Minneapolis-Honeywell controls and the price you should have gotten then from them?

A. Yes. In other words our price, like most any other business, we buy from the man who represents a certain commodity, and if he is a nice fellow and has a pretty good product, well, we like to see him get the business.

So their representative would come in to us and he would say "Look, you are getting five burners down here. How about sending you a few controls?"

Well, if the price is the same we like to see him get the credit, and he would send it along, and then the price came through and it wasn't the same as Minneapolis, we called their attention to it and they credited it.

Q. And so you got in effect what was a regular jobber's price?

A. That's right.

Mr. Haycraft: That's all.

1228 Mr. Haycraft: I have another witness.

Trial Examiner Sheppard: Mr. Reporter, this gentleman is Mr. H. S. Johnson, 215 Hemingway Avenue, East Haven, Connecticut.

Where did you get this subpoena, Mr. Johnson?

Mr. Johnson: It was received by my wife in East Haven and I was notified in Pittsburgh.

Trial Examiner Sheppard: And the subpoena was forwarded to you from East Haven, Connecticut, to Pittsburgh?

Mr. Johnson: No, I came back to York on Saturday

and met my wife there, but the subpoena was in East Haven.

Mr. Haycraft: Then you went back to East Haven?

Mr. Johnson: Yes.

Trial Examiner Sheppard: You came from East Haven down here then to testify?

Mr. Johnson: That's right.

Trial Examiner Sheppard: And how far is East Haven from here?

Mr. Johnson: It is about 84 miles from New York, and whatever the mileage is from New York to Philadelphia.

Mr. Freeman: 90 miles.

Trial Examiner Sheppard: 174 miles. All right, Mr. Johnson.

1229 H. S. JOHNSON, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Haycraft.

Q. What is your occupation, Mr. Johnson?

A. No occupation.

Q. Did you ever work for the Goodrich Oil Burner Manufacturing Company in New Haven, Connecticut?

A. Yes.

Q. When?

A. 1929 to 1940.

Q. In what capacity were you employed?

A. When I left I was the manager of the company.

Mr. Freeman: What was that last answer?

Mr. Haycraft: "When I left I was the manager of the company".

By Mr. Haycraft:

Q. In what business were they engaged?

A. In the wholesale and retail distribution of Petroleum products, and the manufacture, wholesale and retail sale of oil burners.

Q. What were your duties while you were with them?

A. Purchasing, supervising the activities of the oil burner branch.

1230 Q. What brand or brands of temperature controls did you buy and use on your oil burners?

A. Minneapolis-Honeywell and Mercoid.

Q. When did you first begin to use Minneapolis-Honeywell?

A. I don't know.

Q. How long did you use them?

A. I would say until 1931, 1932, at which time we started using both Mercoid and Minneapolis-Honeywell.

Q. How long did you continue to use both?

A. Until I left the company in 1940.

Q. And over how big a trade area did you sell oil burners wholesale and retail?

A. Over a period of years New England states, northern New York state, Long Island. We came down as far as Baltimore in later years.

Q. Did you have a contract with either the Minneapolis-Honeywell or Mercoid for the purchase of temperature controls?

A. Had a contract with both companies.

Q. Each year?

A. Yes, sir.

Q. Do you recall what bracket you were in with the Minneapolis-Honeywell?

A. The last year I was with the company we were in the one hundred set bracket.

1231 Q. Before that what were you in?

A. I can't tell you. I don't remember.

Q. 100 per cent bracket. Would that be—

Mr. Freeman: Set. You mean sets. Not per cent.

By Mr. Haycraft:

Q. 100 set. Was that their highest?

A. I believe that was their lowest.

Q. Lowest bracket, bracket one?

A. Yes.

Q. Have you any recollection of the price you paid for the controls that you bought?

A. Not accurately. I would say they were in the neighborhood of $18 a set.

Q. How did that price compare with what you were paying Mercoid?

A. There was quite a difference.

Q. Approximately how much difference?

A. We were paying Mercoid if I remember correctly 14.65 a set.

Mr. Gilpatric: Was this 1940?

The Witness: 1939 and '40, yes.

By Mr. Haycraft:

Q. Well, did you make any difference in the price of the burner equipped with Minneapolis-Honeywell as compared with Mercoid?

1232 A. We made an additional charge for a burner equipped with Minneapolis-Honeywell controls.

Q. How much difference?

A. There was a $2.50 charge plus an additional charge for any other controls that were involved.

Q. What do you mean? Extra controls?

A. That's right. Limit controls or extra thermostats.

Q. What would be the circumstances that that would happen? How would that happen, what extra controls were sold?

A. It would depend on an additional relay control, perhaps an aquastat, or something of that nature.

Q. Who were your principal competitors during the years 1930 to 1940?

A. Well, from a wholesale point of view I don't believe we were competitive.

Q. You don't believe you were competitive?

A. We operated mainly throughout lower Connecticut on a retail basis. We had one account in Baltimore that were taking burners, something like 25 at a shot, or something of that nature, and we had a few small dealers scattered throughout New England, but the majority of the burners that we manufactured were consumed in a retail operation of our own, saving three or four bulk plants throughout the state.

Q. Were you familiar with the Quiet-Heet Oil Burners of Newark, New Jersey, during the time you were with Goodrich?

1233 A. Yes, sir.

Q. When did you first learn of that company?

A. About the time they first started wholesaling burners, I would say.

Q. About what year?

A. About '36, I would say.

Q. And are you familiar with their operations subsequent to that?

A. That's right.

Q. Did you have any personal contact with any of their representatives?

A. The only contact I had with the Quiet-Heet Manu-

facturing Company, one day I was approached by a man representing himself as a representative of Quiet Heat, and he tried to interest our company in a low priced burner.

Q. What do you mean by low priced burner?

A. Well, a burner that he said that we could sell to the retail trade cheaper than we could sell our own burner.

Q. Do you recall the price that he quoted on that occasion?

A. No, I don't.

Q. What price were you getting for your burners, equipped with controls?

A. You mean from a retail point of view?

Q. Retail and wholesale.

A. Towards the end they were flying around so
1234 fast that I hesitate to answer, but the last price that we had from a retail point of view was $175 installed. Wholesale prices were running around—I had one account that we sold at 52.50.

Q. Was that equipped with controls?

A. That's right.

Q. Do you remember whether or not the price that you got from Quiet-Heet was equipped with controls?

A. There was no quotation made from Quiet-Heet because we told them that we were not interested.

Q. Did he tell you what controls were on the burners that he attempted to sell you?

A. Yes. The burner was offered under the Minneapolis-Honeywell trade name. By that I mean this, there was more emphasis placed on the type of controls that the burner was furnished with than there was on the burner itself.

Trial Examiner Sheppard: Read the last answer of the witness please.

(Answer read.)

Trial Examiner Sheppard: All right.

By Mr. Haycraft.

Q. Do you recall when it was that this offer was made to you?

A. I would say it was about 1938. I cannot be any more specific than that.

1235 Mr. Haycraft: That's all. You may cross-examine.

Trial Examiner Sheppard: Any cross?

Mr. Freeman: Yes.

Cross-Examination by Mr. Freeman.

Q. You were predominantly engaged in the retail business?

A. I would say about 85 per cent of our activity was retail.

Q. And in this retail business of yours who were your competitors?

A. Well, you mean company names?

Q. Yes.

A. There was Power Equipment—

Q. Where were they located?

A. New Haven.

Q. And what burner were they selling?

A. Chrysler.

Q. How did their price compare with your price of $175?

A. Their price was higher.

Q. Their price was higher?

A. That's right.

Q. And do you know whose controls they had on their burner?

A. I can't say.

Q. Do you know whether they were Minneapolis-1236 Honeywell controls?

A. I would rather not say because I don't know.

Q. All right. Now, who else were you in competition with?

A. Connecticut Heat and Fuel Company handling Petrol burners.

Q. Is that Petroleum Heat and Power?

A. That's right.

Q. How did their price compare with your price?

A. Their price was slightly higher.

Q. Do you know whose controls they handled?

A. I believe they would furnish the burner equipped with Minneapolis-Honeywell or Mercoid.

Q. Do you know if they had any difference in price between the Minneapolis-Honeywell and the Mercoid equipped?

A. No.

Q. But you do know that their price was a little higher than your $175 price?

A. That's right.

Q. And who else were you in competition with?
A. I can't remember what what fellow called himself but he handled the Silent Glow Oil burner.
Q. And is that the Silent Glow Company up at Hartford?
A. That's right.
Q. And do you know how that price compared with your price?
1237 A. By the way, that name was Martin Heating and Engineering Company.
Q. That is, the dealer handling Silent Glow.
A. That's right.
Q. Where were they located?
A. They are out of business now.
Q. I mean when you were in competition with them.
A. They were located in New Haven.
Q. How did their price compare with your price?
A. It ran about the same.
Q. And whose controls did they have, if you know?
A. I am afraid I don't.
Q. Do you have any Sears, Roebuck stores around your territory?
A. Yes.
Q. And did you have any oil burner competition from Sears, Roebuck?
A. It wasn't too great.
Q. But they offered for sale oil burners?
A. That's right.
Q. And they also offered them for sale complete, that is, installed?
A. Yes.
Q. And do you know how that installed price compared with your installed price?
1238 A. It ran about the same.
Q. And do you know whose controls they used?
A. I think they were using Mercoid.
Q. Now, are there any other companies up there that you were out competing with?
A. There are a lot of small companies. Every plumber in town was handling an oil burner, and there was a number of different Quiet Heat dealers up there, either handling them under their own name or under the name of Quiet Heat.
Q. And these plumbers and others that were installing

oil burners at a variety of prices, there wasn't any fixed price?

A. There was no bottom.

Q. And they went up how high?

A. Well, they were always very careful to be under any quotation that any legitimate oil burner dealer would make.

I would say under no circumstances were their prices higher than $160.

We are speaking of base prices now.

Q. Now, how about these oil burner companies that sold at higher prices, how high up did they go?

A. There was one company that was selling as high as $275, the Ray Products.

Q. Ray Products?

A. Yes.

1239 Q. Whose products was that?

A. Ray Company.

Q. Is that the Ray oil burner?

A. Yes.

Q. And they went down as low as $160?

A. No, they didn't—this particular company?

Q. No, general competition.

A. They went down to about $125.

Q. So so far as retail price or price paid by the consumer or purchasing public in your own territory, the oil burner prices ranged from about $125 installed up to about $275?

A. That's right.

Q. And would you say that was for comparable heating, that is, for a five or six room house?

A. Yes.

Q. Did you ever run into any competition from an Aldrich made burner?

A. I know of the burner. There was no competition up there at the time.

Q. Would you say that there were fifteen or twenty dealers in oil burners in your own locality?

A. I would say so, yes.

Q. And around almost any range of price you were looking for?

A. Yes.

1240 Q. Now, in this wholesale business of yours at 32.50, that included controls?

A. That's right.

Q. And those were M-H controls?

A. Those were Mercoid controls.

Q. Did you have a different installed price when you were selling at retail for Minneapolis-Honeywell controls than when you used Mercoid controls?

A. Yes. We had an additional charge for Minneapolis-Honeywell controls.

Q. Well, on the retail price about how much additional did you get for Minneapolis-Honeywell controls?

A. If my memory is correct I think it was $15.

Q. In other words you were paying $18 per set for Minneapolis-Honeywell controls and about 14.65, or a difference of 3.35, between your Minneapolis cost and your Mercoid cost?

A. That's right.

Q. And then when it came to retail selling you added about $15 on?

A. Yes.

Trial Examiner Sheppard: Is that for installation?

Mr. Freeman: No, that is whenever the purchaser or consumer or purchasing public wanted a set of controls of Minneapolis-Honeywell make, the company included 1241 an additional $15.

Trial Examiner Sheppard: I see.

By Mr. Freeman:

Q. Now, I made a statement to the Examiner in answer to his question. That is a correct statement, is it not?

A. Yes.

Q. Now, as far as the physical work of installing, there would not be any additional expense?

A. No difference at all.

Q. So wherever you sold an oil burner with Mercoid controls at $175, so far as your cost of physically installing that burner you could have just as well have used Minneapolis-Honeywell controls?

A. That's right.

Q. And you were able to get in some cases the additional $15 for Minneapolis-Honeywell controls?

A. We got it in all cases.

Q. You got it in all cases?

A. That's right. If people wanted Minneapolis-Honeywell controls our additional charge of $15 was perfectly justified.

Mr. Haycraft: May I ask a question?

Mr. Freeman: Yes.

Mr. Haycraft: You don't mean by that answer that all of your controls were Minneapolis-Honeywell controls?

1242 The Witness: No.

By Mr. Freeman:

Q. Now, did you ever sell at wholesale with Minneapolis-Honeywell controls on?

A. Yes, sir.

Q. By the way, did you ever run into the Braden Engineering Company?

A. Yes. We were Braden dealers.

Q. Oh, you were handling the Braden burner?

A. That's right.

Q. In addition to making your own burner?

A. No, that was previous to making our own burner. Braden had a dealer set-up whereby he would sell you a dozen burners or twenty-four burners dissambled, then the dealer assembled them and sold them under his own trade name.

Q. Then when you began making your own burner you did that because you thought you could make them cheaper than from what you could buy them from Braden?

A. That's right.

Q. Then you were in competition thereafter with other dealers in your community with the Braden burner?

A. That's right.

Q. Now, how did Braden's price compare with your price?

A. They didn't have a dealer after we started making our own burner. We had a factory in Providence and

1243 Braden's factory was in Providence and our burner was in competition with about every burner that was ever manufactured in the country, I guess.

Q. Now, how about Providence where you had to meet Braden's competition? I would like to have you tell us how Braden compared price-wise with your price.

A. They were about the same.

Q. So your going into the oil burner manufacturing business was because you thought you could make them cheaper than you could buy them from somebody else?

A. It wasn't a manufacturing proposition. It was an

assembling proposition. We didn't make anything, we just bought a lot of parts and put them together.

Q. You bought standard parts like Mercoid controls or Minneapolis-Honeywell controls?

A. That's right. And we had our castings made for us in a foundry in Connecticut, and when we got everything, we put it together.

Q. Any oil burner you sold, however, went out under your own name?

A. That's right.

Q. And you gave it the service that was required?

A. That's right.

Q. You didn't look to anybody else for service?

A. That's right.

1244 Q. Do you have any idea how the controls purchased from Minneapolis-Honeywell compared percentage-wise with controls that you bought from Mercoid or any of the other companies?

Mr. Haycraft: Do you mean in volume?

Mr. Freeman: Yes.

The Witness: I cannot recall exactly.

By Mr. Freeman:

Q. Just your best estimate.

A. Our volume by far was with Mercoid rather than Minneapolis-Honeywell. I would say perhaps 75 per cent Mercoid.

Q. In other words, 75 per cent Mercoid and 25 per cent Minneapolis-Honeywell?

A. That's right.

Q. And is that true from about 1935 until about up to pre-Pearl Harbor?

A. That is true from about 1936 I would say.

Q. Well, during 1936 the percentage ran about that way?

A. Yes.

Q. And then for each year thereafter—

A. Until 1940.

Q. That is, 75 Mercoid—

A. Roughly 75.

Q. And 25 per cent—

A. That's right.

Q. You had contracts with Minneapolis-Honey-

1245 well. Is that correct?

A. Yes.

Q. You never looked upon that contract as keeping you from buying controls from anybody else?

A. Minneapolis-Honeywell made that point very clear. It was generally known in the trade that a company would contract with two or three control manufacturers. You were not obligated to take the number of controls that you contracted for.

Q. And the Minneapolis-Honeywell representative made that clear to you?

A. Yes.

Q. So when you signed up you knew that you were free to buy anywhere else?

A. That's right.

Q. And you followed that practice?

A. That's right. We contracted with both companies.

Q. You had contracts with both companies at the same time?

A. Yes.

Mr. Freeman: That's all.

Redirect Examination by Mr. Haycraft.

Q. Your contract with Minneapolis-Honeywell had provision as to the number of sets that you expected to take?

1246 A. We were asked to anticipate our control requirements.

Q. For instance, I show you Commission's Exhibit 200, which is a contract used by one burner manufacturer, and I ask if that is similar to the one you had?

A. That's right.

Q. And that blank space where the number of sets is inserted, is that the way with you?

A. There was a figure inserted in there.

Q. A figure?

A. In our case it was a hundred sets.

Q. There wasn't any language saying season's requirements or anything like that?

A. No.

Q. Now, with this Quiet-Heet how did the price wholesale and retail compare with yours?

A. You mean on the dealer's quotations?

Q. Yes.

A. They were always below us on Quiet-Heet.

Q. Substantially?

A. Substantially.

Q. Do you have any idea of the price quoted?
A. $125 retail.
Q. Were they equipped with Minneapolis-Honeywell controls?
A. I assume they were. I couldn't state concretely.
Q. That is what they offered you?
1247 A. Yes.
Q. How do you account for the fact that you were able to get $15 more for oil burners equipped with Minneapolis-Honeywell than with Mercoid?
A. Minneapolis-Honeywell is advertised in a number of publications that are very well circulated throughout the homes, and we took the position that if people insisted upon Minneapolis-Honeywell controls that they should pay for it.
Q. In other words, you figured there was a demand created by the advertising.
A. Sure. If we could make a few dollars due to a customer's insistence, why, we certainly were there to do it.
Q. Was there any time during the history of your business that you did not have a demand for a certain number of Minneapolis-Honeywell controls?
A. No, sir.
Q. There was that demand.
A. That's right. Some dealers would not take burners without Minneapolis-Honeywell controls.
Mr. Haycraft: That is all.

Recross Examination by Mr. Freeman.

Q. You never had any hesitancy about standing back of one of your burners equipped with Mercoid controls, from the standpoint of performance?
1248 A. Absolutely not.
Q. And from the standpoint of performance the Mercoid did just as good a job as the Minneapolis-Honeywell controls?
A. Under certain conditions they did a better job.
Q. That is your opinion now.
A. Absolutely. I will back that up by this statement, that all Mercoid controls are on an inclosed switch, and under certain conditions those seem to operate better than open contacts.
Q. Your company then as a matter of fact were really pushing or had standardized on Mercoid controls?

A. That's right.
Mr. Freeman: That's all.

Redirect Examination by Mr. Haycraft.

Q. Well, how about the guarantee of service or otherwise by your Quiet-Heet competitors? You guaranteed your burner for a year?
A. That's right.
Q. Did Quiet-Heet give that guarantee?
Mr. Freeman: We have already had that answer by Mr. Lapidus of Quiet-Heet.
Mr. Haycraft: This man is a dealer.
Mr. Freeman: You want to talk about what dealers guarantee here as distinguished from the Quiet-Heet
1249 guarantee?
The Witness: Anyone selling a Quiet-Heet burner had to give a one year guarantee, to be competitive.
Mr. Haycraft: That's all.
Trial Examiner Sheppard: Find your voucher right here (indicating).
I am giving you three days, Mr. Johnson, one coming, one down here, and one back.
The Witness: Yes.
Trial Examiner Sheppard: Anything further?
Mr. Haycraft: I have nothing further to offer at this time. I would like to reserve the right to go over the record and in case I do find anything I would like the privilege of adding it at the first hearing of Respondents if possible.
Subject to that I am ready to rest my case at this time.
Trial Examiner Sheppard: Well, if you have anything I will follow the same rule we have many times before. If you have anything further I will let you put it in on the day before the Respondents start their case.
Anything else?
Mr. Gilpatric: Mr. Examiner, shouldn't we have a little more time than that on anything he is going to offer further?
1250 Mr. Haycraft: Well, I think that is fair.
Mr. Gilpatric: I think we should have at least two weeks.
Mr. Haycraft: If I find there is anything I will be glad to give at least two weeks notice of the issue, and, where it is, Chicago, St. Louis, whatever it is. I don't think there is anything. I cannot think of anything now.

Mr. Gilpatric: Mr. Examiner, I believe we have explained to you off the record that Mr. Freeman is counsel for this Respondent in a consolidated case which is scheduled for argument, at least, the present indication is, before the Supreme Court, early in November, and since that case involves issues that are here present in this case and since Mr. Freeman is going to be engaged first in preparing his brief and then in arguing the case, up until the middle of November, we respectfully request that the time of reconvening to hear the Respondents' evidence be fixed not earlier than that time.

Trial Examiner Sheppard: All right, gentlemen, I will take that into consideration. It is my purpose in all these cases to set definite dates.

Mr. Gilpatric: May I say one thing off the record?

Trial Examiner Sheppard: Yes. Off the record.

(Discussion off the record.)

1251 Trial Examiner Sheppard: Will you read the last.

(Record read.)

Trial Examiner Sheppard: (Continuing.) And having in mind what you have just stated about the Argument before the Supreme Court on the matter of the Freeman patent and the Cross patent too—isn't it—I am going to set the resumption of the case on November 16, 1943, with the understanding if you need more time you will let me know by letter, and then if Mr. Haycraft by that time thinks he wants another hearing we will give you all two weeks notice, and I will set that date, and also communicate with you as to where you want to hold hearings in this case and I will arrange it for you.

Mr. Gilpatric: That is fine.

Mr. Freeman: So that if we do not hear from Mr. Haycraft by November 1st we can then assume that he has rested his case in behalf of the Commission.

Mr. Haycraft: Yes.

Trial Examiner Sheppard: I think so and then you can get up your schedule and I will, through the Chief Trial Examiner's office, make all arrangements.

And with that understanding, Mr. Reporter, we will adjorn the Hearing in Philadelphia.

(Whereupon, at 3:40 o'clock p. m. of Monday, Sep-
1252 tember 20, 1943, the hearing in the above-entitled matter was adjourned to November 16, 1943, as above noted.)

1253 Room 1123,
New Post Office Building,
Chicago, Illinois,
November 29, 1943.

Met, pursuant to notice, at 10 a. m.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Messrs. Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and Paul J. Chase, Esq., 15 Broad Street, New York, New York, and Bair & Freeman, by Will Freeman, Esq., 135 South La Salle Street, Chicago, Illinois, Attorneys for respondent.

1254 PROCEEDINGS.

Trial Examiner Sheppard: Miss Reporter, we will convene the hearing in the matter of the Minneapolis-Honeywell case, Docket No. 4920, ordered by the Examiner to reconvene in the city of Chicago at the request of the respondents on this date, the 29th of November, 1943, at 10:00 o'clock in the morning.

Show the appearances as follows: Mr. Everett F. Haycraft appears for the Commission, and Mr. Will Freeman and Mr. R. L. Gilpatric and Mr. Chase for the respondents.

All right, gentlemen, are you ready to proceed with the case? Mr. Freeman, you may go ahead as you see fit.

Mr. Freeman: I will call Mr. Tate.

V. R. TATE, was thereupon called as a witness for the respondent and, having been first duly worn, testified as follows:

Direct Examination.

Trial Examiner Sheppard: Mr. Tate, you have been sworn in this case, have you?

The Witness: Yes.

Trial Examiner Sheppard: What is your address?

The Witness: 500 West Oklahoma, Milwaukee.

Trial Examiner Sheppard: Let the record show
1255 that Mr. V. R. Tate, having been previously sworn in this case, appears now at the request of the respondent. Proceed, Mr. Freeman.

By Mr. Freeman:

Q. Mr. Tate, you have already testified in response to a subpoena served upon you by the Commission; that is correct, is it not?

A. That is correct.

Q. And you are an officer of Perfex Corporation, a competitor of the respondent in this case, correct?

A. That is correct.

Q. You have had served upon you a subpoena requesting you to produce contracts, that is, sales agreements as between your company and some 88 identified oil burner manufacturers, that is, contracts with those companies, if you had a contract.

Now, have you produced and do you have here those contracts?

A. I have.

Q. Will you please make them available to me?

A. The photostatic copies are there.

Q. Now, you have given me photostatic copies and you have the originals in your possession, is that correct?

A. That is correct.

Q. And the originals, of course, are to be avail-
1256 able to Mr. Haycraft?

A. Yes.

Mr. Freeman: They will be available to you for the purpose of any cross-examination. We, however, will introduce photostatic copies, if that is agreeable with counsel for the Commission.

Mr. Haycraft: No objection to the photostatic copies.

By Mr. Freeman:

Q. Now, Mr. Tate, can you tell me, or give me the names of the companies that Perfex had an agreement with for the year 1937?

A. Do you want the full name?

Q. Yes, please.

A. Acme Tool & Gauge Company; Brown Oil Burner Equipment Company; Burner Parts & Service Corporation.

Q. Is that also known as the Pennsylvania Company?
A. I believe their name was changed in 1939 to Penn Oil.
Mr. Haycraft: Penn Oil & Burner Manufacturing Company.
Mr. Freeman: Boiler & Burner.
Mr. Haycraft: Boiler & Burner.

By Mr. Freeman:

Q. Proceed, Mr. Tate.
A. Citro Oil Burner Corporation; The Heil Company.
1257 Q. That is of Milwaukee, Wisconsin?
A. Correct. Hoban Manufacturing Company.
Mr. Haycraft: What is that last one?
The Witness: Hoban, H-o-b-a-n. Standard Products Company; Timken Detroit Axle Company; Wisconsin Oil Burner Company.
Mr. Freeman: We offer in evidence as Respondent's Exhibit 14 the agreement with Acme Tool & Gauge.
Trial Examiner Sheppard: Mark it for identification.
(The paper referred to was marked Respondent's Exhibit 14 for identification.)
Mr. Freeman: We are offering it now, if it is agreeable.
Trial Examiner Sheppard: All right, you may offer them as you go along.
Mr. Freeman: We offer in evidence as Respondent's Exhibit 15 the agreement with Brown Oil Burner Equipment Company.
Trial Examiner Sheppard: Mark that as Respondent's Exhibit 15.
(The paper referred to was marked Respondent's Exhibit 15 for identification.)
Mr. Freeman: We offer in evidence as Respondent's Exhibit 16 the agreement with Burner Parts & Service Corporation.
1258 Trial Examiner Sheppard: Mark that as Respondent's Exhibit 16.
(The paper referred to was marked Respondent's Exhibit 16 for identification.)
Mr. Freeman: We offer as Respondent's Exhibit 17 the agreement with Citro Oil Burner Corporation.
Trial Examiner Sheppard: Let it be marked.
(The paper referred to was marked Respondent's Exhibit 17 for identification.)

Mr. Freeman: We offer as Respondent's Exhibit 18 the agreement with The Heil Company.

Trial Examiner Sheppard: Let it be marked.

(The paper referred to was marked Respondent's Exhibit 18 for identification.)

Mr. Freeman: We offer as Exhibit 19 the agreement with Hoban Manufacturing Company.

Trial Examiner Sheppard: Let it be marked.

(The paper referred to was marked Respondent's Exhibit 19 for identification.)

Mr. Freeman: We offer as Exhibit 20 the agreement with Standard Products Company.

Trial Examiner Sheppard: Let it be marked.

(The paper referred to was marked Respondent's Exhibit 20 for identification.)

Mr. Freeman: We offer as Respondent's Exhibit
1259 21 the agreement with Timken-Silent Automatic Division of the Timken Detroit Axle Company; and as Respondent's Exhibit 22 the agreement with Wisconsin Oil Burner Company.

Trial Examiner Sheppard: Let them be marked.

(The papers referred to were marked Respondent's Exhibits 21 and 22 for identification.)

Trial Examiner Sheppard: All right, any objection, Mr. Haycraft, to the exhibits 14 to 22, inclusive?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let them be accepted into the record.

(The documents referred to, heretofore marked for identification RESPONDENT'S EXHIBITS 14, 15, 16, 17, 18, 19, 20, 21, and 22, were received in evidence.)

By Mr. Freeman:

Q. Now, in addition to the companies that you have just referred to, where your company had an agreement with respect to sales, did you, as a matter of fact, sell oil burner controls to other companies in the year 1937, and by "other companies", I limit myself to those companies enumerated in the subpoena?

A. We did.

Q. And would you mind giving me a list of the companies that you sold oil burner controls to, other than those that you had written contracts with?

1260 A. Campbell Machinery; Carlson Brothers Tool & Machine Company; Carter-Korth Oil Burner Com-

pany; Concord Oil Corporation; Electrol, Incorporated; Fairfield Oil Heating Company; General Oil Burner Corporation; General Oil Heating Corporation; Gold Star Oil Burner Manufacturing Company; Harvey-Whipple, Incorporated; Hyle, H-y-l-e, Oil Burner Company.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record. Proceed, Mr. Witness.

The Witness: La Grace, L-a-G-r-a-c-e Oil Burner Company, but in our records it appears as L-a-G-a-c-e; Liberty Research Lab., Incorporated; Mohawk Oil Burner Manufacturing Company; National Devices Company; Petroleum Heat & Power Company; Volcano Burner Corporation; Wayne Oil Burner Company; Westchester Home Equipment Company; York Oil Burner Company, Incorporated.

By Mr. Freeman:

Q. Now, have you prepared a schedule for the year 1937 with respect to those companies that you have contracts with and the other companies that you have just mentioned in your last answer, setting forth the prices at which you either sold oil burner controls to such companies or offered to sell controls to such companies?

1261 A. I have.

Q. And is that the paper that you have in front of you at the present moment?

A. That is correct.

Q. And I understand that that lists the companies that you have referred to here this morning and the particular type of thermostats, limit controls, and primaries, and the prices given to each of the companies set opposite each of their names, is that correct?

A. That is correct.

Trial Examiner Sheppard: Is that for 1937?

Mr. Freeman: For the year 1937, your Honor.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Now, Mr. Tate, in 1937 it is a fact that your company sold controls in sets, that is, a primary, a room thermostat, and a limit control?

A. That is correct.

Q. And do I understand that in the year 1937 you gave an overall price for those three instruments?

A. That is correct.

Q. And in some instances—

Trial Examiner Sheppard: You mean an inclusive price, is that it?

Mr. Freeman: An inclusive price.

1262 Trial Examiner Sheppard: An inclusive price.

By Mr. Freeman:

Q. And in some instances that inclusive price was a little less than what the price would be for the three individual units, is that correct?

A. That is correct.

Q. And I note upon the paper that you have just referred to, which we will mark for identification as Respondent's Exhibit 23, that you have under the heading of "Sets", your No. 100 thermostat, a limit control, and your No. 5200 primary control, and a given set of figures. Do those figures disclose the prices at which your company sold or offered for sale sets of controls in the year 1937?

A. That is correct.

Q. And I take it that is likewise true with the next three columns, which have to do with other types of thermostats and intermittent ignition primaries, as distinguished from constant ignition primaries, is that correct?

A. That is correct.

Q. And I take it where there is a blank space in these columns, having to do with set prices, that the low price to any of such companies, where there was a blank space, was made up of the particular three controls purchased, is that correct?

A. Where there is a blank space it was because
1263 I did not find a quotation or any sales at that particular price.

Q. So that the composite picture that we have here for the year 1937 is the result of your checking recently your books and records with respect to the particular companies mentioned and contracts that you had with such companies as well as quotations and sales invoices, and the like, is that correct?

A. That is correct. I checked our office records and did some checking on the invoices, although that is a tremendous job, and I did not check them thoroughly.

Q. Well, the record that you have here for the year 1937 was made up in the usual and ordinary course of your business, or as you would make up any study of your busi-

ness for the year 1937, as the result of the subpoena issued to you?

A. That is correct.

Mr. Freeman: We offer in evidence as Respondent's Exhibit 23 the tabulation for the year 1937 as made by the witness Tate.

Trial Examiner Sheppard: Do you want time to examine on that?

Mr. Haycraft: Yes.

Trial Examiner Sheppard: All right. The Examiner won't rule on this now until Mr. Haycraft has studied it and has had a chance to examine on it.

Mr. Haycraft: May I ask the witness a couple of
1264 questions on the voir dire?

Trial Examiner Sheppard: Yes.

By Mr. Haycraft:

Q. Are all these items in this exhibit comparable to items sold by the Minneapolis-Honeywell Company, or competitive—comparable to or competitive with?

A. The list includes both constant and intermittent ignition oil burner primary controls, which are sold to the trade to accomplish the same purpose as those—

Q. That is, 5200 and 5500?

A. And 5500, yes. The limit controls are standard limit controls, and are sold, accomplishing the same purpose as the standard limit controls sold by our competitors.

Likewise, the room thermostats are for controlling the room temperature, and they are sold for the same purpose as those of our competitors.

By Mr. Freeman:

Q. By your competitors, you mean Minneapolis-Honeywell, the respondent in this case?

A. Minneapolis-Honeywell and others.

By Mr. Haycraft:

Q. Could these items be used in combination with Minneapolis-Honeywell controls? For instance, could the thermostats be used with the Minneapolis-Honeywell
1265 limit controls and primary controls?

Mr. Freeman: That is objected to as improper cross-examination, and for the further reason that this witness testified at length at Milwaukee with respect to the comingling of controls, some of which testimony was testified to over the objection of counsel for the Commission.

Mr. Haycraft: The purpose of this questioning is to see whether or not there is any objection to the exhibit. If the thermostats are as I anticipate they are, then I may not have any objection.

Mr. Freeman: Well, go right ahead.

Trial Examiner Sheppard: Go ahead and answer, Mr. Witness.

The Witness: The series 100 thermostat can be connected up to control the majority of Minneapolis-Honeywell primary controls. That involves a change in the wiring, and so forth, that I testified to in Milwaukee.

By Mr. Haycraft:

Q. What about the 150 listed in the second column?

A. The 150 is a heater type thermostat, which includes a resistance element, in series with the contacts, and has to be balanced against the relay coil that it controls, and would not control the Minneapolis-Honeywell primary controls properly without, you might say, factory recalibration.

1266 Q. So the 150 could not be very well used, then, with the Minneapolis-Honeywell?

A. That is correct, as manufactured and sold by us, it could not be substituted.

Q. I take it that the sets, then, are just combinations of the respective—well, that is all right.

I have no objection to the exhibit, Mr. Examnier, except those columns referring t, thermostat No. 150, which is the third column, and the eighth and tenth columns.

Trial Examiner Sheppard: All right, the Examiner accepts the exhibit, exclusive of the matter Mr, Haycraft mentioned, but will give it study.

Mr. Freeman: Just so that the record is striaght, Mr. Tate, I will ask this question:

By Mr. Freeman:

Q. Isn't it a fact, Mr. Tate, that your No. 150 thermostat, when used with your No. 5500 primary, and the limit control, serves exactly the same function in connection with controlling an oil burner that an M.H. T-11 thermostat, a limit control, and the R-117 serves?

A. That is correct.

Q. They are sold in competition, are they not?

A. That is correct.

Mr. Haycraft: Then I withdraw my objection to those

columns where they are sold in combination. I only
1267 object to the third column.

Trial Examiner Sheppard: All right. You may accept that exhibit, Miss Reporter.

(The document referred to was marked RESPONDENT'S EXHIBIT 23 and received in evidence.)

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record now.

By Mr. Freeman:

Q. As a matter of fact, Mr. Tate, the thermostats which are No. 100, which you said might be used with Minneapolis-Honeywell primary, provided, of course, the wiring was changed, as you testified at Milwaukee, those thermostats sell for less money, do they not, than your No. 150?

A. That is correct.

Q. And that has been true throughout the history of your business, starting with 1937, right on up to date?

A. That is correct.

Q. Or as long as you have had both thermostats in your line?

A. That is correct?

Q. So that from a money standpoint, the No. 100 thermostat actually sells for less money than your 150 thermostat?

1268 A. That is correct.

Q. And do you know, Mr. Tate, how your No. 100 thermostat compares in price, relatively speaking, with the Honeywell T-11 thermostat? Is it higher or lower?

A. It is my impression that it is lower, but I have no actual facts.

Q. Well, the thermostat that your company features is comparable to M.H.'s T-11 thermostat, and that is really your 150?

A. That is correct, because that is a heater thermostat, and the Minneapolis T-11 is also a heater thermostat.

Q. Now, for the year 1938 will you produce the contracts that your company had with the oil burner manufacturers mentioned in the subpoena, listing them just as you did in connection with your answer for the year 1937?

A. Acme Tool & Gauge Company; Automatic Burner Corporation; Carlson Brothers Tool & Machine Company;

Cleveland Steel Products Corporation; Fairfield Oil Heating Company; General Oil Heating Company; Hart Oil Burner Corporation.

Mr. Haycraft: What was that last one?

The Witness: Hart Oil Burner Corporation; Harvey-Whipple, Inc.; The Heil Company; Hoban Manufacturing Company; Hupp Oil Burner Company; Muehlbach, M-u-e-h-l-b-a-c-h, Manufacturing Company; Reif-Rexoil, Incorporated; Scott-Newcomb, Incorporated; Stand-
1269 ard Products Company; Volcano Burner Corporation; Wayne Oil Burner Company; Westchester Home Equipment Company; Wisconsin Oil Burner Company.

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Freeman:

Q. And you have here the originals of each of the agreements that you have just referred to?

A. I have.

Q. And those were contracts under which your company did business with the respective names enumerated, for the year 1938, is that correct?

A. That is correct.

Q. And those contracts disclose the price, terms of sale, and other conditions with respect to your dealings as between those individual companies and your company?

A. That is correct.

Q. And, of course, that is true also for the year 1937?

A. That is correct.

Mr. Freeman: We offer in evidence as Respondent's Exhibit 24 the agreement with Acme Tool & Gauge Company for the year 1938.

(The document referred to was marked Respond-
1270 ent's Exhibit 24 for identification.)

Mr. Freeman: We offer in evidence as Respondent's Exhibit 25 the agreement with Automatic Burner Corporation for the year 1938.

(The document referred to was marked Respondent's Exhibit 25 for identification.)

Mr. Freeman: We offer in evidence as Respondent's Exhibit 26 the agreement with Carlson Brothers Tool & Machine Company for the year 1938.

(The document referred to was marked Respondent's Exhibit 26 for identification.)

Mr. Freeman: I offer in evidence as Respondent's Exhibit 27 the agreement with Cleveland Steel Products Corporation for the year 1938.

(The document referred to was marked Respondent's Exhibit 27 for identification.)

Mr. Freeman: I offer in evidence as Exhibit 28 the agreement with Fairfield Oil Heating Company for the year 1938.

(The document referred to was marked Respondent's Exhibit 28 for identification.)

Mr. Freeman: I offer in evidence as Exhibit 29 the agreement with General Oil Heating Company.

(The document referred to was marked Respondent's Exhibit 29 for identification.)

1271 Mr. Freeman: I offer in evidence as Respondent's Exhibit 30 the agreement with Hart Oil Burner Corporation.

(The document referred to was marked Respondent's Exhibit 30 for identification.)

Mr. Freeman: I offer in evidence as Exhibit 31 the agreement with Harvey-Whipple, Incorporated, for the year 1938.

(The document referred to was marked Respondent's Exhibit 31 for identification.)

Mr. Freeman: I offer in evidence as Respondent's Exhibit 32 the agreement with the Heil Company for the year 1938.

(The document referred to was marked Respondent's Exhibit 32 for identification.)

Mr. Freeman: I offer in evidence as Respondent's Exhibit 33 the agreement with Hoban Manufacturing Company for the year 1938.

(The document referred to was marked Respondent's Exhibit 33 for identification.)

Mr. Freeman: I offer in evidence as Respondent's Exhibit 34 the agreement with Hupp Oil Burner Company for the year 1938.

(The document referred to was marked Respondent's Exhibit 34 for identification.)

Mr. Freeman: I offer in evidence as Exhibit 35
1272 the agreement with Muehlbach Manufacturing Company, the name of which was later changed to the Marquette Electric Company.

(The document referred to was marked Respondent's Exhibit 35 for identification.)

Mr. Freeman: I offer in evidence as Respondent's Exhibit 36 the agreement with Reif, Rexoil, Inc., for the year 1938.

(The document referred to was marked Respondent's Exhibit 36 for identification.)

Mr. Freeman: I offer in evidence as Respondent's Exhibit 37 the agreement with Scott-Newcomb, Inc., for the year 1938.

(The document referred to was marked Respondent's Exhibit 37 for identification.)

Mr. Freeman: I offer in evidence as Exhibit 38 the agreement with Standard Products Company for the year 1938.

(The document referred to was marked Respondent's Exhibit 38 for identification.)

Mr. Freeman: I offer in evidence as Respondent's Exhibit 39 the agreeemnt with Volcano Burner Corporation for the year 1938.

(The document referred to was marked Respondent's Exhibit 39 for identification.)

Mr. Freeman: I offer in evidence as Respondent's
1273 Exhibit 40 the agreement with Wayne Oil Burner Company for the year 1938.

(The document referred to was marked Respondent's Exhibit 40 for identification.)

Mr. Freeman: I offer in evidence as Respondent's Exhibit 41 the agreement with Westchester Home Equipment Company for the year 1938.

(The document referred to was marked Respondent's Exhibit 41 for identification.)

Mr. Freeman: I offer in evidence as Respondent's Exhibit 42 the agreement with Wisconsin Oil Burner Corporation for the year 1938.

(The document referred to was marked Respondent's Exhibit 42 for identification.)

Mr. Freeman: May I have your ruling on those exhibits, your Honor?

Trial Examiner Sheppard: You have offered them all, have you?

Mr. Freeman: Yes, I have offered them.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let them be accepted as Respondent's Exhibits 24 to 42, inclusive.

(The documents referred to, heretofore marked for identification RESPONDENT'S EXHIBITS 24, 25,
1274 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 42, were received in evidence.)

By Mr. Freeman:

Q. In addition to these companies with which your company conducted its business by virtue of the agreements that I have just offered in evidence you actually made sales and gave quotations for sales in connection with oil burner controls to other companies during the year 1938, is that correct?

A. That is correct.

Q. Would you give me a list of at least those companies with which your company did business in the year 1938, limiting, of course, the question to those companies enumerated in the subpoena which was served upon you in this case?

A. We either sold or offered to sell controls to the following companies in 1938:

Burner Parts & Service; Electrol, Incorporated; Gold Star Oil Burner Manufacturing Company; Herco Oil Burner Corporation; National Devices Company.

Mr. Haycraft: Did you say Herco there?

The Witness: Yes.

Timken Detroit Axle Company; Williams Oilomatic Company; York Oil Burner Company, Inc.

By Mr. Freeman:

1275 Q. And have you prepared a sheet for the year 1938 similar in form to what you have prepared for the year 1937, showing the various thermostats, limit controls and primaries and the respective prices at which you offered the companies enumerated upon the sheet, which we now identify as Respondent's Exhibit 43?

(The document referred to was marked Respondent's Exhibit 43 for identification.)

By Mr. Freeman:

Q. Is that correct?

A. That is correct.

Q. Respondent's Exhibit 43 for identification was pre-

pared in substantially the same manner as Respondent's Exhibit 23?

A. That is correct.

Q. And there you likewise listed the respective prices for the various items, correct?

A. That is correct.

Q. Now, in connection with the prices for sets of controls for the year 1938, I note that your sets for that year omit the limit controls. Is that correct?

A. That is correct.

Q. So that the prices under the columns entitled "Sets" are for a primary and a thermostat in each case?

A. That is correct.

1276 Q. So that if you wanted to get the price for three controls, that is, a primary, a thermostat, and a limit control, all you would have to do is to take the figures of the columns under "Sets", and add to it the particular limit control price which we find in the fourth column on Exhibit 43, correct?

A. That is correct.

Q. And your No. 100 thermostat was used interchangeably with your 5200 primary as well as your 5500 primary, is that correct?

A. That is correct.

Q. And likewise your 150 thermostat could be used with either the 5200 primary or the 5500 primary?

A. That is correct.

Q. And also in each case, according to your second and third columns, on Exhibit 43, the price of your No. 100 thermostat is always less than the respective price quoted the same company for the No. 150 thermostat?

A. That is correct.

Mr. Freeman: We offer in evidence Respondent's Exhibit 43.

Trial Examiner Sheppard: All right. Do you want time to look at it or do you want to ask some questions now, Mr. Haycraft?

Mr. Haycraft: Yes, I want to glance at it.

1277 I offer the same objection on this. No objection to the exhibit, except as to the third column, as to the 150 thermostat.

Trial Examiner Sheppard: All right, I will overrule the objection and accept the exhibit in toto and give it what study I think it deserves in reference to the matter of the 150.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 43, was received in evidence.)

By Mr. Freeman:

Q. Have you produced the agreements that your company had with customers for the years 1939, 1940, and 1941?

A. I have.

Q. If so, will you give me first the agreements that you had for the year 1939?

A. Cleveland Steel Products Corporation; Harvey-Whipple, Incorporated; Hayward Manufacturing Company; the Heil Company; Lynn Products Company; Reif-Rexoil, Incorporated; Scott-Newcomb, Incorporated; Wayne Oil Burner Corporation; York Oil Burner Company.

1278 Mr. Freeman:

We offer in evidence as Respondent's Exhibit 44 the agreement with Cleveland Steel Company for the year 1939;

As Respondent's Exhibit 45 the agreement with Harvey Whipple, Inc., for the year 1939;

As Respondent's Exhibit 46 the agreement with Hayward Oil Burner Company for the year 1939;

As Respondent's Exhibit 47 the agreement with the Heil Company for the year 1939;

As Respondent's Exhibit 48 the agreement with the Lynn Products Company for the year 1939;

As Respondent's Exhibit 49 the agreement with Reif-Rexoil, Inc., for the year 1939;

As Respondent's Exhibit 50 the agreement with Scott-Newcomb, Inc., for the year 1939;

As Respondent's Exhibit 51 the agreeemnt with Wayne Oil Burner Corporation for the year 1939;

And as Respondent's Exhibit 52 the agreement with Yorke Oil Burner Company for the year 1939.

Trial Examiner Sheppard: Let those exhibits be accepted in the record.

(The documents referred to were marked RESPONDENT'S EXHIBITS 44, 45, 46, 47, 48, 49, 50, 51, and 52 and received in evidence.)

By Mr. Freeman:

Q. Now, Mr. Tate, will you give us a list of the 1279 companies you had contracts with for the year 1940?

A. Penn Boiler & Burner Manufacturing Co.

Mr. Haycraft: That is the Automatic—

The Witness: Formerly Burner Parts & Service.

Mr. Haycraft: Yes.

A. Carlson Bros. Tool & Machine Co.; Harvey Whipple, Inc.; The Heil Company; Hoben Manufacturing Company; Lynn Products Company; Reif-Rexoil, Inc.; Wayne Oil Burner Corporation; Yorke Oil Burner Company.

Mr. Freeman: We offer in evidence as Respondent's Exhibit 53 the agreement with Penn Boiler & Burner Manufacturing Company for the year 1940; as Respondent's Exhibit 54 the agreement with Carlson Bros. Tool & Machine Co. for the year 1940;

As Respondent's Exhibit 55, the agreement with Harvey Whipple, Inc., for the year 1940; as Respondent's Exhibit 56 the agreement with The Heil Company for the year 1940; as Respondent's Exhibit 57 the agreement with the Hoben Manufacturing Company for the year 1940; as Respondent's Exhibit 58 the agreement with Lynn Products Company for the year 1940; as Exhibit 59 the agreement with Reif-Rexoil, Inc., for the year 1940; as Respondent's Exhibit 60 the agreement with Wayne Oil Burner Corporation for the year 1940; and as Respondent's Exhibit 61 the agreement with Yorke Oil Burner Company for the year 1940.

1280 Trial Examiner Sheppard: Any objection to those exhibits?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let the agreements, Exhibits 53 to 61, inclusive, be accepted in the record.

(The documents referred to were marked RESPONDENT'S EXHIBITS 53, 54, 55, 56, 57, 58, 59, 60 and 61 and received in evidence.)

By Mr. Freeman:

Q. Now, Mr. Tate, will you give us the names of the companies with which your company had contracts for the year 1941, involving, of course, oil controls.

A. Carlson Bros. Tool & Machine Co.; Harvey Whipple, Inc.; The Heil Company; Hoben Manufacturing Company; Lynn Products Company; Reif-Rexoil, Inc.; Wayne Oil Burner Corporation; Yorke Oil Burner Company.

Mr. Freeman: We offer in evidence as Respondent's Exhibit 62 the agreement with Carlson Bros. Tool & Ma-

chine Company for the year 1941; as Respondent's Exhibit 63 the agreement with Harvey Whipple, Incorporated for the year 1941; as Respondent's Exhibit 64 the agreement with The Heil Company for the year 1941; as Respondent's Exhibit 65 the agreement with Hoben Manufacturing Company for the year 1941; as Respondent's Exhibit 66 the agreement with Lynn Products Company for the year 1941; as Respondent's Exhibit 67 the
1281 agreement with Reif-Rexoil, Inc., for the year 1941; as Respondent's Exhibit 68 the agreement with Wayne Oil Burner Company for the year 1941; and as Respondent's Exhibit 69 the agreement with Yorke Oil Burner Company for the year 1941.

Trial Examiner Sheppard: Any objections to those exhibits, Mr. Haycraft?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let the agreements, Respondent's Exhibits 62 to 69 be accepted in evidence.

(The documents referred to were marked RESPONDENT'S EXHIBITS 62, 63, 64, 65, 66, 67, 68, 69 and received in evidence.)

By Mr. Freeman:

Q. I hand you a sheet of paper which you gave me this morning, which is being marked for identification as Respondent's Exhibit 70, and I will ask you now to give me, for the year 1939 the names of the companies enumerated in the subpoena with which your company did business in the year 1939, without a signed contract.

A. Burner Parts & Service; Electrol, Incorporated; Hart Oil Burner Corporation; Hupp Oil Burner Company; Timkin Detroit Axle Company.

Q. Now, will you do the same thing in connection with the year 1940?

A. Automatic Burner Corporation, Cleveland
1282 Steel Products Corporation; Electrol, Incorporated; Gold Star Oil Burner Manufacturing Company, Timkin Detroit Axle Company.

Q. And will you do the same now with respect to the year 1941?

A. Automatic Burner Corporation; Cleveland Steel Products Company; Electrol, Incorporated; Gar Wood Industries, Incorporated; Gold Star Oil Burner Company; Timkin Detroit Axle Company.

Q. And have you prepared Respondent's Exhibit 70 for identification in exactly the same manner that you prepared Respondent's Exhibit 23, except as to the years 1940 and 1941, you have omitted any figures under the column "Total Sales"?

A. That is correct.

Q. And I note now, for the years 1939 to 1941, inclusive, that there is no mention of the No. 100 thermostat. Would you explain what happened to it?

A. There were very few of the No. 100 thermostats sold to these oil burner companies in the years 1939, 1940 and 1941.

Q. In other words, the more general sales of thermostats had to do with the kind that had artificial heat applied to the thermostats, sometimes known as "heat anticipation"; is that correct?

A. Correct.

Q. And that was your No. 150 thermostat?

1283 A. The No. 150 and the No. 155, and they are both listed on Exhibit 70.

Q. That No. 150 thermostat is comparable in function and sold in direct competition to Minneapolis-Honeywell T-11?

A. That is correct.

Q. I notice also that for the years 1939, 1940 and 1941, there is no mention of any price for sets of controls, as you had in 1937, where three controls comprised a set; and for the year 1938, where two controls comprised a set.

Do you want to make any explanation, so that the record can be clear, as to why Exhibit 70 differs somewhat from Exhibit 23?

Trial Examiner Sheppard: And 53.

Mr. Freeman: And 43, pardon me.

A. In the years 1939, 1940 and 1941, we did not have set prices.

Q. In other words, during those years, 1939 to 1941, you could figure out the price of three controls by taking and adding a thermostat, a limit control, and a primary together?

A. That is correct.

Mr. Freeman: We offer in evidence as Respondent's Exhibit 70 the tabulation made by the witness, Tate, for the years 1939, 1940 and 1941.

Trial Examiner Sheppard: All right. Any objection, Mr. Haycraft?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted as Respondent's Exhibit 70.

(The document referred to, heretofore marked RESPONDENT'S EXHIBIT 70 for identification was received in evidence.)

By Mr. Freeman:

Q. No, in addition to the companies which you have specifically enumerated for the years 1937 to 1941, your sales people and sales representatives were actually calling on a good many other oil burner manufacturers, is that correct?

A. That is correct.

Q. And calling, in the main, upon those companies that hold themselves out as oil burner manufacturers?

A. That is correct.

Q. And, in each of those cases, I take it, you were soliciting the sale of thermostats, primary controls and limit controls in competition to the respondent here, as well as in competition to the Penn Electric Switch Company and Mercoid?

A. That is correct.

Q. And it had been a practice of your company for the years 1937 up to and including 1941—taking into consideration that in 1942 and 1943 we are engaged in war work—to solicit actively the business of oil burner manufacturers for their control requirements, is that correct?

1285 A. That is correct.

Q. And I take it that your company called upon oil burner manufacturers, whether they had a contract signed with Minneapolis-Honeywell or not? You solicited their business, is that correct?

A. I think that is correct, because, in most cases we probably wouldn't know, or have any way of knowing, whether they had a contract or not.

Q. You were always energetically out soliciting business for your company?

A. That is what we paid our salesmen for.

Q. Now, Mr. Tate, your company recognized the different trade channels in connection with its prices for oil burner controls? That is, it recognized the channels as a manufacturer, as a jobber and as a dealer, is that correct?

A. That is correct.

Q. And now, coming to oil burner manufacturers, to

which I am now directing my inquiry, you had, or gave to oil burner manufacturers different prices, dependent upon their potential volume or ability to buy controls or their requirements, is that correct?

A. That is correct.

Q. And then I take it that you had several different prices, price set-ups, for the years 1939 to 1941, inclusive, and you gave to a particular customer that price
1286 which he was entitled to, in accordance with his purchasing ability or potential requirements?

A. Well, at least that is one of the determining factors of setting the price.

Q. I am not interested in your detailed structures, Mr. Tate, but I would like to get into the record about how many different—oh, call them brackets or price structures—did you have for oil burner manufacturers?

A. I believe we had six in those years.

Q. And you have prepared and have given to me, for the years 1939 to 1941, inclusive, the various brackets, as well as the various items which are sold in competition to the respondent here and the respective prices, is that correct?

A. That is correct.

Q. So that your contracts that have been introduced here, in connection with the years 1939, 1940 and 1941, will show thermostats listed and priced in accordance with these respective brackets, dependent upon the company's ability to buy? Correct?

A. That is correct.

Mr. Haycraft: That is objected to as irrelevant and immaterial to the issues in this case. We are not trying this witness' company for violation of any act that I know of.

1287 Mr. Freeman: Well, you are trying Minneapolis-Honeywell for competition, unfair competition, and whenever we endeavor to show that Minneapolis-Honeywell had competition, you seem to interpose an objection.

Mr. Haycraft: I let him go this far, Mr. Examiner, to put in all the evidence as to competition, but this is something different again. This shows the inner set-up of this witness' company, and I don't think it is relevant or material. The only question that would possibly be material in this case is the actual price.

Mr. Freeman: Well, that is what this exactly shows and that is why I am trying to give answers to you, Mr. Haycraft.

Mr. Haycraft: Well, Mr. Examiner, I don't think it is necessary for any argument along that line. This witness has testified at some length by identifying a number of exhibits, as to the prices at which the company actually sold or offered to sell to certain companies, which were listed, and about which I questioned the respondent's witnesses in my case in chief. That is perfectly all right. But now, we have an attempt to bring out from this witness whether or not his company—not the respondent, that is the Perfex Company—maintained a certain bracket of prices in selling to certain classes of customers and that has no place in this case. That isn't relevant to the issues in
1288 this case as to how this witness' company may make up its prices. It doesn't make any difference. They may have taken a number of things into consideration in fixing their prices and it has nothing to do with the brackets of the respondent, which are in issue in this case—the bracket prices of the respondent, which are in issue.

Mr. Freeman: I am not interested in the bracket structure of this company. I am interested in the exact dollars at which this company offered to sell controls to oil burner manufacturers in competition with Minneapolis-Honeywell and its price structure—and when I say "its" I mean Perfex—is entirely irrelevant, Mr. Examiner.

Mr. Haycraft: He is entitled to know the prices at which Perfex sold or offered to sell in competition with the respondent, but how he arrived at the prices has no place in this record.

Mr. Freeman: Let me ask one question and I think I can straighten this out, Mr. Haycraft.

Mr. Haycraft: All right.

By Mr. Freeman:

Q. Are these prices which appear upon—

Mr. Haycraft: Wait a minute. That hasn't been put in evidence and I am going to object to any interrogation about it.

Mr. Freeman: Well, wait a minute until I get through with the question, and then go ahead and interrupt.

1289 Mr. Haycraft: All right. Go ahead.

By Mr. Freeman:

Q. Are these prices which appear upon Respondent's Exhibit 71 for identification those prices at which your company offered to sell controls for the years 1939, 1940 and 1941 to oil burner manufacturers, generally?

Mr. Haycraft: Objected to, Mr. Examiner, unless it is restricted to the companies which we have here and that evidence is in here already.

Trial Examiner Sheppard: Okay. I will let you answer that.

A. These are not published prices. These are confidential prices and they were not offered—

Trial Examiner Sheppard: Not offered—

A. (Interposing.) To everyone.

By Mr. Freeman:

Q. You did sell oil burner controls—that is, thermostats, the No. 150—at $3.00, did you not?

Mr. Haycraft: Just a minute, Mr. Examiner. He is trying to get in evidence this exhibit, which I am going to object to, when he offers it, and I object to this type of interrogation and I want to call your attention that there is an exhibit in evidence, which I did not object to, which sets forth their prices quoted these people, listed in the left hand column here (indicating).

1290 Those are the companies involved in this case, and I object to going clear out now into a general field, which is beyond the limits of this case.

Mr. Freeman: Didn't you put in our bracket structure, Mr. Haycraft?

Mr. Haycraft: Certainly I put in your bracket structure, sure, but that doesn't follow that every other competitor's bracket structure is competent.

Mr. Freeman: We are not condemning the Perfex bracket structure nor are we defending it. We are not interested in Perfex bracket structure. We are interested in the prices at which it sold controls. After all, we have to meet competition.

Mr. Haycraft: That you have in evidence.

Mr. Freeman: Well, that is your version of it.

Trial Examiner Sheppard: All right, gentlemen, I will let this witness testify along this line.

By Mr. Freeman:

Q. Mr. Tate, maybe I can simplify this. Among the various contracts that you have here produced in connection with the years 1939, 1940 and 1941, you do find the various items therein enumerated at prices corresponding to those prices that we now find upon Respondent's Exhibit 71 for identification?

Mr. Haycraft: I object to that question as irrel-
1291 evant and immaterial, no probative value in this case.

Whether or not this exhibit contains the figures at which they sold is irrelevant. The figures are in evidence at which they sold.

Trial Examiner Sheppard: Mr. Tate, do you understand that question? Do you get what Mr. Freeman is trying to bring in?

A. The majority of the figures on Exhibit 71 appear in these various contracts.

Trial Examiner Sheppard: That is what I thought. Those are in the various contracts, but they are summarized there, aren't they?

A. They don't all appear in the contract, but most of them do.

Mr. Freeman: We have here on one sheet, your Honor, a summary of it, and that is what I want.

Trial Examiner Sheppard: I will let you go ahead and testify, to clear it up, and I will give it what value I think it should have, when I study the matter.

Mr. Haycraft: Mr. Examiner, I think I should make clear to you the nature of my objection to this. Is this an offer of the exhibit or what is this now? If the exhibit is going to be offered, I would like to have a chance to object to it and make my objection.

Trial Examiner Sheppard: Yes. You haven't of-
1292 fered it yet?

Mr. Freeman: No, not yet.

Mr. Haycraft: Well, then, I object to any further interrogation of it, with respect to it, until it is offered.

Trial Examiner Sheppard: Why don't you make an offer of it, and we will relieve that situation right now.

Mr. Freeman: I just wish this man Haycraft would be a little more consistent. I would be only too glad to offer it.

I now offer in evidence as Exhibit 71 the price structure set-up of the Perfex Company for the years 1939, to 1941, inclusive, with respect to oil burner manufacturers.

Mr. Haycraft: I object to that offer, Mr. Examiner, for these reasons. In the first place, it is irrelevant and immaterial to the issues in this case—what the Perfex structure is and how they arrived at the prices they quote; and in the second place, as this witness testified in respect to this exhibit, it contains prices not included in the offers or the sales made to the concerns that are involved in

these exhibits and in this proceeding. As you know, in building up this record, there are a number, about eighty some odd companies that have been involved, and these prices in this exhibit go beyond that.

In other words, you are going into a field now which is not in the Commission's case in chief, and I object to
1293 it on that ground.

Mr. Freeman: Mr. Examiner, may I make an oral statement?

Trial Examiner Sheppard: Yes.

Mr. Freeman: We are not limited to the eighty-eight companies which Mr. Haycraft, at one time or another in connection with the Commission's case, referred to specifically.

We are out to show to the Commission and to your Honor that this company was engaged in active competition—that is Perfex—was engaged in active competition with Minneapolis-Honeywell—and we are not limited to those companies you choose to talk about.

Trial Examiner Sheppard: I think, gentlemen, I rather agree with Mr. Haycraft on the matter he just referred to, but I am going to let it go in.

Mr. Freeman: That is all we are intersted in. If he doesn't want the summary in, for some reason or other it is immaterial, we can fix it up by taking each of the contracts and going through each of them individually and we can sit here another half a day and get this same structure, same pattern, if that is what you want, Mr. Haycraft. We can do it that way.

Trial Examiner Sheppard: If you gentlemen think it is an important part of your case, I will let you put it
1294 in, and then I will give it study when I get to it.

Mr. Haycraft: I don't know, of course, as to how far these prices may be considered confidential by the witness' company, but I can readily see that there might be some quotation in there that they might not want to make public.

Trial Examiner Sheppard: All right, Miss Reporter, I am going to accept that Exhibit 71 for what it is offered for in this case and, in my study, in the probative value, if I want to use it, I will do it, and if I don't, I won't. You gentlemen can do the same thing.

(The document referred to was marked RESPONDENT'S EXHIBIT 71 and received in evidence.)

By Mr. Freeman:

Q. Mr. Tate, in the year 1941, you quoted the Carlson Company a price of $3.00. Is that correct, for your No. 150 thermostat?

A. That is correct.

Q. And that is the price that appears for the No. 150 thermostat in bracket 2 for the year 1941, correct?

A. That is correct.

Q. And we likewise find in this year, 1941, that you quote $2.65 for a No. 150 thermostat to The Heil Company and that we find in bracket 5 for the year 1941.

Trial Examiner Sheppard: That is on 71, that is 1295 on Exhibit 71?

Mr. Freeman: Yes, on Exhibit 71.

Trial Examiner Sheppard: All right.

A. That is correct.

By Mr. Freeman:

Q. And as a matter of fact, we find in your price for the No. 150 thermostat for the year 1941, the prices which you gave us here this morning, all of the figures for brackets 2, 3, 4, 5 and 6? Correct?

A. That is correct.

Q. And likewise, the same is applicable to limit controls and primaries? Correct?

A. That is correct.

Q. Now, when you were out soliciting business for controls from companies other than those specifically enumerated in the subpoena, were you governed by some price structure applicable to the company's potential or ability to buy controls?

Mr. Haycraft: That is objected to as going beyond the Commission's case in chief, as well as being immaterial.

Trial Examiner Sheppard: I don't think I get the significance of the question. Would you read it, Miss Reporter.

(The reporter read the question.)

1296 Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Trial Examiner Sheppard:

Q. Mr. Tate, go ahead and tell us about that, and if I think it is important, I will let it stand. If I don't, I will strike it. Just answer that as well as you can.

A. The customer's potential is one of the principal governing factors in arriving at the prices—

Trial Examiner Sheppard: (Interposing) I would think so.

A. —that we quote.

Trial Examiner Sheppard: I think that is an integral part or element of the matter. All right.

By Mr. Freeman:

Q. And when you testified earlier that you recognized different trade channels—that is, as a manufacturer and as a jobber and as a dealer—you meant that you had different prices applicable to manufacturers than you had to jobbers and than you had to dealers, is that correct?

A. That is correct.

Q. Now, none of these contracts that you have here introduced this morning, for the years 1937 to 1941, specify any definite number of controls. That is correct, isn't it?

1297 A. It doesn't specify any total quantity.

Q. It specifies specific controls and the price applicable for that specific control to that specific company mentioned in the agreement?

A. That is correct.

Q. And when those prices are made up, they are made up according to the company's actual ability to buy and not necessarily the exact number that the company is to buy from you during that year?

Mr. Hayeraft: I object to the form of the question. Let the witness state it, let the witness state what he has taken into consideration, for the record.

Trial Examiner Sheppard: Yes, you can do that, Mr. Tate.

The Witness: Now, will you go back and read it to me.

(The reporter read the question.(

A. The prices are based on a number of things; one of which is the potential that we think the customer can buy during the year, but he is not held to any exact number.

By Trial Examiner Sheppard:

Q. In other words, he can buy more if he wants to, or less, if he wants to?

A. That is correct.

Trial Examiner Sheppard: All right.

1298 By Mr. Freeman:

Q. You do not require any initial order when a contract is signed—that is, any specified amount—in order to make the customer any particular price?

A. In some cases, we do.

Q. And, of course, you take into consideration then, the amount of the initial order, as part of your base for prices?

A. That is correct.

Q. And I take it that you likewise have some contracts with companies that never purchase any controls at all from your company?

A. That is correct.

Q. So that when you send out your contracts and they send it back to you, it is, in effect, your price list and terms and conditions of sale? Correct?

A. It is a contract as to the matters covered in the agreement.

Q. It sets forth the relationship that is to exist if the company purchases controls from your company and if you ship controls to the purchaser?

A. That is correct.

Q. It is a regular form of conduct as between your company and the oil burner manufacturer?

A. That is correct.

Q. And am I correct in my understanding that

1299 when a contract is signed, there isn't any necessity that the company purchase any controls from your company?

Mr. Haycraft: It seems that the contract speaks for itself on that point, Mr. Examiner.

Trial Examiner Sheppard: I think the witness already answered it. He said that the man has a right to purchase more than what his contract calls for, or less, if he wants to.

Mr. Freeman: And in some cases here, we have some contracts that I might point out where there has been no purchase during the year.

Trial Examiner Sheppard: That is right.

By Mr. Freeman:

Q. That is correct, isn't it?

A. That is right.

Trial Examiner Sheppard: I gathered that from what he testified.

Mr. Freeman: Just so that we are clear.

Trial Examiner Sheppard: Yes.

By Mr. Freeman:

Q. Now, Mr. Tate, you have endeavored, in the short period of time that you had, to produce here those records or memoranda which you made from records in your office, with respect to those companies mentioned in the subpoena. Correct?

A. That is correct.

1300 Q. And these are the prices at which you either offered to sell controls in competition to others, or actually sold controls in competition to others?

A. That is correct.

Q. Just one more question. During your cross-examination, when the Commission put on its case, you will recall that you mentioned a number of patents.

A. That is correct.

Q. Under which you operate in one way or another, either those that you owned or had a license under which you made primary controls or room thermostats, and I have prepared a book of those patents which I would like to offer in evidence as Respondent's Exhibit 72.

I might say, Mr. Tate, that you may look these over, although they do compare with those that you have enumerated.

Trial Examiner Sheppard: Let's have a little recess, gentlemen, and give Mr. Tate an opportunity to look that over.

(Short recess taken.)

Trial Examiner Sheppard: All right, back on the record.

Mr. Freeman: So that the record is clear we offer in evidence Respondent's Exhibit 72, a book of patents having to do with primary controls and thermostats

1301 under which Perfex makes its primary and thermostat controls.

Trial Examiner Sheppard: Any objection, Mr. Haycraft?

Mr. Haycraft: Has the witness identified them as having been used at the present time or having been used during this period of time that has been covered in the—

The Witness: (Interposing) I have examined the patents and they are the patents that we owned, either own or operate under.

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let Respondent's Exhibit 72 be accepted.

(The document referred to was marked RESPONDENT'S EXHIBIT 72 and received in evidence.)

Mr. Freeman: That is all. You may cross-examine.

Cross-Examination by Mr. Haycraft.

Q. Following further along that line, the last exhibit that was admitted, will you describe the respective patents and the item, when the patent was used and the circumstances under which it was used?

A. Cunningham re-issue, patent No. 21,993; oil burner time control patent, owned by Perfex.

Q. When did you acquire it?

A. It was developed by Perfex.

1302 Q. Developed by Perfex. When was it put into manufacture? In other words, when was the primary manufactured under that patent by Perfex?

A. I think it was the fall of 1937. It covers the intermittent ignition control. That was testified to in Milwaukee. I don't have the exact date here. It may have been the spring of 1938.

Trial Examiner Sheppard: Anything more?

Mr. Freeman: Do you want him to go through all of them, Mr. Haycraft?

Mr. Haycraft: Yes, if these patents are going to be used in this case, I want to find out what use was made of them.

Mr. Freeman: The witness already testified that he has used one or more of the patents in connection with the making of primary controls and thermostats. I don't see that it is material as to when they were used. They have been used from the very inception of Perfex Company, in 1936, in connection with the primary controls.

Mr. Haycraft: That is what I want to find out.

Mr. Freeman: He has answered that.

Mr. Haycraft: No, he hasn't. He is answering it now.

Trial Examiner Sheppard: All right, Mr. Tate, will you give the gentlemen that information?

1303 A. Scott patent No. 1,640,730, covering an oil burner primary control, and is owned by Electrol, Incorporated. We are operating under a license since 1937, I believe.

By Mr. Haycraft:

Q. Is that an intermittent or constant ignition control?

A. Intermittent ignition, primary control.

Burke, patent No. 1,657,065. We have been operating under a license on this patent since about 1937.

Q. Which one is that?

A. Burke.

Q. Burke?

A. That covers oil burner primary controls of either constant or intermittent ignition.

Scott, patent No. 1,836,939. That was an oil burner primary control and is owned by Electrol, Incorporated. We have been operating under a license since about 1937.

Q. Is that constant or intermittent ignition?

A. Intermittent ignition.

Aldrich, patent No. 1,893,875, deals with the slip friction mechanism of an oil burner—either constant or intermittent ignition. We are operating under a license, but I don't remember the exact date; in 1938 or it may have been as late as 1939. I think it was 1938, though.

Duemler, et al., patent No. 1,972,875, oil burner primary control. It deals with both the constant and the in-

1304 termittent control, and is one of the group in the Zoro patents. We have had a license since about 1940.

Q. Have you had to pay any royalty on that to the Zoro patent?

Mr. Freeman: That is objected to as immaterial—just what they operate under, that is all we asked.

Trial Examiner Sheppard: Go ahead. I will let the witness answer.

A. I don't believe we are paying any royalty under that patent.

By Mr. Haycraft:

Q. Is it still owned by the Cleveland Trust Company?

A. I don't know.

Mr. Freeman: Ask him if that is a part of the Zoro. I will say, as a lawyer, it isn't.

Mr. Haycraft: I am trying to get the information from the witness.

A. I don't know what happened to the Zoro pool after this was over.

Cunningham patent No. 2,918,556. That is a patent that has been surrendered in connection with the re-issue patent formerly discussed. I don't know if you need any comment on it.

Q. When was it used?

A. It was used from the latter part of 1937 or
1305 the spring of 1938 until the re-issue patent came out on January 6, 1942.

Q. That is the same as that one you have already referred to, is it?

A. That is correct.

Lindemann, patent No. 2,216,748 is owned by Perfex, deals with the lockout mechanism of both the constant and intermittent oil burner control. We have been using this structure since the last part of 1936.

The next is Tate, patent 2,254,983. It deals with constant ignition oil burner, primary control, developed some time prior to October, 1938.

Q. When was it put into use?

A. I don't—that particular model—I don't know just what year that one, corresponding to the picture in here, was brought out. I think it was probably as late as 1940, but I don't know just from looking at this hurriedly whether or not the claimed material in here deals with some of the other primary controls. There is always an overlapping.

Tate, patent No. 2,254,984. This deals with an oil burner primary control, and deals with the same type of control as that in No. 2,254,983.

Christiansen, patent No. 2,266,721. This patent deals with the thermal element and slip friction of an oil burner primary control and was developed and put into use by Perfex some time prior to October, 1938.

1306 Deubel, patent No. 2,269,443, deals with an oil burner primary control of either the constant or the intermittent ignition type, and was developed and used prior to October, 1938.

By Mr. Freeman:

Q. Don't you mean October of 1939, the filing date, instead of 1938?

A. October—there is a misprint there—it is 1938 on one page and 1939 on the other.

Mr. Freeman: Well, you can say it was used at or about the date of filing.

The Witness: That is correct. It was developed and put into use on or before the filing date of the application.

Hotchkiss, patent No. 2,313,072, deals with a thermal responsive device or oil burner primary control. This application was filed October 30, 1940, and the exact structure that is shown here is not being used in the primary controls that were sold. I don't know offhand whether the claimed structure deals with our present oil burner controls or not.

By Mr. Haycraft:

Q. Which one is that, Hotchkiss?

A. That is correct.

Next is the Malone patent No. 2,313,083. It deals
1307 with the thermal element and slip friction, oil burner primary controls. The exact structure here has never been put into commercial use.

Breese, patent No. 1,757,951, deals with a room thermostat and a method of getting a night set-back of the temperature automatic. We are operating under a license dating back to about 1939, as I remember it.

Q. Is that your No. 155?

A. No, that deals with the clock type thermostat.

Trial Examiner Sheppard: Clock?

A. Clock.

Kronmiller, et al., patent No. 2,171,272, deals with a room thermostat. It is owned by Minneapolis-Honeywell. We are operating under a license. I don't remember the date of that license, probably 1939. It may have been as late as 1940.

The next is Cunningham, patent No. 2,171,273. It also deals with a room thermostat. It is owned by Minneapolis-Honeywell. We are operating under a license, along with the previous patent.

Christiansen, patent No. 2,216,032, covers a special room thermostat, which is sold to one of the oil burner companies, included in the list here. The application was filed March, 1939.

Lindemann, patent 2,250,135, deals with a heater
1308 type room thermostat. The application was filed in January, 1938, owned by Perfex.

Lindemann, patent No. 2,269,776 covers room thermo-

stat and was developed and put into use prior to Sep-
1309 tember, 1938. Cunningham, Patent No. 2,290,944, owned by Perfex, and was filed in September, 1938, dealing with a room thermostat.

By Mr. Haycraft:

Q. Now, referring to Respondent's Exhibit No. 23, do you have that there?

A. Yes.

Q. Now, is there any way that you can tell what percentage of the volume of total sales in the first column consisted of a thermostat or the limit controls or the primary controls?

A. No, I cannot.

Q. And this was 1937, and what part of the time of the year did you first manufacture and sell primary controls?

A. I think it was, as I remember it, that constant ignition primary control came out in the fall of 1936.

Q. That is the 5200?

A. That is correct.

Q. When did the 5500 come out?

A. I had that material in Milwaukee. It is my recollection it was the spring of 1937.

Q. What patents were you operating under with the 5200 and 5500?

Mr. Freeman: Read the question, please.

(The question above referred to was read by the reporter.)

1310 Trial Examiner Sheppard: Do you remember that, Mr. Tate?

Mr. Freeman: I take it, Mr. Haycraft, when you say "patents," you also mean applications for letters patent, which covers the period just preceding the actual issuance of the patent?

Trial Examiner Sheppard: Can you tell us that?

The Witness: Well, it would be the things that we worked out ourselves, and certain of these patents in here—

By Mr. Haycraft:

Q. (Interposing.) I was just wondering if you recall any of those patents that were as early as 1936.

A. Patents themselves were earlier.

Q. Yes, I was asking whether they were that early?

A. Oh, a number of these patents are earlier than 1936.

Mr. Freeman: You are talking about filing dates, Mr. Haycraft.

By Mr. Haycraft:

Q. When were they used? When was the use made of the devices?

A. Well, the ones we are operating under licenses. I don't know when there was use made of them by other people.

Q. I mean by your firm. You took your license out as of what time, the licenses that you took out on those
1311 primary controls?

A. Well, our licenses, I don't remember the exact dates of them. I gave the approximate dates as I went through these patents.

Q. Do you recall, for instance, what you sold to the Electrol Company in 1937, what the items were?

Trial Examiner Sheppard: You can refer to that exhibit there, Mr. Tate.

A. I wouldn't know what the items were. I guess it would be mostly limit controls and thermostats, because they manufacture a large percentage of their own primaries, or did at that time.

By Mr. Haycraft:

Q. As a matter of fact, you didn't sell them any primary controls in 1937, did you?

A. I didn't check the record the last few days, and I don't have any sheet before me showing that or setting that forth.

Q. Do you know what you sold, principal sales, to the Burner Parts?

A. I have no breakdown on any of the sales here.

Q. What is your recollection as to what you sold Timken in 1937?

A. Timken bought some of the 5200's, but I don't believe very many constant ignition; and then the 5500 came along later. They didn't buy many of those. They bought the 5520.

1312 Q. Weren't the bulk of the sales limit controls, pretty much?

A. In 1937, I think that is correct.

Q. Was it the bulk of their sales? What about 1938, would that be true of that year, too?

A. I think they were buying some primaries in 1938. That is my recollection.

Q. But they continued to buy these extra sets of limit controls in substantial amount?

A. That is correct.

Mr. Freeman: I would like to suggest to the Examiner that this type of examination has already been indulged in by Mr. Haycraft when he examined both Mr. Luthe and Mr. Tate, and I refer to the record, pages 369 and '70, where Mr. Luthe testified that Timken in 1936 sold about $10,000 worth of controls and in 1937 about $37,000 worth of controls, including primary controls and limit controls.

Then Mr. Tate himself testified on pages 438 to 440, that there were sold to Timken in 1937 11,000 units, in 1938 10,000 units, in 1939, 21,000 units; total sales in each year being roughly 3¼ to 4 times the unit sales.

Mr. Haycraft: What I am trying to do is get a breakdown, if he has it. I have some of that in from the Timken end of it.

Trial Examiner Sheppard: I had a recollection, 1313 Mr. Tate, that you gave us some information along that line in the other hearing.

By Mr. Haycraft:

Q. You are not able to break down any of these figures?

A. No, I have no breakdown on them, no. I haven't.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Anything further?

Mr. Freeman: One question.

Redirect Examination by Mr. Freeman.

Q. There has been some discussion as to whether or not Cleveland Steel Company had a signed contract with your company for the year 1939, and I would like to have you check your records and tell us.

A. Yes, we have a signed contract with Cleveland Steel for the year 1939.

Trial Examiner Sheppard: Have you got the exhibit number there?

Mr. Haycraft: 44.

Trial Examiner Sheppard: Referring to Exhibit 44.

Mr. Freeman: That is all.

Trial Examiner Sheppard: Anything else?

Mr. Haycraft: That is all.

Trial Examiner Sheppard: All right, Mr. Tate, I thank you, sir. You are excused.

(Witness excused.)

1314 Trial Examiner Sheppard: We will adjourn now until 2:00 o'clock.

(Whereupon, at 12:30 p. m., a recess was taken until 2:00 p. m., this day.)

1315 Afternoon Session 2:00 p. m.

Trial Examiner Sheppard: All right, gentlemen, come to order. Proceed, Mr. Freeman.

Mr. Freeman: Mr. J. W. Owens, will you take the stand?

Mr. Snyder: Mr. Examiner, I wonder if I could interject myself at this time? I think it would probably be as good a time as any.

Trial Examiner Sheppard: Will you state your name for the reporter?

Mr. Snyder: Erwin C. Snyder, attorney for Mr. Owens.

Mr. Freeman: You mean attorney for Mercoid Corporation?

Mr. Snyder: Yes, Mercoid Corporation. My firm is Nicholson, Snyder, Chadwell & Faderburg.

Trial Examiner Sheppard: And you are attorney for Mercoid?

Mr. Snyder: Yes.

Trial Examiner Sheppard: All right, go ahead.

Mr. Snyder: I have here a subpoena duces tecum which has been addressed to Mr. Owens, as vice president of the Mercoid Corporation, asking that he bring with him copies of contracts, with a long list of customers, and a 1316 price list, discount sheets, and other data showing the various prices at which Mercoid Corporation offered and sold such controls to the oil burner manufacturers named during the years 1937 to 1941, inclusive.

It is our contention that this calls for a confidential sort of information that the respondent in this case is not entitled to, and we would like to have this set down for argument at some later date. We are not prepared today. We have been just called into the matter and we are not prepared to argue at this time.

Mr. Freeman: This was served on November 5th, and

it is a rather late date to come in and make an objection, just because you haven't been consulted.

Mr. Snyder: We have an objection just the same, and we wish to express it to you and, if necessary, to the Commission in Washington, because we don't think this kind of information should be requested of a competitor.

Trial Examiner Sheppard: Is this a subpoena by the Federal Trade Commission?

Mr. Snyder: It is issued by the Federal Trade Commission.

Trial Examiner Sheppard: And regularly served upon Mr. Owens?

Mr. Snyder: And regularly served upon you?

Mr. Owens: Yes.

1317 Mr. Snyder: You can set it down for argument on Saturday morning, or something like that.

Trial Examiner Sheppard: I don't know as there is anything you can argue before me.

Mr. Snyder: Then we would like to argue it before the Commission in Washington.

Trial Examiner Sheppard: Of course, the Examiner can't pass on the materiality or relevancy of the testimony until it is presented before me. I haven't anything to pass on, don't you see?

Mr. Snyder: Of course, the fact that it calls for all this confidential information is something.

Trial Examiner Sheppard: I will call you to the stand, Mr. Owens.

J. W. OWENS was thereupon recalled as a witness for the respondent and, having been previously duly sworn, testified as follows:

Direct Examination.

Trial Examiner Sheppard: You testified here before, didn't you, last time?

The Witness: Yes, sir.

Trial Examiner Sheppard: Your name is J. W. Owens?

The Witness: Yes.

1318 Trial Examiner Sheppard: Your address?

The Witness: The home address, 4448 North Mozart Street.

Trial Examiner Sheppard: Miss Reporter, let the record show that Mr. J. W. Owens has already been sworn

in this case and appears again under subpoena of the Commission issued on behalf of the respondent in this case.

Now, Mr. Freeman, you can proceed.

By Mr. Freeman:

Q. You are the same J. W. Owens that testified in behalf of the Commission in this case?

A. Yes.

Q. And you were served with a subpoena on or about November 5, 1943, that is, a subpoena duces tecum, asking you to produce contracts that you had with any one of the 88 companies mentioned in the subpoena for the years 1937, 1938, 1939, 1940, and 1941, is that correct?

A. That is correct.

Q. Will you produce any of the contracts that your company entered into with any one of the 88 companies mentioned in the subpoena for the years 1937 to 1941, inclusive?

A. Will I produce them?

Q. Yes.

A. Not willingly.

1319 Q. Will you produce them in response to the subpoena issued by the Commission in this case?

Mr. Snyder: I object to this procedure, your Honor. I have stated that we wished to argue the validity of this subpoena with the Commission.

Trial Examiner Sheppard: That is all right, Mr. Attorney, but I just want to make something; Mr. Freeman wants to have a record also that you can go up to the Commission on. We have got to have some record on it.

Mr. Snyder: We have a subpoena.

Trial Examiner Sheppard: Go ahead.

By Mr. Freeman:

Q. Do I understand, then, that at the present time you refuse to produce any of the contracts called for in the subpoena, in accordance with the Commission's subpoena issued to you?

A. On advice of my attorney, yes.

Q. Have you prepared and do you have here the price list, discount sheets, or other data showing the various prices at which Mercoid Corporation offered and sold such controls to said oil burner manfacturers during the years 1937 to 1941, inclusive?

A. I have.

Q. You have them here?

A. Yes.

1320 Q. Will you produce them?

A. I can't do it.

Q. I am asking you whether you will make available to me in behalf of the respondent the prices, discount sheets, and other data which you have secured or prepared in connection with the subpoena issued by the Commission.

A. They are all confidential and I don't feel that I can do it, that I can take that action, without taking it up with the members of the executive committee of my company and our attorney.

Q. You have had knowledge of this subpoena since November 5th, correct?

A. That is correct.

Q. And you knew on November 5th that you were to appear here on November 29th, is that correct?

A. That is correct.

Q. Now, what did you do by way of taking up with the executives of your company the request with respect to the information on the subpoena?

A. I took the matter up. They suggested I go ahead and get the stuff together. I did that, and when I appeared here I found out we were laboring under a misapprehension.

Q. Just what was that misapprehension?

A. We thought that this information was for the Federal Trade Commission and not for a competitor.

1321 Q. Well, you knew that you were subpoenaed by the Commission for and in behalf of the respondent in this case?

A. I know, but I am not sufficient of a legal light to just glance at the thing and know who the respondent was. I didn't pay any attention to that part of it and I didn't know until I got here this morning what the set-up was.

When I found out what it was, I just decided I couldn't go ahead and divulge this information. Now, I am ready and willing to go ahead and answer any questions on the general set-up. I am not trying to be stubborn or arbitrary, but I only feel that the information as to prices is confidential, and, getting into your company's hands, could be used against us at some future date and to our disadvantage.

Trial Examiner Sheppard: On these prices, Mr. Owens,

aren't these prices back yonder in sort of ancient history now? Aren't they back in 1938, 1939, and 1937?

The Witness: That is true, Mr. Sheppard, but we are supposed to know—our competitors are supposed to know their capabilities, and I am relying upon my own judgment as to whether or not the divulging of these prices from 1397 to 1941 would be detrimental to the best interests of the Mercoid Corporation, and the answer is it would be detrimental.

By Mr. Freeman:

1322 Q. Do I understand you to say that you would, if you produced the prices, the price lists, discounts, and the like, you were ready and willing to give that information to the Commission?

The Witness: That is true.

By Mr. Freeman:

Q. Now, I understand, then, that you are not willing to testify with respect to prices, discounts, and the like in this hearing for and in behalf of the respondent?

A. Yes and no. I am willing to testify up to a certain point and try to give you all the information I can along the lines that you are seeking, but I do not like to disclose the price set-up or prices to individual customers. I am ready to go along and give you what information I can on the price set-up, if that will be of any assistance.

Trial Examiner Sheppard: Well, Mr. Freeman, I think we can proceed with Mr. Owens on all those things that he voluntarily wishes to testify on.

Mr. Freeman: No, I want him to respond specifically to this subpoena that was issued by the Commission, and I am telling you that if he does not I am going to appear before Judge Barnes, in accordance with the law, and ask that he be produced here with these records. This subpoena has been issued by the Commission and we want him to respect it. He could have applied before.

1323 Mr. Gilpatric: He could have applied any time before this. He could have applied at any time in the last three weeks.

Trial Examiner Sheppard: My suggestion is to go into everything you want that he says he will testify to.

Mr. Freeman: There isn't any reason for doing this piecemeal.

Trial Examiner Sheppard: All right, go ahead.

The Witness: May I ask for a change of venue from Judge Barnes—

Mr. Snyder: (Interposing.) Mr. Owens, let me take care of that.

Trial Examiner Sheppard: Any other questions?

By Mr. Freeman:

Q. Will you tell us the names of the companies that you have contracts with for the year 1937?

Mr. Snyder: I object.

Mr. Freeman: I am not asking for contracts now. I am just asking for the names of the companies.

Mr. Snyder: That testimony may be of a confidential nature and I haven't had an opportunity to go over this with my client.

Mr. Freeman: Confidential nature doesn't have any standing in a case before the Federal Trade Commission. This man came here and testified, he told us what his 1324 sales were to certain of these companies. Haven't we the right to get as much information as the Commission does?

Mr. Snyder: You certainly had a right to cross-examine him at the time.

Mr. Freeman: No, we didn't. It was improper cross-examination then, and you weren't here.

Mr. Snyder: You cross-examined him, didn't you?

Mr. Freeman: Not with respect to any contracts, because that was improper cross-examination.

Trial Examiner Sheppard: We will leave it to you, Mr. Owens, if you will give that information asked in the last question.

The Witness: I will reserve the right to; if my attorney permits me to go ahead, I will reserve the right to refuse to answer any questions bordering on what I would consider confidential information.

Trial Examiner Sheppard: All right, that will be all right.

Mr. Snyder: You have to be the judge of it, Mr. Owens. I haven't gone over it with you.

Trial Examiner Sheppard: You have a right to answer or not in regard to any question that you have the advice of your counsel on.

The Witness: I didn't bring a lot of photostatic copies.

1325 Mr. Snyder: I think we ought to discuss this matter a little.

Mr. Freeman: Would you like to recess?

Mr. Snyder: Yes.

Mr. Freeman: If it is agreeable with the Major.

Trial Examiner Sheppard: All right, I will give you half an hour. Is that all right?

Mr. Snyder: Yes.

Trial Examiner Sheppard: Let the record show a recess of half an hour to accord the attorney an opportunity to talk to Mr. Owens.

(A recess was taken.)

Trial Examiner Sheppard: All right, on the record. Proceed, Mr. Freeman.

By Mr. Freeman:

Q. Did you have a contract with the Acme Tool & Gauge Company in the year 1937?

A. We submitted prices to that company that year.

Q. Will you give me the prices which you submitted to that company in the year 1937 for a primary and control of the intermittent ignition type?

The Witness: Will you repeat that question?

Trial Examiner Sheppard: Read the question.

(The question above referred to was read by the reporter.)

1326 Mr. Freeman: Provided, of course, that you did quote that on an intermittent ignition type primary.

Mr. Snyder: Your Honor, I object to this line of examination. We are objecting to giving any confidential information to the respondent here.

Trial Examiner Sheppard: I am just leaving it up to Mr. Owens. You can put in your objection.

Mr. Snyder: We object to it.

Trial Examiner Sheppard: I am just leaving it to Mr. Owens, and any question he doesn't want to answer, he needn't.

By Mr. Freeman:

Q. What is the answer?

A. No.

Q. That is, you did not quote the company, or do you refuse to give me the information?

A. I refuse to answer the question on the grounds that it is confidential information.

Q. And did you quote that company in the year 1937 for a room thermostat for use in connection with the oil burner controls?

Mr. Snyder: Same objection.

A. I believe there was a price included on the room thermostat.

By Mr. Freeman:

1327 Q. And I take it that you likewise refuse to give me that information?

A. Yes, I refuse to divulge any prices.

Q. And likewise you quoted Acme Tool & Gauge Company in the year 1937 for limit controls?

A. That is correct.

Q. And I take it that you likewise refuse to disclose the price quoted?

A. That is correct.

Mr. Snyder: I don't see any reason for going ahead with this examination.

Trial Examiner Sheppard: You have to make a record for the Commission.

Mr. Snyder: That doesn't make any difference. If the respondent argues he is entitled to this information, he should go before the Judge and argue it then.

Trial Examiner Sheppard: That is true.

Mr. Snyder: And I don't care to have my client make any further record in this matter.

Trial Examiner Sheppard: All right, just inform him what you want him to do.

Mr. Snyder: Mr. Owens, I wish you wouldn't answer these questions at all.

Mr. Freeman: Are you telling him not to comply with this subpoena of the Commission?

1328 Mr. Snyder: You heard what I said.

Mr. Freeman: I am just asking you a question. You can be civil about it, can't you?

Mr. Snyder: Well, I stated my reasons. You are asking for confidential information which you aren't entitled to, and are using this proceeding against you as a subterfuge to get the confidential information of my client.

Mr. Freeman: I have asked him questions specifically with respect to the year 1937, and referring to Acme Tool & Gauge Company. There are some 88 names. Are you telling him now not to answer any of the questions of a similar nature directed to the other 87 companies?

Mr. Snyder: That is right.
Mr. Freeman: For the year 1937?
Mr. Snyder: That is correct.

By Mr. Freeman:

Q. And you, Mr. Owens, you refuse to give me any information with respect to the other 87 companies enumerated in the subpoena for the year 1937?

A. Upon advice of counsel, I refuse to divulge any confidential price information.

Q. I wish you would answer my question. Do you refuse to give me any of the prices at which you sold or quoted any of the 88 companies mentioned in the subpoena for the year 1937?

1329 A. That is correct.

Q. You refuse?

A. Upon advice of counsel, I refuse.

Q. And I take it that you then refuse to give me any prices at which you sold or quoted any of the 88 companies for the year 1938?

A. That is correct.

Q. And likewise for the year 1939?

A. That is correct.

Q. And likewise for the year 1940?

A. That is correct.

Q. And likewise for the year 1941?

A. That is correct.

Q. Will you tell me whether or not you had a contract with Acme Tool & Gauge Company in the year 1937?

A. We submitted prices.

Q. Do I understand that answer to mean that you had no contract, no annual contract?

A. I couldn't tell you at this time whether or not there was a—I couldn't tell you whether or not we even submitted contracts to be signed or if we just sent them prices. I do have a record that we sent them prices in that year.

Q. Did you have a contract for the year 1937 with the Alida Manufacturing Company?

1330 A. I have a record that we sent—that we quoted prices to Alida Manufacturing for that year.

Q. For the year 1937?

A. 1937.

Q. Did you check your records to determine whether or not you had an annual contract with that company in the year 1937?

Mr. Snyder: Mr. Examiner, whether he had a contract with these people or not is confidential information and I don't see why a competitor, even before the Federal Trade Commission, has a right to use the processes of the Federal Trade Commission to get that information from them.

Trial Examiner Sheppard: Well, that is a matter of argument, too, Mr. Snyder.

Mr. Freeman, it seems to me that there is no use to pursue this any further. If you gentlemen want to do something about the subpoena, I will give you time in which to do it.

Mr. Freeman: I still want to ask him some questions.

By Mr. Freeman:

Q. I hand you a sheet of paper which I will have marked for identification as Respondent's Exhibit 73.

(The document referred to was marked Respondent's Exhibit 73 for identification.)

1331 By Mr. Freeman:

Q. (Continuing.) Entitled Form 11—rather Form 11, entitled "Oil Burner Manufacturers Prices—1938, for Manufacturers requiring from one to fifty sets", and will ask you whether or not that is a photostatic copy of your price list for the year 1938.

Mr. Snyder: Don't answer, Mr. Owens. Let me see the exhibit, please.

I object to the witness identifying this.

A. Upon advice of counsel, I refuse to answer.

Trial Examiner Sheppard: Instruct him not to answer any question you don't want him to answer.

Mr. Snyder: All right.

By Mr. Freeman:

Q. Will you tell us whether or not your company in the year 1938 put out price lists in accordance with the one that I handed you, marked Respondent's Exhibit 73 for identification, generally, to the trade?

A. Upon advice of counsel, I refuse to answer.

Q. Do I understand that you have here in your possession a price list for the year 1938, similar to Form 11, which I have reference to as Respondent's Exhibit 73?

A. On advice of counsel, I refuse to answer.

Q. Your company did put out a price list under the heading Form 11, did it not, in 1938?

1332 A. Upon advice of counsel, I refuse to answer any questions connected with prices.

Q. You did testify in behalf of the Commission as to the lowest price which you charged for a combination fan and limit control, is that correct?

A. That is correct.

Q. And in that case you didn't reserve your right of confidential information in connection with the prices when the questions were asked of you by Mr. Haycraft, counsel for the Commission, is that correct?

A. I found no connection between that particular occasion and the matter under discussion at the moment. That covered one single item that I answered every one of your questions on, and your associates' questions, clearly and to the best of my ability.

Q. And I now hand you Form No. 32, oil burner manufacturers' prices for the year 1938 for manufacturers requiring 50 to 300 sets, which we will have marked for identification as Respondent's Exhibit 74.

(The document referred to was marked Respondent's Exhibit 74 for identification.)

Q. (Continuing.) And I take it that you likewise refuse to answer any questions with respect thereto?

A. That is correct. I refuse to answer.

Mr. Snyder: I object to the type of examination 1333 going on, Mr. Examiner.

Trial Examiner Sheppard: Mr. Freeman is just making a record to go into the court with. The witness will just answer the questions on advice of counsel, whatever they may be.

By Mr. Freeman:

Q. I now hand you a price list marked Form No. 33, oil burner manufacturing prices—1938, for manufacturers requiring 300 to 1,000 sets, which I will ask to have marked for identification as Respondent's Exhibit 75.

(The document referred to was marked Respondent's Exhibit 75 for identification.)

By Mr. Freeman:

Q. (Continuing.) And will ask you whether or not that corresponds to a price list put out by the Mercoid Corporation in 1938, to oil burner manufacturers.

A. On advice of counsel, I refuse to answer.

Q. And I now hand you a photostatic copy marked

Form No. 44, which I will ask to have marked for identification as Respondent's Exhibit 76.

(The document referred to was marked Respondent's Exhibit 76 for identification.)

Q. (Continuing.) And will ask you to state if it corresponds to a price list put out by the Mercoid Corporation for oil burner manufacturers requiring 1,000 to
1334 2,500 sets of controls during the year 1938.

A. On advice of counsel, I refuse to answer.

Q. And I now hand you Form No. 55, which I will ask to have marked for identification as Respondent's Exhibit 77.

(The document referred to was marked Respondent's Exhibit 77 for identification.)

Q. (Continuing.) And will ask you whether or not your company put out price lists corresponding to Form 55 during the year 1938 to all burner manufacturers requiring 2,500 or more sets.

A. On advice of counsel, I refuse to answer.

Q. I hand you Federal Trade Commission's Exhibit No. 7, and I will ask you to state whether or not it is a contract entered into by your company with the Cleveland Steel Products Company.

Mr. Haycraft: That is the respondent's exhibit, isn't it?

Mr. Freeman: That is right, Respondent's Exhibit 7.

By Mr. Freeman:

Q. And I ask you whether or not that is an original agreement between your company and Cleveland Steel Products Company.

A. Yes, it is.

Q. And your signature appears thereon?

1335 A. That is right.

Q. And likewise Respondent's Exhibit No. 8 is an agreement between your company and Cleveland Steel Products Company, is that correct?

A. This is a copy of our contract form for the year of 1938, but it wouldn't necessarily represent a contract between Mercoid and Cleveland Steel Products, because none of these contracts would become official without my signature.

Q. Well, you did send out to your customers contracts in form, words, and figures corresponding to Respondent's Exhibit 8, setting forth price lists for various controls in the year 1939, is that correct?

A. Yes, I will agree that it is.

Q. And did you send out similar contracts to more than one company?

A. Did we what?

Q. Did you send out similar contracts corresponding to Respondent's Exhibit 8 to more than the Cleveland Steel Products Company in that year?

The Witness: Will you read the question, please?

(The question above referred to was read by the reporter.)

A. Upon advice of counsel, I refuse to answer.

By Mr. Freeman:

Q. I now hand you Commission's Exhibit No. 53
1336 and I will ask you to look at particularly page 765 and tell us whether or not you had an agreement with Herco Oil Burner Company for the year 1938.

Before you answer that, keep in mind that is an exhibit that was introduced by the Mercoid Corporation as an agreement outstanding, even though it isn't signed. I will give you that for the benefit of your counsel.

A. Well, I couldn't tell from that, but I could look at my records to determine.

Q. Well, give us the information, then, from your records.

Mr. Snyder: Was this identified by him?

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discusion off the record.)

Trial Examiner Sheppard: On the record. You may answer.

A. Yes, that is a copy.

By Mr. Freeman:

Q. So that even though the contract wasn't signed, that is, the one that we have here appearing in Commission's Exhibit 53, page 765, you did have a contract with that company?

A. Yes, sir.

Q. And as a matter of fact, on February 16, 1938, you received an initial order for 261 controls, is that correct?

1337 A. Well, I wouldn't know that.

Q. Isn't it a fact that you make a notation upon

your contracts with respect to the initial order that comes back with the contract?

A. I wouldn't remember that.

Q. Do you find such a notation, that is, with respect to 261 controls upon the contract with Herco for the year 1938, page 765 of Commission's Exhibit 53?

A. Well, it is on there, but I don't know anything about it.

Q. Isn't it a fact that you do not recognize a customer's contract, that is, where they signed the contract and returned it to your company, until after you receive an initial order, depending upon what form of contract you give the particular company, that is, whether it is a Form 11, Form 22, Form 33, Form 44, or Form 55?

A. Well, I can't think of any direct answer to that question, Mr. Freeman.

Q. Isn't it true that you have a minimum order requirement—that is, I am now speaking about the year 1938—for contract Form 11, of 25 units?

Mr. Haycraft: That is objected to as irrelevant and immaterial to the issues in this case.

Mr. Freeman: I am trying to get the information with respect to these contracts the hard way.

1338 Mr. Haycraft: I am submitting it is not a proper question in this case.

Trial Examiner Sheppard: I don't know.

Mr. Freeman: It has to do with contracts.

Trial Examiner Sheppard: The witness will give us the information. It may or may not fit into the picture. I can't tell yet.

Mr. Haycraft: Mr. Examiner, it is the same objection I raised to Mr. Tate's examination as to the set-up.

Mr. Freeman: This is a little different because it is directed to when the company, Mercoid, considers that it has an agreement. The mere signing of this paper means nothing until after the minimum order has come in.

Trial Examiner Sheppard: I will consider it in the general study of the case.

The Witness: Is there a question before the house?

Trial Examiner Sheppard: Read the question.

(The question above referred to was read by the reporter.)

A. Well, that question, I would consider, involves matters of a confidential nature, pertaining to the policy of

our company, and upon advice of counsel I will refuse to answer.

By Mr. Freeman:

1339 Q. And I take it, then, that you likewise will refuse to answer any questions that I might ask with respect to minimum order requirements for Forms Nos. 22, 33, 44, and 55?

A. I do, yes.

Q. I now hand you Sales Bulletin No. 41, dated January 14, 1938, directed to Sales Force, and will ask you to state whether or not it is a bulletin put out by the Mercoid Corporation as of about January 14, 1938, to the sales department of the Mercoid Corporation.

A. If you will tell me where you got this, Mr. Freeman, I might consider answering it.

Q. I am asking you whether or not your company sent out bulletins of that kind to the sales force?

A. I refuse to answer.

Q. Isn't it true that for the year 1938 you sent out published prices to a good many oil burner manufacturers, soliciting their business?

A. That would be a usual procedure.

Q. And all I am asking you now is to give me the prices at which you solicited business for the year 1938 from these companies.

A. Wouldn't you like it for 1939, 1940, and 1941 also?

Q. You bet I would.

A. Well, I refuse to divulge that information upon advice of counsel.

1340 Q. And I will ask you the same question during the years 1937—we have been talking about 1938—I will ask you the same question during the years 1937, 1939, 1940, and 1941, your company sent out published prices to the oil burner manufacturers throughout the country, price lists, did it not?

A. Yes, they were sent out to various oil burner companies and other trade classifications that we generally sent prices to the first of the year, whenever we got out a new catalogue.

Q. And you now consider such information confidential, although you sent them out to oil burner manufacturers in rather large quantities in the years 1937, 1938, 1939, 1940, and 1941, is that correct?

A. As far as a competitor is concerned, yes.

Q. I notice in your last answer you mentioned that you sent out price lists to oil burner manufacturers, and I think you said dealers or others?

A. I just said other classifications.

Q. What are these other classifications?

A. There are distributors, dealers, jobbers.

Q. And I take it that you have a different price set-up for dealers than you have for jobbers and different for jobbers than you have for manufacturers?

Mr. Haycraft: I object to that as irrelevant and
1341 immaterial.

Trial Examiner Sheppard: No, that has something to do with this entire set-up. I will let you answer that.

The Witness: May I have the question, please?

(The question above referred to was read by the reporter.)

A. Well, that goes again into the realms of confidential information and I won't be able to answer that.

By Mr. Freeman:

Q. But you do have different price set-ups?

A. I have just answered that question, Mr. Freeman.

Q. Will you tell me whether or not you considered Sears Roebuck a manufacturer or dealer or distributor, or what?

Mr. Haycraft: Objected to as irrelevant and immaterial.

Trial Examiner Sheppard: Yes, that objection will be sustained.

By Mr. Freeman:

Q. Will you tell us now what your low price was for combination fa. and limit control to Sears Roebuck, and the reason I am asking you that question is because it was touched upon by the Commission in its case when you voluntarily testified?

Mr. Haycraft: I will object to that voluntary testimony,
Mr. Freeman. He was called by the Examiner to
1342 testify, to help Mr. McCabe out.

Mr. Freeman: I will withdraw that voluntary part.

Trial Examiner Sheppard: Read the question.

(The question above referred to was read by the reporter.)

Mr. Haycraft: It is in the record. It is a matter of repetition.

Trial Examiner Sheppard: I think it has already been testified to.

Mr. Freeman: I just want to correct Mr. Owens, and I also want to correct Mr. Haycraft. It was Mr. Owens who testified with respect to what was sold to Sears Roebuck, on page 329 of the record.

Trial Examiner Sheppard: Yes, I think it is already in the record. I remember something about it.

The Witness: May I read it off here, because I have found out since that this was absolutely correct? I checked again afterwards.

Mr. Freeman: That is fine.

The Witness: The price to Sears Roebuck was $4.80.

"Q. At what time?

"A. In 1939.

"Q. In 1940?

"A. In 1940 the price was $4.75."

By Mr. Freeman:

1343 Q. Do you know what it was in 1938?

A. I may have that here. I am not sure that they bought any that year, Mr. Freeman

Q. Well, I am handing you a sheet of paper which we will mark for identification as Respondent's Exhibit 79.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Freeman: Mark this as Respondent's Exhibit 79.

(The document referred to was marked Respondent's Exhibit 79 for identification.)

By Mr. Freeman:

Q. I hand you this sheet marked Respondent's Exhibit 79, entitled Sears & Roebuck Company, 1938, prices, and will ask you to check it, if you care to, in order to refresh your memory.

Mr. Freeman: We ask now that the sales bulletin No. 41 of January 14, 1938, be marked for identification as Respondent's Exhibit 78. That was referred to in previous testimony.

(The document referred to was marked Respondent's Exhibit 78 for identification.)

By Mr. Freeman:

1344 Q. Does that help you refresh your memory?

A. On advice of counsel, I refuse to answer.

Q. You mean the advice of counsel doesn't help you refresh your memory?

A. No.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Mr. Haycraft: Mr. Examiner, I wish to at this time point out that the testimony of Mr. Owens was upon being recalled with respect to this one particular item that Mr. McCabe had been asked about, and Mr. McCabe was unable to answer, and I recalled Mr. Owens for the purpose of getting that one particular item.

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Freeman:

Q. Now, you do compete with Minneapolis-Honeywell for the sale of oil burner controls to oil burner manufacturers, do you not?

A. We do.

Q. And you compete with a set of controls comprising a primary control, a limit control, and a thermostat for use in connection with oil burners, do you not?

1345 A. We do.

Q. And likewise you compete with other control manufacturers, such as Penn Electric Switch Company and the Perfex Corporation, correct?

A. That is correct.

Q. And a set of your controls comprised of a primary, thermostat, and limit control, when installed on an oil burner, does substantially the same thing as a set of Penn Electric Switch controls, comprised of a primary, thermostat, and limit control?

A. But better.

Q. Much better?

A. Yes.

Q. And likewise your set of controls comprising these three that I have just mentioned were substantially the same as the three controls sold by Minneapolis-Honeywell, to-wit, a thermostat, primary, and limit control?

A. Same answer.

Q. Much better. And I take it that your company likewise is in competition with Perfex Corporation in its sale of limit controls, thermostats, and primaries for use in connection with oil burners?

A. We are.

Q. Same answer, would you make the same answer?

A. I say we are, yes.

Q. In the Cleveland Steel Products Company agreement, Respondent's Exhibit 7, there is mentioned a
1346 specific number of controls for the year 1939, is that correct?

A. Not entirely. If I were to say yes to your question, that wouldn't be actually what it says in that paragraph.

Q. Well, does it specify that the special—

A. Do you wish me to read what it says?

Q. No, let me read it. "The special net prices extended herewith by the company are based on the purchasers' 1939 control requirements, estimated to be 15,000 units."

A. That is correct.

Q. And that 15,000 was inserted by typewriter, correct?

A. That is right.

Q. And when you gave the prices to Cleveland Steel Products Company for the year 1938, you took into consideration Cleveland Steel Products Company's ability to use or purchase 15,000 units?

A. Are you speaking of 1938 or 1939?

Q. 1939.

A. Oh, pardon me.

The Witness: Will you read that question, now?

(The question was read by the reporter.)

Mr. Haycraft: That is objected to as irrelevant and immaterial, whether they took it into consideration.

Trial Examiner Sheppard: Well, it is a part of the same picture. I don't know. I will let the gentleman answer.

Mr. Haycraft: I wanted to make sure that Mer-
1347 coid isn't on trial.

Mr. Freeman: We will connect up all this testimony.

Trial Examiner Sheppard: If they don't I will strike it. I will let it go in, and if it isn't connected up, we will strike it.

Mr. Freeman: Just keep in mind we are doing this the hard way, now.

Trial Examiner Sheppard: Will you re-read the question.

(The question was re-read by the reporter.)

The Witness: Upon advice of counsel I will refuse to answer.

By Mr. Freeman:

Q. When your company extends a price for a set of controls to any prospective customer, you take into consideration the company's potential, do you not?

A. Anything bordering on the price or policy, upon advice of counsel, I must refuse to answer.

Mr. Haycraft: I object to that question as irrelevant and immaterial, too, Mr. Examiner.

Trial Examiner Sheppard: All right, let the record show it.

By Mr. Freeman:

Q. Did you give any company other than—or, 1348 did you give any company in the year 1939, a price for controls different from the price stated in Cleveland Steel Products Company agreement, Respondent's Exhibit 7?

Mr. Haycraft: Same objection.

Trial Examiner Sheppard: You may answer.

The Witness: Same answer. Any questions bordering on price or policy of the Mercoid Corporation, on advice of counsel, I refuse to answer.

By Mr. Freeman:

Q. Did you give out generally to the trade published prices in the year 1941 to any class of customers?

A. I believe I testified that we did send out prices, and I mentioned that to you before, I mentioned that once before, I answered that question.

Q. Do I understand that you refuse to produce any of those documents or price lists, or data sheets here at this trial, in response to the subpoena issued?

A. No, I have got them right here, but they are not for Minneapolis-Honeywell.

Q. Well, are they for the Federal Trade Commission in this case here?

A. The Federal Trade Commission can have access to them, but not a competitor.

Q. You have stated that you compete with Penn, Per-

fex, and the respondent here in the sale of oil burner
1349 controls, correct?

A. Correct.

Q. And isn't it true that price is a determining factor as to whether you get the business or Perfex gets the business, or Penn gets the business, or the respondent gets the business?

A. Not necessarily.

Q. What are the determining factors, then?

A. That depends upon the customer.

Q. What is that?

A. That depends upon the customer.

Q. Well, isn't it true that price is an important factor?

A. With some customers, yes.

Q. So that with some customers, where price is an important factor, the business goes to the company selling at the lowest price, isn't that correct?

A. Sometimes.

Q. What are some of the other factors that change the situation with respect to the manufacture or purchasing from some company at higher prices?

A. I don't believe I care to pose as an expert on that particular point.

Q. Can't you answer the question, Mr. Owens?

A. I did. I wouldn't care to pose as an expert on that point.

1350 Q. Then you refuse to answer the question?

Mr. Snyder: I believe, Mr. Examiner, that the witness has answered the question, that he didn't care to pose as an expert on this question.

Mr. Freeman: This isn't a question of an expert. I am asking what he knows, as a matter of fact, from his twenty years' or more experience in the control business.

Mr. Snyder: You are asking for a matter of opinion, Mr. Counsel.

Mr. Freeman: Based on twenty years of good, concrete knowledge, Mr. Haycraft, of the best kind.

Trial Examiner Sheppard: Okay, answer it any way you want to, Mr. Owens.

The Witness: I would consider that knowledge as something to be used for my own benefit, and not be divulged at this hearing.

By Mr. Freeman:

Q. You would give it to the Commission, but you refuse to give it to Minneapolis-Honeywell, is that correct?

1351 Q. Do you sell oil burner controls to the Aldrich Company of Wyoming, Illinois?

Mr. Haycraft: Objected to as irrelevant and immaterial. This company is involved in this case in no way.

Trial Examiner Sheppard: It hasn't been mentioned before.

Mr. Freeman: But, your Honor, we are charged here with violating the Robinson-Patman Act and we are trying to show we sell at a price to meet competition. How are we going to show we meet competition if we don't get the information from our competitors?

Mr. Haycraft: Get it from your customers.

Mr. Freeman: The Commission has said in a case recently that you have to show affirmatively you do these things to meet competition. We have to show it by the best kind of evidence.

Mr. Haycraft: I object to that. The best kind of evidence is the man who pays the price.

Mr. Freeman: The best evidence comes from the man who receives the dollar.

Trial Examiner Sheppard: Gentlemen, I will let him testify to that.

Mr. Haycraft: There isn't one scintilla of evidence to connect up that point to anything brought out by the Commission, in respect to the Aldrich Company.

1352 Mr. Freeman: I will change my question and ask you this:

By Mr. Freeman:

Q. I will ask you whether or not you sell controls to Williams Oil-O-Matic.

Mr. Haycraft: And that has already been brought out.

Mr. Gilpatric: I don't like to accept this ruling, your Honor, because this is our defense. We are putting in our defense to the charges in this case, Mr. Examiner. It certainly cannot be said that we are limited to ask questions only in regard to companies that were mentioned by the Commission in their case in chief. We are required to meet the charges in the complaint. I want to make it clear that we could go into every oil burner company in the country in meeting those charges.

Mr. Haycraft: That is where we are going to be at issue and we might as well be at issue right now, because it seems to me when the Commission rests its case, that is its case. You can't go all over the map or all over

the world to prove or disprove charges or allegations. You must disprove something we offered and not something we might have offered or thought about offering.

Trial Examiner Sheppard: All right, gentlemen, we will pass up that until we get to it. Whatever Mr.
1353 Haycraft brought out on the Commission's side, you will have perfect right to bring out on your side, but you are not limited to that entirely.

Mr. Freeman: Exactly.

Trial Examiner Sheppard: You have a right to put in additional defense upon a half a dozen different things, if you want to.

Mr. Gilpatric: That is what we are trying to do, but I think Mr. Haycraft is under the impression that we cannot question about anyone he did not choose to ask about—which is the silliest thing I ever heard of.

Mr. Haycraft: I want to make it clear, if that is your interpretation of my remarks, I will try it again and try to straighten it out for you. Here is the point. The Commission introduces certain testimony in evidence to prove an allegation of the complaint.

Trial Examiner Sheppard: That is right.

Mr. Haycraft: Now, it is no defense for them to say, "Well, we didn't do it here, or we didn't do it there, or some place else." You have to meet the evidence we submit and if we don't submit evidence to support these allegations, there isn't any case. But you go out and say, "We did not discriminate with Aldrich or John Jones", when there wasn't anything in our case at all about them.

That isn't going to help the Commission to decide
1354 the issues. The Commission wants to know whether or not the allegations and the evidence which we put in here in this record to support the allegations in the complaint is true.

Trial Examiner Sheppard: That is very true.

Mr. Haycraft: And you can't disprove it by saying you didn't do it with John Jones or Tom Smith.

Trial Examiner Sheppard: Suppose that is one issue brought out in the case by Mr. Haycraft, you will have a right to meet that issue, but in regard to all of the issues, you have got a right to bring out your own defense.

Mr. Freeman: And we are doing that right now.

Mr. Gilpatric: Mr. Examiner, let me point out that the issues in this case are not defined by the Commission's case. They are defined by the complaint. The complaint

didn't name any specific oil burner manufacturer. It just happened that Mr. Haycraft introduced certain of the quotations into the case. We have got to meet all of the allegations in the complaint, in general.

Trial Examiner Sheppard: It covers any incident Mr. Haycraft brings out or you bring out.

Mr. Gilpatric: We meet the charges leveled against us by the complaint, that is what we are on trial for.

Mr. Haycraft: I submit before we go to court to support any evidence the Commission has, it would
1355 have to have the evidence to support the allegations.

The point is this, Mr. Examiner, the Commission, through issuing a complaint which may be general in its terms, the Commission's attorney presents evidence to support the allegations of the complaint, which is specific evidence, taking up the date and all that sort of thing. We contend that the respondents should be confined to presenting evidence to disprove the proof. We offer evidence to support the allegations in the complaint. It isn't any defense for them to come here and say, "We did not do it here or there." If they can disprove the evidence we have offered, the case goes out the window.

You can't disprove our case or tend to contradict our case by testimony with respect to instances of corporations or customers that are not involved in our case in chief.

Mr. Gilpatric: Mr. Haycraft's statement has one basic fallacy in it, and that is what he has proven in support of the allegations in the complaint. Now, what we are endeavoring to show is that the Commission's case here has not fulfilled, carried out the allegations in the complaint, and we are entitled to go away beyond what he may have picked out as bits of evidence in the hope of proving his case.

Trial Examiner Sheppard: Well, after all, gentle-
1356 men, it is a matter of argument between you.

Mr. Gilpatric: It is a matter of our having a fair trial and having a right to put in a defense that we think is essential.

Trial Examiner Sheppard: The facts brought out by Mr. Haycraft will be presented to the Commission, and the facts submitted by you gentlemen will be presented to the Commission, and if there is sufficient to make a finding, they will do so.

Mr. Freeman: And when they make a finding, it is

a general finding. It isn't specific as to these specific companies Mr. Haycraft referred to and says we are now limited to.

Trial Examiner Sheppard: That is true. Now, Miss Reporter, will you read the question.

(The question was read by the reporter.)

A. You mean today?

By Mr. Freeman:

Q. During the period of 1937 to 1941.

A. Well, upon advice of counsel, I refuse to answer.

Q. And I take it you would refuse to answer a similar question with respect to the 88 companies enumerated in the subpoena?

A. That is correct.

Mr. Freeman: In the light of the last answer and
1357 the testimony of this witness with his refusal to answer or give any information with respect to the matters referred to in the subpoena duces tecum, we ask that this witness be kept under the jurisdiction of the Commission and that he be available when and if we want him back here.

Trial Examiner Sheppard: All right.

Mr. Freeman: And therefore, we will not examine further, until we can have a ruling as to whether or not Mr. Owens must respect the Commission's subpoena duces tecum or not.

Trial Examiner Sheppard: Well, I want some definite date to call Mr. Owens back before me again. I don't want it too general.

Mr. Freeman: Well, we would like to have him here tomorrow morning at 10:30.

Mr. Snyder: I don't think that is—

Mr. Freeman: And every other morning until we can release him. I want him under your jurisdiction.

Trial Examiner Sheppard: I will make an arrangement with Mr. Owens to come whenever you want him. I am sure he will do that.

Mr. Snyder: That is right.

Trial Examiner Sheppard: But I don't want to put him to any inconvenience at all, so, Mr. Owens, you hold yourself ready.

1358 Mr. Haycraft: How much advance notice do you need?

The Witness: Well, I will be in town until next—

well, the rest of this week. I will be away all next week.

Trial Examiner Sheppard: That will be sufficient.

Mr. Haycraft: Half an hour or an hour?

The Witness: I can get down here in thirty minutes.

Trial Examiner Sheppard: All right, you are excused until you hear from me.

The Witness: All right, thank you, Major.

(Witness excused.)

Mr. Freeman: But he is not excused from the subpoena.

Trial Examiner Sheppard: Excused until he hears from me.

Mr. Gilpatric: Calling Mr. Doucet.

Trial Examiner Sheppard: Have you got another witness?

Mr. Gilpatric: Yes, we have.

Mr. Freeman: Just for the purpose of the record, we have your name and address.

Mr. Snyder: Yes, Snyder.

Mr. Freeman: And may we serve any paper or notice upon you, as counsel for the Mercoid Company, in this case?

Mr. Snyder: Yes.

1359 E. J. DOUCET was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Trial Examiner Sheppard.

Q. What is your name?

A. E. J. Doucet.

Q. Where do you live, Mr. Doucet?

A. 5900 Trumbull Avenue, Detroit, Michigan.

By Mr. Gilpatric:

Q. Will you state the company with which you are connected and your position in it?

A. Detroit Lubricator Company, Detroit, Michigan, general sales manager.

Q. Mr. Charles H. Hodges, Jr., is the president of that company, is he not?

A. That is correct.

Q. Do you know whether or not he was served recently

by mailing a copy of a subpoena duces tecum, issued in this case at the request of the respondent, Minneapolis-Honeywell Company?

A. Yes, I do.

Q. And you are appearing here today in place of Mr. Hodges?

A. That is correct.

Q. Mr. Doucet, the subpoena that I have referred 1360 to calls for, among other things, copies of contracts for the sale of automatic temperature controls for domestic oil burners, entered into by your company during the years 1939 through 1943, with a number of specified oil burner manufacturers. Has your company, in fact, entered into any such contracts?

A. No.

Q. Has your company, to your knowledge, made any sales of controls during those years I mentioned to any of the companies named in the subpoena?

A. No, they did not.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Gilpatric:

Q. During that period, you did, however, did you not, offer for sale thermostats, limit controls and fan and limit switches?

A. That is correct.

Q. Were those controls offered to oil burner manufacturers?

A. Yes.

Mr. Haycraft: Objected to unless it is restricted to those companies.

Trial Examiner Sheppard: I have been allowing it. I will let it go into the record.

Mr. Haycraft: I know, but I am going to continue 1361 my objections.

Trial Examiner Sheppard: Objection overruled. You can answer.

A. Yes.

By Mr. Gilpatric:

Q. Did you also offer controls of the types aforementioned to wholesalers and to dealers?

A. Yes.

Q. Did the prices at which those controls were offered to the three different classifications aforenamed differ, as between classifications?

A. Yes, they did.

Mr. Haycraft: Let the record show my general objection to all that.

Trial Examiner Sheppard: Oh, yes, the general objection will be shown, Miss Reporter.

By Mr. Gilpatric:

Q. In the case of sales to jobbers and dealers, what was the general basis of the prices on your company's controls? That is, were they list and discount, or net prices?

A. List and discount basis to wholesalers and dealers.

Q. Did the discounts vary, according to the quantities of controls purchased?

A. Yes, they did.

Q. What was the general nature of your com-
1362 pany's price structure on sales or offered for sale to oil burner manufacturers?

A. What was the structure?

Q. The general set-up of the price?

A. We based our prices in accordance with the potential of the customers.

Q. That is the total output of the burners and the total requirements of controls?

A. The total requirement of controls for that customer.

Q. And not the specific quantities of controls purchased from your company?

A. That is right.

Q. And did your company offer for sale and sell controls at different prices, in accordance with quantities of controls purchased by or in accordance with the customers' differing potential?

A. Repeat that question, please.

(The question was read by the reporter.)

The Witness: I wonder if you could simplify that question? It is a little involved.

Mr. Gilpatric: Yes, let me state it this way; did the price at which your company sold controls to oil burner manufacturers vary in accordance with the potential of the customer?

A. Yes, they did.

1363 Q. Did you have different brackets or classifications of prices?

A. Yes.

Q. Determined on that basis?

A. Yes.

Q. How many such brackets did you have during the years 1939 through 1941?

A. To the manufacturers, four different brackets.

Q. Were those prices net prices within the different brackets?

A. They were net prices wherever the controls were specified on those price sheets. Where the controls were not specified on the price sheets, they were on a list and discount basis.

Q. In my questions thus far, I have referred only to thermostats, limit controls, and fan limit switches. Did your company offer for sale to other than your parent company, American Radiator Company, any primary controls?

A. No.

Q. So you do not have any price structure for the sale of primary controls, other than the prices at which you charge the parent company?

A. That is right.

Q. In order for a particular oil burner manufacturer to have the benefit of a particular level of price, was
1364 he required to place any order for any specific quantity of controls?

A. We never had a contract from—such as has been discussed here, no, I would say not. We would take an order based on what we believed is the potential of the company for a period of a year.

Q. Not require that any specific quantity of controls be ordered?

A. No.

Mr. Gilpatric: That is all.

Mr. Haycraft: No cross-examination.

Trial Examiner Sheppard: Thank you very much.

(Witness excused.)

Mr. Haycraft: I move to strike all the testimony of this witness as irrelevant and immaterial, no probative value.

Trial Examiner Sheppard: The objection is overruled. I will give it probative value.

Mr. Haycraft: There is a motion to strike, your Honor.

Trial Examiner Sheppard: The motion to strike is denied, too.

Anything else?

Mr. Freeman: In view of the fact of our little episode with Jimmy Owens, we ask that we adjourn now until tomorrow morning.

1365 Trial Examiner Sheppard: Take an adjournment until ten o'clock tomorrow morning, Miss Reporter. We stand adjourned.

(Whereupon at 3:45 p.m., November 29, 1943, the hearing in the above entitled matter was adjourned.)

1366

Room 1123,
New Post Office Building,
Chicago, Illinois,
November 30, 1943.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Messrs. Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and

Paul J. Chase, Esq., 15 Broad Street, New York, New York, and

Bair & Freeman, by Will Freeman, Esq., 135 South La Salle Street, Chicago, Illinois, Attorneys for respondent.

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Proceedings.

Trial Examiner Sheppard: Miss Reporter, you can convene the hearing pursuant to our adjournment yesterday.

MALCOLM E. HENNING was thereupon called as a witness for the Respondent, and having been first duly sworn, testified as follows:

Direct Examination by Trial Examiner Sheppard.

Q. Let us have your name, please.
A. Malcolm E. Henning.
Q. And your address?
A. Goshen, Indiana.

Trial Examiner Sheppard: All right, Mr. Freeman, you can proceed.

By Mr. Freeman:

Q. Your name is Malcolm E. Henning and you are a resident of Goshen, Indiana, and vice president of the Penn Electric Switch Company, is that correct?

A. That is correct.

Q. What is the business of the Penn Electric Switch Company?

A. The manufacture of automatic controls for oil burners, stokers, and refrigerators, air compressor, pneumatic water systems and, at the present time, many pieces
1368 of apparatus for the Navy and Army.

Q. How long has the Penn Electric Switch Company been in business?

A. A little more than twenty years.

Q. When did it start its manufacture and sale of controls for use in connection with the oil burner industry?

A. Early in the 1930's—'31 or '32, approximately.

Q. And that is about the time when you entered the employ of the Penn Electric Switch Company?

A. A little earlier than that—1927.

Q. In other words, you have been with the Penn Electric Switch Company since 1927?

A. That is correct.

Q. And about 1932, the Penn Company started in the manufacture and sale of the oil furnace controls?

A. That is correct.

Q. Now, when you started in the oil furnace control business, what was the over-all competitive picture at that time? Did you start in a new industry?

A. No, the heating industry was well established at that time.

Q. And when you say "heating industry", do you include the oil burner industry?

A. That is correct.

Q. Will you name some of the companies that were
1369 then in business, that is, when you started in 1932?

A. Minneapolis-Honeywell; The Mercoid Corporation; Detroit Lubricator.

Q. Did you make any survey or check-up as to what you might have to meet in a competitive way before you entered into the oil burner control industry?

A. To some extent.

Q. And what did you find, generally speaking, Mr. Henning?

A. We found the industry similar to others which we served, in that the picture was a reasonably competitive one and some of the companies were well entrenched and established.

Q. And what do you mean by "well entrenched and established"?

A. Companies like Mercoid and Minneapolis-Honeywell had been in the field for some time and their products were well known in the industry.

Q. When you say "well established," then you mean companies that had been in business for a long time?

A. That is correct.

By Trial Examiner Sheppard:

Q. You mentioned two companies, Mr. Henning. Were there any more in that category?

A. I mentioned three prior to that—also the Detroit Lubricator Company.

By Mr. Freeman:

Q. And when you entered into the oil burner con-
1370 trol business, what did you do to get your products in the field? That is, what did you do in order to sell your products?

A. The customary merchandising, by contacting prospective customers.

Q. Do you recall some of the early customers you contacted?

A. Yes, Century Engineering; Timkin; Gilbert & Barker; A. B. C.

Q. Williams Oil-O-Matic?

A. Williams Oil-O-Matic.

Q. Had you had some business dealings with some of these companies in other fields—namely, refrigeration—before you entered into the oil burner control business?

A. Some of them we had.

Q. Now, during these nine or ten years—that is, from the period of 1932, when you entered the oil burner control field, up to 1943—what has generally been the history of your business? What has its growth been?

A. Will you state that again, please?

Mr. Freeman: Will the reporter read it?

(The question above referred to was read by the reporter.)

A. We have had a steady growth during this period of time and we built up a million dollar business in the heating field during that period.

Q. By "In the heating field" you are again re-
1371 ferring to the oil burner control business?

A. Substantially, yes.

Q. That is a major portion of your heating business, is it?

A. That is correct.

Q. Have you run into any definite obstacles during the time you started—that is, from the time you started in 1932 up to 1941—that kept you from selling oil burner controls?

A. Nothing other than the usual competition that you would encounter in any other field.

Mr. Haycraft: I move to strike the answer, Mr. Examiner. There is no foundation laid that this witness is familiar with the obstacles that might be found in any other field. It is pretty general.

Trial Examiner Sheppard: Well—

Mr. Haycraft: There is no showing that he is familiar with any other field.

Trial Examiner Sheppard: I think he is competent to testify on a general line of competition that any business man would be called upon to meet in a field in which he is just entering. I think he is competent to do that. I think I will let him testify to that. You may add to it, Mr. Henning, anything that you may see fit, along that line.

The Witness: By "the field" I meant we are manufacturers also of refrigeration controls and we have, the
1372 refrigeration industry has a competitive field in this picture. We manufacture controls for pneumatic water systems and air compressors, and we have a competitive field in that picture and the competitors are not of a different character in those industries than they are in the oil burner industry.

By Mr. Freeman:

Q. In view of Mr. Haycraft's objection, I am now going to ask you whether you found any greater obstacle in your venturing into the oil burner control business than you found in the control business relating to refrigeration or the control business relating to pneumatic water softeners or air compressors, or any other business you were engaged in prior to the time you entered in the oil burner control business.

Mr. Haycraft: That is irrelevant and immaterial.

Mr. Freeman: I am just trying to qualify this man, in view of your remarks.

Mr. Haycraft: I object further, Mr. Examiner, be-

cause it is irrelevant and immaterial whether he found any obstacles in any other fields. We are not trying any other field. This trial is restricted to the oil burner business.

Trial Examiner Sheppard: I am particularly interested in the oil burner field.

Mr. Freeman: I am asking, Major, specifically whether he found any obstacles in this field other than what
1373 he found elsewhere. I am talking about the oil burner field.

Trial Examiner Sheppard: I am interested in the oil burner field.

Mr. Freeman: That is what I am interested in, too.

Trial Examiner Sheppard: I think the answer is sufficient. Go ahead. I think the answer is clear on that point.

Mr. Freeman: What is your ruling with respect to my last question?

Trial Examiner Sheppard: Read that last question, Miss Reporter.

(The question above referred to was read by the reporter.)

Trial Examiner Sheppard: Objection sustained as to any competition this man may have had outside of competition with the respondent. We don't want to go into any other fields.

Mr. Freeman: I don't think you mean that last remark, Major,—"outside of competition with this respondent"—because we want to show there is competition in this industry. It has to be directed to the oil burner industry, but we want to have a right to show that the Penn Electric Switch Company was in competition not only with the respondent but with the Mercoid, the Detroit Lubricator, and the many other companies in connection with the
1374 oil burner business.

Trial Examiner Sheppard: The oil burner business is what I am talking about. I don't care to go into the refrigeration business, but you can determine that in the oil burner business.

Mr. Freeman: I understood your remark to mean we could not show any competition other than what he was in competition with this respondent.

Trial Examiner Sheppard: Not at all. You misunderstood me. I just wanted to limit the competition to the same thing that these fellows compete with you on. Go ahead.

By Mr. Freeman:

Q. Now, Mr. Henning, we are talking now about the oil burner business.

Trial Examiner Sheppard: That is right.

By Mr. Freeman:

Q. I understood you to say that you had a steady growth from the time you started up until 1940, and, thereafter, you began to do war work. Right?

A. That is correct.

Q. And you mentioned the Detroit Lubricator, you mentioned the Minneapolis-Honeywell Regulator Company, and you mentioned The Mercoid Corporation. Have you had other competition during the period from 1932 to 1941, in connection with the oil burner business?

1375 A. We have, yes.

Q. Will you name such other competitors?

A. There is the Perfex Corporation and the White-Rogers Corporation.

Q. Do you actively compete with the companies that you have mentioned in the oil burner business?

A. Yes, we do.

Q. Then you make primary oil burner controls?

A. We do.

Q. Do you make room thermostats?

A. Yes.

Q. Do you make limit controls?

A. Yes, we do.

Q. And how long have you been making controls in sets—that is, the three important controls that usually are usable with an oil burner?

A. Approximately ten years.

Q. During those ten years you have called on the trade generally?

A. I have.

Q. Will you give us just a running list of some of the accounts that your company has called upon during the last ten years?

A. Well, the subpoena covers some 88 odd companies. We, of course, have called on those. That is not a

1376 very good cross section of the country. There are many others that would constitute the greater part of the volume, the field,—such as The Crane Company, and Gilbert & Barker Division of Standard Oil—The Delco Cor-

poration; The American Radiator and Standard Sanitary Corporation.

Q. Your company actually calls upon Delco, or called upon Delco?

A. That is correct.

Q. Have you solicited the sale of controls in that company?

A. We have.

Q. Now, when you talk about "controls," I just wish you would tell us, so that the record is clear, just what controls you try to sell Delco.

A. We try to sell them the necessary set of controls that constitute the required circuit for an oil burner.

Q. And what are those necessary controls?

A. They are a thermostat, safety limit control, and primary control.

By Trial Examiner Sheppard:

Q. You sold in sets, did you?

A. Whenever we could.

Q. Whenever you could.

By Mr. Freeman:

Q. And you solicited the sale in sets whenever you could?

A. That is correct.

1377 Q. Now, you mentioned The Crane Company. What controls did you solicit that company for?

A. The same type of controls.

Q. And would you make a like answer to the companies that you called upon from time to time?

A. That is correct.

Mr. Haycraft: That is leading, Mr. Examiner, and I move to strike the question and answer.

Trial Examiner Sheppard: Well, I don't know. I think in a case like this leading questions won't hurt. I will let both of you lead, because it brings out the answers so much quicker and I will let you go on.

By Mr. Freeman:

Q. Do you maintain salesmen in the field?

A. Yes, we do.

Q. And I take it, from your answers, that you personally called on the trade?

A. I do a good deal of that type of work.

Q. Did you do more of it in the early days, back in

1932, say, up to 1937, than perhaps you do at the present time?

A. That is correct.

Q. Well, you might tell me about how many salesmen you had when you started in the oil burner field, devoting your time to the sale of oil burner controls, in 1932 or 1933.

A. Well, when we started, we had a very small
1378 force, but at the present time, we operate branch offices in the metropolitan centers; such as Boston, Philadelphia, New York, Detroit, Chicago, St. Louis, Moline, Rock Island, Davenport, and we have offices, four offices, on the west coast—enough spots of that kind to cover the metropolitan centers, and then we operate a staff of capable merchandising engineers from our main office in Goshen, Indiana.

Q. And that growth has been constant from 1932 on up to the present time?

A. It has.

Q. Have you had any reverses or set-backs that caused a curtailment in any of your sales force at any time?

A. None whatsoever.

Q. And, of course, now your answers are directed to the oil burner control business?

A. That is correct.

Q. Now, Mr. Henning, you have been served with a subpoena by the Commission in behalf of the respondent here, which asked you to produce any contracts that your company may have entered into with some 88 enumerated companies in the subpoena. Hake you made a check of your records?

A. Yes, we have.

Q. And you have produced a number of contracts—that is, photostatic copies or carbon copies—and I would like to have you just run through the list and give
1379 me the names of the companies that your company had contracts with during the years 1937 to 1941.

A. Well, now, this only comprises those which we had from 1938 to 1941. I have a list, however, here of those which we also had in 1937. The reason for that is that our files are only retained for a five-year period, and the 1937 records are not complete. I had to draw the information from our sales cards, which we keep for a great number of years, and I have the photostatic copies of contracts for 1938 to 1941, inclusive.

Q. So that the record is clear, then, Mr. Henning, I wish you would run through the list of names which appear in that subpoena, and tell us which ones your company had an agreement with in the year 1937.

A. Century Engineering Corporation.

Q. By the way, Mr. Henning, would you just as soon tell us about the sales that you had with Century Engineering Company in 1937?

A. Well, it amounted to $18,333.86, according to the record, and it comprised a master or primary control of the continuous ignition type, and the customary safety switch and thermostat.

Q. That is, it comprised a set of controls?

A. That is right. I called on that company personally and I am quite familiar with the set-up.

Q. Well, go on now and give us, continue with the
1380 company for the year 1937 that you had contracts with.

A. Harrison Sales Company, Seattle.

Q. Well, give us your sales to that company in round figures.

A. $4,491.00. The Heil Company.

Q. Of Milwaukee?

A. Milwaukee, Wisconsin, $3,598.00. Pan American Engineering Corporation, Berkeley, California, $819.00. Rossoe Manufacturing Company, Seattle, Washington, $9.08. Yorke Oil Burner Corporation, $412.72.

Q. While we are talking about the year 1937, can you give me, in round figures, your sales to Williams-Oil-O-Matic for oil burner controls for the year 1937?

A. $194,810.00.

Q. Also, do you have any notation as to your number of units you sold Timkin Company in Detroit for the years 1935 and 1936?

A. Yes, I have.

Q. Will you give me the 1935 and 1936 units of sales?

A. In 1935 there were 2,313 units. In 1936, there were 1,779 units.

Q. Now, for the year 1937, you might give me the sales for Electrol.

A. Electrol, $12,153.70.

Mr. Haycraft: Is that Electrol?

1381 Mr. Freeman: Electrol.

Mr. Haycraft: 12,000 what?

Mr. Freeman: $12,153.70.

By Mr. Freeman:

Q. Now, did you personally call on Electrol?

A. Yes, I did.

Q. And what controls did you sell to Electrol back in 1937?

A. We sold them primary—a special control which they applied to their own stack switches, but they also bought along with it thermostats and limit switches.

Q. Am I correct in my understanding that Electrol used a stack switch employing high voltage?

A. That is correct.

Q. So you sold Electrol thermostats and limit switches, together with some parts that went into the Electrol home made primary?

A. That is correct.

Q. I might ask at this time, has your company continued to call on Electrol from 1937 on up to date—or at least up to 1941?

A. Up until 1941, we did.

Q. And you have made sales annually to that company?

A. Yes.

Q. And substantially the same type of controls; thermostats, limit controls and a portion of the primary?

1382 A. Substantially so.

Q. Now, Mr. Henning, I think we have covered the year 1937. You now have photostatic copies of agreements that were entered into by your company through the years 1938 to 1941, inclusive, with some of the specific companies enumerated in the subpoena. Will you refer to them?

A. Well, Century Engineering. Here is a contract for 1938. Another one for 1939. A contract for 1940, a contract for 1941.

Mr. Freeman: We offer in evidence as Respondents' Exhibit 80-A, 80-B and 80-C the Century agreement for 1938; as Respondents' Exhibit 81-A, 81-B and 81-C, the Century agreement for 1939; as Respondents' Exhibit 82-A, 82-B, 82-C, 82-D, 82-E, 82-F, the Century agreement for 1940; and as Respondents' Exhibit 83-A, 83-B, 83-C, 83-D and 83-E, the Century agreement for 1941.

Trial Examiner Sheppard: All right. Any objection to those?

Mr. Haycraft: No, sir.

Trial Examiner Sheppard: Let the Exhibits, Respond-

ents' Exhibits 80 to 83, inclusive, be accepted into the record.

(The documents referred to were marked RESPONDENT'S EXHIBITS 80-A, 80-B, 80-C; 81-A, 81-B, 81-C; 82-A, 82-B, 82-C, 82-D, 82-E, 82-F; 83-A, 83-B, 83-C, 1383 83-D and 83-E and received in evidence.)

By Mr. Freeman:

Q. Now proceed, Mr. Henning, with respect to the other photostatic copies of the agreements here produced.

A. Contract with the Harrison Company for 1938; another in 1939.

Mr. Freeman: We offer in evidence as Respondent's Exhibit 84-A, 84-B and 84-C the 1938 agreement with Harrison Sales Company; and as Respondent's Exhibit 85-A, 85-B and 85-C, the agreement for 1939 with Harrison Company.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let the exhibits, 84 and 85, be accepted in the record.

(The documents referred to were marked RESPONDENT'S EXHIBITS 84-A, 84-B, 84-C; 85-A, 85-B and 85-C and received in evidence.)

By Mr. Freeman:

Q. Well, now proceed, Mr. Henning.

A. The Heil Company, in Milwaukee, Wisconsin, 1938.

Mr. Freeman: We offer as Respondent's Exhibit 86-A, 86-B and 86-C the agreement with The Heil Company for the year 1938.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

1384 Trial Examiner Sheppard: Let it be accepted.

(The document referred to was marked RESPONDENT'S EXHIBIT 86-A, 86-B and 86-C and received in evidence.)

The Witness: The Hoban Manufacturing Company, 1939 agreement.

Mr. Freeman: That we will also offer in evidence as Respondent's Exhibit 87-A, 87-B and 87-C, the Hoban agreement for the year 1939.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The document referred to was marked RESPOND-

ENT'S EXHIBIT 87-A, 87-B and 87-C and received in evidence.)

The Witness: The Master Oil Burner Company, Seattle, Washington, for the years 1938 and 1939 and 1941.

Mr. Freeman: We also offer in evidence Respondent's Exhibit 88-A, 88-B and 88-C, the Master agreement for 1938; as Respondent's Exhibit 89-A, 89-B and 89-C, the Master agreement for the year 1939; and as Respondent's Exhibit 90-A, 90-B, 90-C, 90-D and 90-E, the Master agreement for the year 1941.

Trial Examiner Sheppard: Any objection, gentlemen?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The documents referred to were marked RE-
1385 SPONDENT'S EXHIBITS 88-A, 88-B, 88-C; 89-A, 89-B, 89-C; 90-A, 90-B, 90-C, 90-D, 90-E and received in evidence.)

The Witness: The Montag Stove and Furnace Company, Portland, Oregon, for the year 1938.

Mr. Freeman: We offer as Respondent's Exhibit 91-A, 91-B and 91-C the Montag agreement for the year 1938.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The document referred to was marked RESPONDENT'S EXHIBIT 91-A, 91-B and 91-C and received in evidence.)

The Witness: '39, '40 and '41.

Mr. Freeman: So that the record is clear, you have now handed me agreements with Montag for the years 1939, 1940 and 1941, is that correct?

A. That is correct.

Mr. Freeman: We now offer in evidence as Respondent's Exhibit 92-A, 92-B and 92-C the Montag agreement for the year 1939; as Respondent's Exhibit 93-A, 93-B, 93-C, 93-D, 93-E, the Montag agreement for the year 1940; and as Respondent's Exhibit 94-A, 94-B, 94-C, 94-D and 94-E the Montag agreement for the year 1941.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

1386 (The documents referred to were marked RE-SPONDENT'S EXHIBITS 92-A, 92-B, 92-C; 93-A, 93-B, 93-C, 93-D, 93-E; 94-A, 94-B, 94-C, 94-D, 94-E and received in evidence.)

By Mr. Freeman:

Q. I might ask you, Mr. Henning. I have referred to these agreements by their calendar years, but you start with the date of the sales agreement for your fiscal year; am I correct in my statement that these agreements were made from time to time and they run for a year or a period of twelve months?

A. They run for twelve months, and they usually start from the date of the signature of acceptance. This is the date we issue them from our own typewriters and dispatch them, and when the recipient signs them, it becomes a running distribution from that period.

Q. So that my reference to the Montag agreement for 1941—Respondent's Exhibit 94-A, through E, inclusive—covers in fact, the period starting December 26, 1941, and running for twelve months, is that correct?

A. Correct. That is all explained, the details are explained on the back of the contract.

By Trial Examiner Sheppard:

Q. I am interested to know, Mr. Henning, if that is a common occurrence among all the men in your industry.

A. I think it is, Major.

1387 Q. They start when it is executed?

A. Yes. In other words, if we draw up this agreement and put a date on it, it really isn't a contract until the other man signs it, and then he signs it and returns it to us. We okay it, put our signature on and put the date on, and it becomes effective as of that date.

Trial Examiner Sheppard: I think the record is clear on that. Thank you, sir.

Mr. Haycraft: I would like to ask a couple of questions on that point, if I may.

Trial Examiner Sheppard: All right, you may.

By Mr. Haycraft:

Q. Do you usually negotiate your contracts in December?

A. I beg your pardon?

Q. Do you usually negotiate your contracts in December for the next year?

A. Well, that has been generally the desire, but if you happen to get a contract in the middle of the year, then, of course, it would run twelve months from that time. And if you will note the dates on these, they are all over the

map. The next one is August, here is one for September, the next one is February, and the next one is March, and here is one in January, so it depends when we get to the customer, and if he is willing to go with us from that period on, we draw the contract whenever we can and it is
1388 drawn for a twelve-month period from that time. But your thought is right, we would like to get as near the fiscal year as we can, but that is not always possible.

Trial Examiner Sheppard: You can't always do it.

The Witness: That is correct.

By Mr. Haycraft:

Q. When you mention the 1941 agreement, that was negotiated in December, 1941, but the sales made during 1941 were really under the 1941 agreement. That would be right, I see. Just so that is clear is all.

Mr. Freeman: That is what I wanted to bring out when I referred to the calendar year.

By Mr. Freeman:

Q. Now, Mr. Henning, will you proceed on with the other agreements you have brought here.

A. Micro-Westco, Incorporated, Bettendorf, Iowa. Now, for example, that was dated in August and signed in September.

Trial Examiner Sheppard: I see.

The Witness: Micro-Westco, 1938. I might mention one significant thing about these two. They are both dated in 1938, one in August and one in September. The second nullifies the first, for the reason that the customer was willing to commit himself for a greater quantity and entered into a new agreement a month later for a larger amount of controls and a lower respective price.

1389 Mr. Freeman: We offer in evidence as Respondent's Exhibit 95-A, 95-B and 95-C the Micro-Westco agreement having date of August 22, 1938 on its face; and as Respondent's Exhibit 96-A, 96-B, 96-C, 96-D and 96-E the Micro-Westco agreement having on its face the date of September 26, 1938.

Trial Examiner Sheppard: No objection to it?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted in evidence.

(The documents referred to were marked RESPOND-

ENT'S EXHIBITS 95-A, 95-B, 95-C; 96-A, 96-B, 96-C, 96-D, 96-E and were received in evidence.)

The Witness: Pan American Engineering Company, Berkeley, California, for the years 1938 and 1939.

Mr. Freeman: We offer in evidence as Respondent's Exhibit 97-A, 97-B, 97-C and 97-D the Pan American agreement for 1938; and as Respondent's Exhibit 98-A, 98-B and 98-C the Pan American agreement for 1939.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The documents referred to were marked RESPONDENT'S EXHIBITS 97-A, 97-B, 97-C, 97-D; 98-A, 98-B, 98-C and received in evidence.)

The Witness: The Roscoe Manufacturing Com-
1390 pany, Seattle, Washington, for the year 1939.

Mr. Freeman: And we offer in evidence as Respondent's Exhibit 99-A, 99-B and 99-C the Roscoe agreement for 1939.

Trial Examiner Sheppard: Any objection to that?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The document referred to was marked RESPONDENT'S EXHIBIT 99-A, 99-B and 99-C and received in evidence.)

The Witness: Standard Products Manufacturing Company for the year 1941, Philadelphia, Pennsylvania.

Mr. Freeman: We offer in evidence as Respondent's Exhibit 100-A, 100-B, 100-C, 100-D and 100-E, the Standard Products agreement for 1941.

Trial Examiner Sheppard: Any objection to that?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The document referred to was marked RESPONDENT'S EXHIBIT 100-A, 100-B, 100-C, 100-D and 100-E and received in evidence.)

The Witness: Brown Oil Burning Equipment Co., Cambridge, Massachusetts, for the year 1941.

Mr. Freeman: I might say, with respect to the last agreement referred to by the witness Henning, that it is a typewritten copy, as distinguished from a photostatic copy,
and I trust that my good friend, Mr. Haycraft, will
1391 have no objection to using it?

Mr. Haycraft: Not if he says it is a true copy.

By Mr. Freeman:

Q. That is a true copy, isn't it?

A. It is a true copy.

Mr. Freeman: Okay.

The Witness: We were shy on our tabulation and asked our office late last evening to send it to us this morning and the photostatic machines were not available last night and we made that copy.

Trial Examiner Sheppard: I think that is sufficient. We will mark it 101.

Mr. Freeman: I just wanted to make my record. We offer as Respondent's Exhibit 101-A, 101-B and 101-C a copy of the 1941 agreement with the Brown Oil Burning Equipment Company.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be received in evidence.

(The document referred to was marked RESPONDENT'S EXHIBIT 101-A, 101-B and 101-C and received in evidence.)

By Mr. Freeman:

Q. Now, Mr. Henning, I believe you stated that these are agreements that you had with companies men-
1392 tioned in the subpoena after checking your records? That is correct?

A. Correct.

Q. Now your company, as a matter of fact, has other contracts with other companies?

A. That is correct.

Q. And I take it, also, that that is the usual practice of your company, to enter into agreements with oil burner manufacturers with respect to their purchase of oil burner controls?

A. Wherever possible.

Q. That is, you start out on the premise that you want to sign up each company, if you possibly can?

A. That is correct.

Q. And, I take it, from the explanation you made this morning, that you do sell controls though in quantities to companies that do not sign a contract?

A. That is correct.

Q. And is that true of the Williams-Oil-O-Matic that

you mentioned selling some $200,000 worth of controls to in the year 1937?

A. Yes, it is.

Q. That is, you mad those sales without any contract?

A. Right.

Q. Does the contract that you entered into set forth the terms and conditions of sale, your patent guar-
1393 antee, your warranty and things of that kind?

A. Yes, they do.

Q. And does the contract set forth the conduct or relationship that is to exist between your company and the purchaser for the twelve-month period covered by the contract?

A. Yes.

Mr. Haycraft: Mr. Examiner, it seems to me the contracts will speak for themselves.

Mr. Freeman: Well, off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Trial Examiner Sheppard:

Q. Mr. Henning, I would like to ask just one question here. I would like to have some sort of explanation why it is that some of your customers, in selling your products to them, you make a formal agreement, as evidenced by these agreements we have just been talking about, and in others you don't have any agreement.

A. Well, there is a reluctance on the part of some manufacturers to give us an agreement and we do everything we possibly can to encourage them to do it, but some manufacturers just won't respond to our efforts.

Trial Examiner Sheppard: They would rather be free, so that if they would prefer to buy they could buy
1394 where they want, and not be bound up by a contract to one.

The Witness: I would rather imagine that that is their feeling, although it has been our experience that even though they sign contracts, they do buy from others.

By Trial Examiner Sheppard:

Q. I was going to ask you; that although you do make a contract specifically with some manufacturers, they do buy on the outside, too?

A. Yes, they do.

By Mr. Freeman:

Q. Well, Mr. Henning—

Trial Examiner Sheppard: (Interposing.) Just one more question.

By Trial Examiner Sheppard:

Q. With a great many of the customers, that you evidently have in the sale of your products, do you have more that buy without contracts, or do you have more that buy after going into a contractual relationship with you?

A. From the tabulation of customers, I would say that we have more that buy with contracts, but from the dollar and cents volume, I believe we have more that buy without contracts.

Trial Examiner Sheppard: I see. Go ahead, Mr. Freeman.

By Mr. Freeman:

1395 Q. Might you give, in round numbers, your sales to Williams Oil-O-Matic for the years 1938, 1939, 1940 and 1941?

A. 1938 was $73,154.00; 1939, $61,939.00; 1940, $70,445.00; 1941 was $80,093.00.

Q. Mr. Henning, there was some mention here about agreements and you have testified that you endeavor to get them wherever you can. Do you solicit agreements from oil burner manufacturers where you know that they have signed up an agreement with some other company?

A. Yes, we do.

Q. Do you personally know, or have you actually run into situations where, of your own knowledge, you knew that the company had an agreement with one of your competitors, and likewise signed up an agreement with your company?

A. Yes, we have.

Q. And that is of your own knowledge?

A. That is of my own knowledge.

Q. And, following along now on that line, do you know of any instance that you personally have run into where you solicited an agreement, secured the signature of the company on an agreement, where the oil burner manufacturer had an agreement with the respondent, Minneapolis-Honeywell?

A. Yes.

Q. Now, Mr. Henning, I note on the agreements that

you have attached certain net prices, price schedules
1396 for Penn heat controls, and I am going to ask you whether or not the schedules attached to all these agreements that you have here bear the same selling prices or net prices for a thermostat, a primary and a limit control?

A. They do not.

Q. I note on these agreements, in certain places, that "The net prices listed below (or the net prices as shown on the attached schedule) which shall be considered as part of this agreement"—and then a blank space, and in such blank space there is typewritten a key number. Will you tell me what that key refers to?

A. That key or quote number refers to the attached net price which we have extracted from our general price to manufacturers—our general sheet—and attached it to the order—such prices representing the quotations that the customer is entitled to, based on his potential volume.

In the lower left hand corner will be noted, for example, on Brown Oil Burning Equipment—

Q. (Interposing.) Respondent's Exhibit 101.

A. —a quote number H-501-F.

Q. L.

A. Yes, L, rather. The "H" stands for heating, and the last digit of the numbers "501" indicates that it is bracket 1 from our general price sheets.

Q. And the particular quote number which you
1397 just gave, H-501-L, appears in typewritten form upon the face of the agreement?

A. That is correct.

Q. And the prices then to the Brown Oil Burning Equipment Company for the twelve-month period, or for the year period, following the date of the contract, is then governed by the price schedule attached to the agreement? Correct?

A. That is correct.

Q. Now, I note upon the Rossoe agreement—Respondent's Exhibit 99—the key number or quote number, as you refer to it, of H-502, and will you explain what that means.

A. The only difference between that number or numbers and the one previously referred to on Respondent's Exhibit 101, is the last digit "2", which indicates bracket 2 prices.

Q. And the schedule of net prices attached to the agreement is likewise code H-502, is that correct?

A. That is correct.

Q. So that from the code number, can you tell us what bracket or price structure your company extended to Rossoe Manufacturing Company during the period covered by the agreement, Respondent's Exhibit 99?

A. Yes, we can.

Q. And what is that?

A. Bracket 2.

Q. That Rossoe Company had the benefit of a
1398 lower or higher price for oil burner controls than Brown Oil Burning Equipment Company?

Trial Examiner Sheppard: Exhibit 101.

Mr. Freeman: 101, Exhibit 101, thank you.

A. Rossoe received a lower figure than the Brown Oil Burning Equipment Company.

By Mr. Freeman:

Q. So that the higher the digit number, the lower the net price for controls?

A. That is correct.

Q. Now, I find on Respondent's Exhibit 96—the agreement with Micro-Westco—the quotation inserted in typewriting "8-504" and I will ask you to state what that means.

Mr. Haycraft: Mr. Examiner, may we have it understood that I have an objection to all this line of examination with respect to the bracket set-up, the internal arrangement, and so forth.

Mr. Freeman: I am not asking for bracket set-up. I am asking for the net prices, the prices that the respondent has to meet.

Mr. Haycraft: I would like to get my objection into the record. It seems to me we are wasting a lot of time here. It doesn't make any difference how that company makes up those prices. They are there. The fact is evidenced by the
figures in here and the prices are here at which they
1399 sold.

Mr. Freeman: Do you want a four-thousand-page brief with complete analysis or explanation, or do you want this witness to proceed to explain?

Mr. Haycraft: You can have your brief. I don't care what your brief contains.

Trial Examiner Sheppard: Go ahead. I think possibly this will be the last of that line.

Mr. Freeman: No, I have some more and I am going

to offer to prove it if you say we can't put it in. I think it is important. How are we going to know the prices we have to meet? You have accused us of setting prices and extending discriminatory prices and how can we combat that if we don't get our competitors in and bring it out before the Commission.

Mr. Haycraft: Here are the prices right here. Each one of these exhibits he is putting in shows the period covered and the prices on the various items. Now, what he is doing is showing that there is a difference between this man and another man and another man in the internal set-up. What difference does it make? What they have got to meet is the prices each one of the customers were charged.

Trial Examiner Sheppard: Go ahead, Mr. Freeman. I will let you put in your case.

Mr. Haycraft: May it be understood that I have 1400 an objection to all that?

Trial Examiner Sheppard: Yes, let the record show your objection.

Mr. Freeman: I might also add in connection with some of these contracts, this company does business not only in connection with the oil burner controls, but also upon refrigeration controls and they are then keyed on the same contract, or form, by R, which designates refrigeration; and with some of their explanation, God only knows what sort of prices you will refer to, when you get ready to argue the case.

Mr. Haycraft: Don't judge my ability by your own. Don't worry about that.

Mr. Freeman: I don't.

Trial Examiner Sheppard: Go ahead, gentlemen. Go ahead.

By Mr. Freeman:

Q. Then the key number, H-504, refers to another price structure?

A. Bracket 4, yes.

Q. And any of these quotations upon the agreements—that is where they are quoted with any letter other than H—are not applicable to oil burner controls?

A. That is correct.

Q. Now, Mr. Henning, would you give us, from 1401 the years 1937 to 1941, your lowest prices for oil burner controls—and by "oil burner controls", I

mean sets consisting of primary, limit control and thermostats—give us the prices first upon those sets where the primary is of the intermittent ignition type.

Mr. Haycraft: That is objected to, unless it is restricted to the 88 companies or any company that was brought out in the Commission's case in chief, like the Williams-Oil-O-Matic. That is perfectly proper, because that was referred to in the Commission's case, but I submit, Mr. Examiner, that they are not meeting any issues unless they do bring you quotations for the companies where we offered to show there was discriminatory or there were restrictive clauses in the agreement.

Mr. Gilpatric: Mr. Examiner, the complaint in the case —which I think we all agreed defines the issues,—charges this respondent with price discrimination generally throughout the industry of manufacturing controls; and also alleges that that discrimination affects competition among control manufacturers and also manufacturers of oil burners generally, without any reference to Williams Oil-O-Matic or the 88 companies that Mr. Haycraft referred to in his case.

Now, we are entitled, under the Act, first of all, to show that the Commission hasn't proven that the discrimination alleged affects competition. And one of the ways we
1402 can show that is to show that our prices are above the prices of our competitors, so that whenever we discriminate, it can't hurt their sales of controls.

Secondly, we are entitled to show, under Section 2 (b) of the Act that where we did discriminate those prices were made to meet equally low prices of competitors.

Now, on both of those defenses, the price structures of our competitors, not the details throughout, but the general price levels which Mr. Freeman has asked for, are relevant and, therefore, we feel we are entitled to this kind of exhibit. We had this exhibit in the case of Mr. Tate and a similar exhibit was introduced, through him, for the Perfex Corporation.

Trial Examiner Sheppard: All right, go on, Mr. Freeman. Put on your case as you see fit.

Mr. Freeman: I might ask that question again, so that we have it clear.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. I want just the lowest prices that you extended for a set of controls, where the set included the primary of the intermittent ignition type.

Mr. Haycraft: We offer the further objection, even in the face of the explanation made by counsel for the respondent, that unless it was made to a customer of
1403 the respondent and on a certain date, of a certain type of control, and the respondent charged a higher price for a comparable control, there is no relevancy and no materiality to this case.

Mr. Freeman: Will you concede that the respondent charged a higher price, Mr. Haycraft?

Mr. Haycraft: Just a moment. Even accepting the premise, which I don't accept, but for the sake of argument, supposing that you are entitled to go out here now and pick out any customer and say, "We sold at a higher price to this customer than our competitor", it seems to me that if that is going to be their defense, eliciting testimony of this kind, it should be confined to those instances where the respondent sold to a customer at a higher price than a competitor sold, in order to bring it before this Commission. What interest can the Commission have in any other instance? So that, as a basis for this question, there should be a foundation laid—that the customer he is talking about now was quoted a price lower than the respondent's price. Otherwise it has no place in the case.

Mr. Gilpatric: Mr. Examiner, in answer to that, you might say we are simply at the threshold of our case. How are we going to connect up our testimony and show these prices have a bearing on our prices if he is going to object from here straight on out.

1404 Trial Examiner Sheppard: I will let this testimony go in, and if it isn't connected, we will let it go out. I realize that and I am going to let you proceed on that basis.

The Witness: Well, the lowest price which we quoted on a set of controls consisting of a thermostat, limit switch and primary control—

By Mr. Freeman:

Q. Of the intermittent ignition type.

A. —of the intermittent ignition type, during the year 1937 was $15.73. In the year 1938, $14.53. In the year

1939, $14.65. In the year 1940, $14.30. In the year 1941, $14.30.

Q. Now, Mr. Henning, can you give us the low price for the years 1937 to 1941, with respect to a set of controls, where the primary was of the constant ignition type?

A. Yes, I can. For the year 1937, $14.51. For the year 1938, $13.55. For the year 1939, $13.65. For the year 1940, $12.55. For the year 1941, $12.55.

In the last two years, we had two continuous ignition primaries and had another quotation on a different type per set, consisting of a thermostat, limit switch and primary control of the continuous ignition type, of $13.30 for the year 1940, and $13.30 for the year 1941.

Q. I note that you have two prices for constant
1405 ignition in 1940 and 1941, and only one price—that is one price for the years 1940 and 1941 in connection with intermittent ignition. Do you have any explanation?

A. I just explained that. Let the young lady read it to you.

(The answer above referred to was read by the reporter.)

The Witness: What I explained was that we had two continuous ignition type controls during the years 1940 and 1941. We gave the respective prices of the two different types.

By Mr. Freeman:

Q. I understand that and I would still like to have you tell me whether or not you planned on having just a single type of primary of the intermittent type for the years 1940 and 1941, or had you planned on likewise coming into a second form?

A. It was our intention to bring out another intermittent ignition control for the years 1940 and 1941, but the war effort intervened with our usual procedure.

Q. Had you actually made plans to bring out any other primary of the intermittent ignition type?

A. Yes, we had.

Q. Would the set then have sold at a price equal to your $14.30 set, or higher or lower, what are the facts?

1406 A. It would have been lower.

Mr. Haycraft: Objected to, Mr. Examiner, what it might have been.

Mr. Freeman: I am asking—

Mr. Haycraft: (Interposing.) Let's stick to what actually happened.

Mr. Freeman: I think we are entitled to explain it, Mr. Examiner, which we are doing now.

Mr. Haycraft: When the war effort came on, how could that possibly be a defense in this case? Certainly not. The prices that the respondent had to meet were in existence. What somebody might have done has no bearing on the issues.

Mr. Freeman: Mr. Haycraft, I just happen to know that whenever any of these companies—whether Penn or Perfex or Minneapolis-Honeywell—plan on coming out with any new control, they tell that to their prospective customer long in advance of the time that the control comes into the scene, and they tell them it is going to be of a lower price.

(To witness.) Have I stated that correctly, Mr. Henning?

The Witness: That is substantially the way it is.

Mr. Haycraft: You certainly can't urge that as a defense in violating the Robinson-Patman Act.

1407 Mr. Freeman: Is that correct, Mr. Henning?

The Witness: That is the fact.

1408 Trial Examiner Sheppard: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Sheppard: On the record, please. We will proceed now.

Mr. Freeman: We offer in evidence as Respondent's Exhibit 102 a tabulation of prices extended to the oil burner industry by the Penn Electric Switch Company for the years 1937 to 1941, inclusive.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: Let me see it.

May I ask the witness a couple of questions about it?

Trial Examiner Sheppard: Yes.

By Mr. Haycraft:

Q. Are these prices reflected in the contracts that have already been identified and received in evidence, or are these prices different from those?

A. No, sir, these are reflected in the contracts referred to.

Q. The two numbers, 672 and 670, those are the pri-

mary, one for the intermittent ignition and the other one for the constant ignition, is that correct?

A. That is correct.

Q. And the price, for instance, in the column 1409 under this one, under Roman numeral I, which is the first column with the figures, the set price is $21.08, that is, for the 672, and below that the 17.85, that is the constant ignition set price?

A. That is right.

Mr. Haycraft: I have no objection, Mr. Examiner.

Trial Examiner Sheppard: Let the Exhibit 102 be received.

Mr. Haycraft: I suggest you mark it some way to indicate just what it is.

Trial Examiner Sheppard: Give a little description of it, Mr. Freeman.

By Mr. Freeman:

Q. Mr. Henning, I have marked upon the tabulation that has been here referred to as Respondent's Exhibit 102 for identification, the words "Penn Electric net prices to manufacturers." That is correct, is it not?

A. That is correct.

Mr. Freeman: And we offer as Respondent's Exhibit 102 the tabulation entitled "Penn Electric net prices to manufacturers."

Trial Examiner Sheppard: Let it be accepted.

(The document heretofore marked for identification RESPONDENT'S EXHIBIT 102, was received in evidence.)

1410 By Mr. Freeman:

Q. In addition to the tabulation or schedule attached to some of the agreements that you have here produced, I note that on the face of some of the agreements you have prices. What did they refer to? And I am showing you now the agreement with Master Oil Burner Company, dated January 10, 1939.

Mr. Haycraft: What is that exhibit number?

A. They refer to thermostats, limit switches, and primary controls.

By Mr. Freeman:

Q. And the document that you are referring to is Respondent's Exhibit 89?

A. That is correct.

Q. So that in some cases the prices were quoted on the schedule and in other cases on the face of the agreements themselves, is that correct?

A. Yes. The reason for that was merely for convenience because in most cases the customer was only interested in the three controls tabulated on the front of the agreement, but for his convenience, in case he should order miscellaneous controls, we always attached the general price sheet in order to facilitate time and correspondence.

Q. Now, Mr. Henning, I note upon the Brown Oil Burner Equipment agreement, Respondent's Exhibit
1411 101, the term "their requirements." What did that mean to you, or why was that inserted?

A. Well, it meant their requirements of Penn switches in accordance with the tabulation of controls as listed in the price schedule attached.

Q. And I notice upon Exhibit 98, by way of example, the words "their requirements of heating controls." What did that mean?

A. That meant heating controls as per the tabulation attached.

Q. Did that mean all of their controls to the exclusion of purchasing any controls from any of your competitors?

A. No.

Q. And I notice upon Respondent's Exhibit 99 the notation "100 or more sets of Penn heating controls." What did that mean?

A. It meant just what it said.

Q. Did your customers know that when they signed up an agreement with you they were free to purchase controls from other companies?

Mr. Haycraft: That is objected to, Mr. Examiner, what his customers knew. This man can't testify.

Mr. Freeman: I will withdraw the question.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

1412 Q. From your calling on the trade and your actual soliciting of orders for controls and the signing up of these contracts, have you ever had any conversations with customers about their right to purchase controls from other companies?

Mr. Haycraft: Objected to as irrelevant and immaterial.

Trial Examiner Sheppard: I will let you answer the question.

A. Yes, we have.

Trial Examiner Sheppard: Just give me your experience on that.

By Mr. Freeman:

Q. Go right ahead, Mr. Henning.

A. Well, it would be obvious, if you were in this business, that there comes a time in the selling of equipment such as an oil burner that customers and dealers will insist upon other makes of controls aside from what may be standard with a manufacturer.

The manufacturer in other circumstances will buy whatever is required to satisfy his dealer organization. Generally speaking, he may be purchasing the lion's share of his controls from one company, to benefit by the better price involved in quantities, but he almost invariably reserves the right to purchase anything required to keep his dealer organization intact and satisfied. And it
1413 is a common thing to discuss with manufacturers that situation, and I know of none that don't buy whatever they want, even though they may be contracting for the lion's share of their controls from some one manufacturer.

Mr. Freeman: Does that answer the question, Major?

Trial Examiner Sheppard: Yes.

By Mr. Freeman:

Q. Do you know of some companies that standardize on different manufacturers' controls, or perhaps different types of burners?

A. Yes, I do.

Q. Will you give us some of those companies?

A. Well, Century Engineering, in that list, Century Engineering Corporation, Cedar Rapids, Iowa, standardize on our controls, and the name plates were imprinted with their name rather than our own, but we know that they also signed contracts with other competitors at the same time they had standardized on Penn products, for the reason which I explained to the Major.

Q. Well, do you know of some company that purchases your controls as a standard on a DeLuxe burner, or one type of burner, and then controls from another company for another type burner?

A. I recall that Timken did that.

1414 Q. You know, do you not, that Penn controls are standard with William Oilomatic?

A. They were during the years 1937 to 1941, as far as I know.

Q. And you know, however, that Williams Oilomatic does purchase a lot of controls from other companies?

Mr. Haycraft: I object to that as a leading question, Mr. Examiner. That is no way to prove his case. If he wants to call someone from Williams Oilomatic, let him do it.

Trial Examiner Sheppard: Be a little careful about that. I hoped to be broad on those things, but if there is too much of it I may not be.

Mr. Freeman: I will withdraw that question.

By Mr. Freeman:

Q. Mr. Henning, do you sell all of the controls for oil burners used by Williams Oilomatic?

A. We did not during the years 1937 to 1941, inclusive.

Q. Do you know of your own personal knowledge of the use by Williams Oilomatic Company of controls made by other companies?

A. Yes, I do.

Q. Will you give me the names, if you can, of some of your competitors who sell Williams Oilomatic?

A. The Mercoid Corporation and Minneapolis-

1415 Honeywell both sold a reasonably good percentage of controls to the Williams Oilomatic Company during the years of 1937 to 1941, inclusive, while the Williams Oilomatic Company was standard with respect to Penn products.

Q. Your prices that you extend to oil burner manufacturers and extended to any of the 88 companies mentioned in the subpoena were made upon what basis?

A. Made on two bases: One, potential; and another, where a customer desired to enter into an arrangement to purchase a fixed number of controls.

Q. And that was the determining factor in extending a particular price to a particular customer?

A. That is correct.

Mr. Haycraft: I object to the form of the question; besides it is leading, and I don't know what he refers to. He has referred to two factors. It is leading and misleading, both.

Trial Examiner Sheppard: Well, the witness has already answered the question. It is more or less a repetition.

By Mr. Freeman:

Q. What do you mean by "potential" as a factor?

A. The estimated quantity of controls that an oil burner manufacturer could use over a twelve months' period.

Q. Now, after—

1416 Trial Examiner Sheppard: Is that the estimate of the manufacturer or the estimate of the customers?

The Witness: It is the estimate of the manufacturer.

Trial Examiner Sheppard: That is what I thought.

The Witness: And the customer generally discussed, we usually discussed it and arrived at some figure which they thought they could use, based on their past years' experience.

Trial Examiner Sheppard: It is a figure that is come to by negotiation?

The Witness: That is right.

By Mr. Freeman:

Q. Now, Mr. Henning, after you sign up a contract of the kind that you have here produced this morning, with a customer, where the customer is going to standardize on your controls, is your selling problem ended when you receive the contract?

A. It gets worse. It hasn't ended. Our problem is to keep the product sold, and the easiest problem is to sell it. The major problem is to keep it sold.

Q. So that we have it definitely in the record, what do you mean by keeping it sold, keeping your product sold?

A. It has been our experience that when we are successful in having a manufacturer of oil burners stan-

1417 dardize upon our product, as soon as our competitors learn about it they usually bear down on the customer en masse, and then the real selling begins, and usually doesn't end for the twelve months' period.

Q. Has that been your general experience over the years that you have been selling oil burner controls?

A. That is correct.

Q. In your selling of oil burner controls, have you actively had to compete with Minneapolis-Honeywell?

A. Yes, indeed.

Q. And how about Mercoid Corporation?
A. Yes.
Q. And how about the Perfex Corporation?
A. We have.
Q. And how about White-Rogers?
A. Yes.

Trial Examiner Sheppard: How do you stand in size compared to the four you have mentioned? You didn't start until 1932, did you?

The Witness: About 1932, yes. Under the best estimates, we are the second largest in the industry.

Trial Examiner Sheppard: The what?

The Witness: We are the second largest in the industry.

Trial Examiner Sheppard: You are the second
1418 largest.

The Witness: Yes, we have gone past all the others.

Trial Examiner Sheppard: You have grown tremendously since 1932, then, haven't you?

The Witness: Yes, we have.

Trial Examiner Sheppard: Who do you refer to as the first one? The respondent?

The Witness: Yes, Minneapolis-Honeywell.

By Mr. Freeman:

Q. Mr. Henning, the Major just asked you about your tremendous growth over a period of the last ten years. Am I correct in my understanding that you started from scratch in 1932, with respect to the oil burner business?

A. That is correct.

Q. And I might ask you, have you personally been responsible for some of the oil burner control developments of your company?

A. Yes, I have. In years past I was in charge of the research division.

Q. And while in charge of the research division, were you actually in charge of sales also?

A. Yes.

Trial Examiner Sheppard: Are you the president of the concern now, Mr. Henning?

1419 The Witness: I beg your pardon?

Trial Examiner Sheppard: What is your official position there now?

The Witness: I am executive vice president of the company now.

By Mr. Freeman:

Q. And today you are in charge of sales, in addition to your other duties?

A. That is correct.

Q. And these records that you have here produced have all been produced under your personal direction?

A. That is correct.

Q. Now, Mr. Henning, I hand you a book of patents, which I will ask the reporter to mark for identification as Respondent's Exhibit 103.

(The document referred to was marked Respondents' Exhibit 103 for identification.)

By Mr. Freeman:

Q. (Continuing.) I will ask you to look through these patents and tell us, briefly, if they are patents that relate to the products of your manufacturer, specifically directed to oil burner controls, that is, primaries and thermostats.

A. The patents contained in this exhibit refer to combustion controls for oil burners and thermostatic cir-
1420 circuits for oil burners.

Q. And by "thermostatic circuits", you have reference to the control for a thermostatic circuit, which we sometimes call primary controls, is that correct?

A. That is correct.

Q. And how about thermostats themselves?

A. The book also contains a number of patents covering thermostatic controls for oil burners.

Q. And I take it that the first patent assigned by George A. Knaak to the Penn Electric Switch Company was one acquired by the Penn Company?

A. When we purchased the Wilboken Switch Company, Milwaukee, Wisconsin, yes.

Q. And aside from the Knaak patent, has your company during the period from 1932 up until 1941 used these patents in connection with its manufacture of controls, or, putting it another way, has your company actually manufactured controls and sold them under these patents?

A. Yes, we have.

Mr. Freeman: That is all. You may cross-examine.

Mr. Haycraft: Aren't you offering that?

Mr. Freeman: Yes, we offer in evidence as Respondent's Exhibit 103 the book of patents of the Penn Electric Switch Company, directed to primary controls and thermostats.

1421 Trial Examiner Sheppard: Any objection, Mr. Haycraft?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let is be accepted as Respondent's Exhibit 103.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 103, was received in evidence.)

Cross-Examination by Mr. Haycraft.

Q. Does that book of patents contain any limit control—

Mr. Freeman: It says on its face that it doesn't contain any limit controls, and it has only been offered to show primary controls and room thermostats.

A. Mr. Haycraft, it does not contain any patents on any limit controls, as such.

Many of these patents are drawn around a system where it shows the stack switch, and graphically it shows the limit switch and thermostat in the circuit, but the patent relates primarily to a stack switch on a thermostat.

By Mr. Haycraft:

Q. You go through the exhibit and indicate the different patents, the date they were taken out, and describe their use.

1422 A. The first patent referred to by Mr. Freeman was one which we acquired in the purchase of a company and has never been used, as far as I know, in any of our regular apparatus.

Q. Which is that one?

A. It is the patent known as No. 1708309, G. A. Knaak.

Mr. Freeman: Can I interject here?

Mr. Haycraft: I would rather not.

Mr. Freeman: All right.

By Mr. Haycraft:

Q. Proceed, Mr. Henning.

A. The next patent, 1962095, assigned to the Penn Electric Switch Company, L. M. Persons, inventor.

It covers a combustion safety control with two heaters in parallel.

Q. When did you take that out?

A. This was taken out in 1934—filed in 1934, and issued in 1934.

The next patent, 1962506, is a Henning patent, assigned to Penn Electric Switch Company. It is a special purging feature for stack switches, so arranged that in case of flame failure the primary control would shut down for a predetermined period, then recycle again in an effort to start the burner on a successive cycle.

Q. When was that taken out?

A. That was filed in 1931 and issued in 1934.

Q. You have used that in your company?

1423 A. We used it for a time, yes, sir.

Q. What time did you use it?

A. About the time that the patent issued.

Q. You haven't used it since?

A. No, we haven't, Mr. Haycraft. This art changes rather rapidly. You invent something, and I happened to be in that part of it for a time, and you use it for a time, and you pass on to something else, based upon the progress that the industry makes.

Q. All right, go to the next one.

A. Patent No. 2022826, A. L. Rubel, inventor, filed in 1933; issued in 1935.

Q. What use was made of that?

A. This control had a friction rapid shut-down feature and it was introduced on the basis of extreme safety for large burners, and it was used for a short period only.

Q. About when?

A. About the time the patent issued.

Q. 1934?

A. 1935. Yes, 1935.

Q. The next one?

A. The next patent, 2030941, A. L. Rubel, issued in 1936, filed in 1932.

This is a combustion failure feature with what we call a purge period, and it was an improvement on the
1424 previous invention of mine which I referred to. It was a little less complicated, and it was used for a time, about the time the patent issued.

Q. About 1936?

A. Yes, sir, 1936.

1425 Q. Go to the next one.

A. Patent No. 2034309, L. M. Persons, issued March 17, 1936, and filed in November, 1933. This is a further improvement on a purging period, rapid shut down.

As far as I know, the device was too sensitive, and we never used it. It was impractical.

Patent No. 2034311, issued March 17, 1936. The name is A. L. Rubel, filed in 1932.

This related to a means of a predetermined ignition interval prior to the introduction of fuel.

It was a precaution for safety. I don't think we ever used it.

Patent No. 2040402, issued May 12, 1936, to L. M. Persons, filed November 17, 1933.

This was a safety arrangement to prevent successive cycles of operation in case of a failure on the first or initial start of the oil burner.

Q. Did you ever use it?

A. Not that I recall.

Patent No. 2064181, A. L. Rubel, issued December 15, 1936, filed in 1932.

This is an improvement on warp switches, energized when combustion occurs in order to break a circuit through a heater or safety switch, so that upon combustion occurring, the safety switch will not thereafter trip out.

1426 That is being used today.

Q. All right, the next one.

A. Patent No. 2080580, issued May 18th, 1937, to B. E. Shaw, filed December 2, 1935.

This is a low voltage protection feature so arranged with the split transformer secondary that the combustion safety primary is responsive to low voltage conditions on the line.

It is very important and being used today.

Patent No. 2086823, issued July 13, 1937, and filed in 1936, B. E. Shaw.

This is a combination of resisters in parallel in primary controls so arranged that it is known as a balanced circuit.

It is an improvement on primary controls, as a protective means for oil burners.

After experimental stages it was passed up.

Patent No. 2102091, December 14, 1937, L. M. Persons, filed in August, 1935.

Q. Issued when?

A. Issued December 14, 1937. This is a design patent covering certain improvements in spring leaf contact members on combustion controls used today with some modification.

Q. And the next patent?

A. Patent No. 2256766, issued September 23, 1941,

1427 B. E. Shaw. Filed in 1940.

This is an arrangement of safety heater elements for quick shut down, whereby the safety heater is partially heated all the time in an effort to make it more responsive at the time of flame failure. Not being used today.

Q. Was it used at any time?

A. Yes.

Q. When?

A. For about six months is all, enough to get sample controls out in the field, and then we abandoned it.

The next one comes under thermostats. The first one is a design patent, No. 99758, and merely covers distinctive design features issued in 1936 to L. S. Houghton, filed in 1935.

Next is an Albert Penn patent covering a room thermostat of the bellows actuated type, in conjunction with a magnet and armature, a sensitive room thermostat which is responsive to approximately 1 degree differential.

Filed in 1928, issued in 1930, and that happened to be our first effort in the heating field. It was a very successful control, and is being used still today in its original design.

Q. All right, take the next one.

A. Patent No. 1867756, issued July, 1932, Albert Penn.
A bimetallic metal actuated thermostat, using a mag-
1428 net and armature, responsive to temperature changes,
and is being used today.

Q. What date was that brought out?

A. It was brought out in 1932. Its counterpart was the first one that I mentioned.

Q. All right, go ahead.

A. M. E. Henning Patent 1962505, covering a hygrostat or humidostat, filed in 1930, issued in 1934. A device responsive to changes in relative humidity, using a wet and dry bulb principle, coacting with a magnet and armature arrangement.

Q. To what extent has that been used?

A. It was not used to any great extent.

Q. All right, take the next one.

A. Patent 2030933, issued to L. M. Persons, February 18, 1936, filed in 1933.

This is a double detent magnetic arrangement in order to give positive contact action in both periodic frequencies of the armature. Propelled by bimetallic metal. A sensitive thermostat being used in some modification today.

Trial Examiner Sheppard: When did that clock come on these thermostats the first time?

The Witness: Well, I think it was before my time, Major. The clock was first introduced by the Minne-
1429 apolis-Honeywell Company, and my guess is 40 or 50 years ago.

Trial Examiner Sheppard: I thought it was a late development.

The Witness: We have made many improvements on clocks since then, of the electric type, but the early inventions were, I think, before I was born.

Trial Examiner Sheppard: I didn't know they were that far back. Go ahead. I thought they were late developments.

The Witness: The next one is Patent No. 2040404, filed in 1934, issued to L. M. Persons in 1936.

This covers a cyclator arrangement whereby the periodic cycles of an oil burner may be controlled, either wider or closer, by means of thermostatic adjustment convenient to the service engineer.

That is being used today.

By Mr. Haycraft:

Q. When was that brought out?

A. It was brought out—it was filed in 1934, and issued in 1936. We no longer use this thermostat, but that feature as patented is now in other thermostats.

Patent No. 2054040, issued September 8, 1936, to L. M. Persons; filed in 1934.

It covers a low mounted type of thermostat designed for baseboard mounting, rather than the conventional
1430 high level.

Not being used. It was used for about a year.

Q. And the next one?

A. Patent No. 2083664, issued to L. M. Persons, June 15, 1937, filed in 1934.

This is what is called an anticipating type of thermostat, so arranged that artificial heat is applied to the sensitive element when the burner is in operation, to hasten the operation of the thermostat.

Being used by practically all manufacturers today.

Q. You mean you license other manufacturers to use it?

A. It is a long story, Mr. Haycraft, but this patent covers certain features within the scope of heat anticipation, but the patent that existed at the time, under which we were licensed, was owned by General Electric, and they got

into interference with a patent or pending application of Minneapolis-Honeywell, and I think they finally prevailed over the existing art, and we are now licensed under their patent.

Q. Under whose patent?

A. Minneapolis-Honeywell. Am I correct in that?

Mr. Freeman: You are not.

Trial Examiner Sheppard: Well, now, wait a minute.

1431 Mr. Freeman: I would like to straighten it out. I tried that case against General Electric, and I know all about it, and I know about the patent Mr. Henning is referring to.

The heat anticipating patent owned by General Electric was a Schafer patent. It was involved in a suit filed in the United States District Court at Brooklyn, New York, under the Section of the Statute relating to interfering patents, which is somewhat like an interference, and that is apparently Mr. Henning's understanding, which interfering patent was owned by Minneapolis-Honeywell. It was a fail and re-issue patent.

The sum and substance of that particular controversy involving Minneapolis-Honeywell and General Electric Company was decided by the Second Circuit Court of Appeals, where the Schafer patent owned by General Electric was held invalid, which terminated all of the license agreements, that is, such agreements as Penn Electric Switch Company had under the General Electric Company's patent, and, likewise, Perfex had a license, in fact, some ten or twelve other companies had licenses. That wound up the so-called heat anticipation patent picture.

Mr. Haycraft: But the witness is correct that the Penn Electric Switch is now a licensee of Minneapolis-Honeywell?

1432 Mr. Freeman: Not on any patents that are directed to thermostats of a heat anticipating kind. That was all wound up when the patent picture was held invalid by the Second Circuit Court of Appeals.

Mr. Haycraft: You mean by that that neither one of them had valid patents?

Mr. Freeman: That is correct.

Mr. Haycraft: I see.

Trial Examiner Sheppard: That is informative to you, then?

The Witness: Yes, that informs me. He is correct. It has been a long time, and it refreshes my memory.

Trial Examiner Sheppard: All right, proceed.

By Mr. Haycraft:

Q. Go on to the next patent.

A. The next one is Patent No. 2092327, issued September 7, 1937, to L. M. Persons, and it is a variable means of applying anticipafed heating to a thermostat.

We feel the patent is still good, but we are not using it.

Patent No. 2158435, issued to B. E. Shaw, May 6, 1939, filed in 1937. This is a design or construction patent covering manufacturing details in a low mounted type of thermostat, the construction of which we are using today.

1433 Q. And the next patent?

A. Patent No. 2249259, filed May 13, 1940, issued to B. E. Shaw in 1941, a design and construction patent covering a line voltage thermostat, having some unique features with respect to the application of bimetallic metal, being used today.

One of our late constructions.

Q. And the next one?

A. Patent No. 2262343, issued November 11, 1941, to B. E. Shaw, filed December 6, 1939, covering a convenient means of inserting heating anticipator elements, so that they may be removed conveniently, and replaced with proper sizes, balancing the thermostat with the primary control.

Being used today.

Q. And the next one?

A. Patent No. 2265495, issued to B. E. Shaw, December, 1941, filed in 1939, a design and construction patent on a line voltage thermostat, having some features covered by, or covering special contact arrangements, and being used today.

Q. And the next patent?

A. Patent No. 2319563, issued to B. E. Shaw, May 18, 1943, filed in 1941.

Improvements on one of our earlier designs in sensitive room thermostat controls, also being used today.

Q. Now, does that list of patents that you referred 1434 to there include all the patents under which you are manufacturing and selling primary controls and thermostats during the period 1937 to 1941, or are you licensed

under other patents, or have you been licensed under other patents?

A. We are licensed under other patents.

1435 Q. What other patents are you licensed under?

A. Well, we are licensed under a Dennison patent, owned by Minneapolis-Honeywell. We are licensed under a—

Q. Is that a primary patent?

A. That is a primary patent.

Q. All right.

A. We are licensed under a Rachet patent, owned by Walter Williams of the Williams Oilomatic Company.

Mr. Freeman, I will have to say we were, or still are. You are more familiar with that than perhaps I am. I say that for the reason that that patent may have expired. I wouldn't know.

Mr. Freeman: Which one are you referring to?

The Witness: Walter Williams' patent.

Mr. Freeman: I think it is still in existence. At any rate, you were a licensee.

The Witness: And we were licensed under the Schafer patent, which I referred to, under General Electric Company, which Mr. Freeman referred to as being upset.

Mr. Freeman: That was a thermostat patent.

The Witness: We at times have acquired patents which we have bought outright from other concerns. I know one that has expired, the Massa patent, covering the original magnet construction used in most of our thermostatic controls.

1436 By Mr. Haycraft:

Q. What is this Dennison patent that you referred to a moment ago?

A. The Dennison patent covers a predetermined time delay interposed by the products of combustion, and it is a means by which a control may recycle after it has once shut down from an initial failure on the part of an oil burner.

Q. Is that referred to as a recycling device?

A. Yes, we seldom ever use it, but on occasions we get a call for it.

Trial Examiner Sheppard: Do you want to run through like we did yesterday or do you want to get through with this witness before lunch?

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record. Go ahead, Mr. Haycraft.

By Mr. Haycraft:

Q. Mr. Freeman is the attorney, is he not, for the Penn Electric Switch Company?

A. He has been our patent attorney for a number of years.

Q. And in your knowledge, do any of the officials of the Penn Electric Switch Company own stock in the Minneapolis-Honeywell?

1437 A. Not to my knowledge.

Q. Were you present on September 11, 1940, at the time that the investigator of the Federal Trade Commission, Mr. I. D. Royal, interviewed you and Mr. Albert Penn and Mr. Ralph Penn in the office in Goshen, Indiana?

A. Yes, I was.

Mr. Freeman: That is objected to as improper cross-examination. We didn't mention anything about it.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Haycraft: That is always a proper question.

Trial Examiner Sheppard: It may be to attack the credibility of the witness. All right, go ahead.

By Mr. Haycraft:

Q. At that time do you recall telling Mr. Royal that Mr. Albert Penn was a stockholder of Minneapolis-Honeywell stock to the extent of 100 shares?

A. No, sir, I do not.

Q. And he never told you that he owned stock?

A. I don't think Mr. Royal ever discussed that with me.

Q. Did Mr. Penn ever tell you that he was the owner of 100 shares of Minneapolis-Honeywell stock?

A. I don't recall that he did.

Q. And you don't recall him telling Mr. Royal that

1438 in your presence?

A. Mr. Royal interviewed me later. I wasn't in the office at the time he talked with Mr. Ralph Penn and Albert Penn, and I am not sure whether it was later that day or the following day when Mr. Royal spent practically the entire day with me.

Q. He spent a day with you, but weren't you also present during part of the interview with Mr. Albert Penn and Mr. Ralph Penn?

A. That I don't recall, Mr. Haycraft.

Q. Now, you testified on direct examination that your sales of automatic temperature controls during the years since you have been in business, in 1932 to 1941, had been constantly on the increase.

Will you give us the figures, beginning with 1936, and going on down to 1941, of your total sales of thermostats and your primary controls and your limit controls?

A. I am sorry, I didn't bring that information with me. It wasn't requested. In fact, there was no disposition on my part not to bring it.

Q. Wasn't it in the subpoena?

Mr. Freeman: No, it wasn't.

A. It didn't request that, or I would have been sure to bring it.

1439 By Mr. Haycraft:

Q. It didn't require you to bring any sales figures?

A. It didn't say totals for the year.

Have you that subpoena there, Mr. Freeman?

Mr. Haycraft: I just want to call your attention to the fact that this witness was not required, apparently, by the respondent to produce the same figures that the Perfex Corporation produced.

Mr. Freeman: I beg to differ with you, Mr. Haycraft. We didn't ask Perfex as to any total sales, total sales volume. That was not in the subpoena.

The Witness: It says price lists, discount sheets, or other data.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: All right, Miss Reporter, back on the record.

The Witness: Mr. Haycraft, if it will serve any convenience, I will be very glad to get by telephone this afternoon the volume of our sales for the successive years that you requested.

I read the subpoena carefully and thought I brought exactly what the subpoena required, and if you want that I will see that you get it this afternoon.

Mr. Haycraft: Let us see what you have, first.

1440 Mr. Freeman: I just want to call your attention to this one fact, Major, that Mr. Haycraft's figures had to do with the total sales volume, and he didn't say total sales volume for any one customer. If he wants the figures for any one customer, Mr. Henning has that here.

Mr. Haycraft: That is what I want right now.

The Witness: I have that. I misunderstood you, then, Mr. Haycraft. I understood that you wanted our total sales volume per year.

Trial Examiner Sheppard: All right, go ahead and we will have those figures.

By Mr. Haycraft:

Q. What figures do you have in the way of sales with respect to the Century Engineering Company subsequent to the year 1937?

A. The year 1937 was $18,333; 1938 was $9,959; 1939 was $19,234; 1940 was $37,113; 1941 was $63,209.

Q. How do you account for the drop between the 1938 sales and the 1937?

A. Well, market conditions many times are the direct result of that and, on the other hand, it may have been fluctuation in his own business for merchandise reasons beyond his control.

There are so many things that will affect volume total for any one year.

1441 Q. There was not a constant increase, then, in the sales to that company during that period of time?

A. Well, technically, no, for the year 1938, but there was an increase every other year.

Q. Well, that is what I am trying to bring out, that there was an exception to your statement.

A. That is correct.

Q. Now, your sales for Harrison Sales Company.

A. I might add, Mr. Haycraft, that I don't believe that I intended to construe at any one time that our overall picture of increase which we had steadily every year would be reflected in the individual accounts.

Q. I will come to the total figures in a minute, but I am taking up the individual first. Harrison Sales Company, in Seattle.

A. Harrison Sales, $4,491 in 1937; $4,594 in 1938; $2,838 in 1939; $1,917 in 1940. No contract in 1941.

Q. How do you account for the decline in sales there in subsequent years?

A. I have no idea how you would account for it.

Q. The Heil Company in Milwaukee, what were your sales subsequent to 1937?

A. Heil Company, we sold $3,598 worth of controls in 1937 and $138 in 1938.

Q. How do you account for the drop-off there?

1442 A. I wouldn't know.

Q. They didn't sell any in subsequent years?

A. Discontinued the use of our controls entirely.

Q. Pan-American Engineering Corporation.

A. $819 in 1937; $67 in 1938; $43 in 1939; $8 in 1940; and $8.61 in 1941.

Q. The Rossoe Manufacturing Company.

A. $9 in 1937; $83 in 1938; $1,493 in 1939; $352 in 1940. No contract in 1941, although we sold them $349 worth.

Q. York Oil Burner Corporation.

A. What was the name?

Q. York.

A. $412 in 1937; $29 in 1938, and nothing for the remaining three years.

Q. Now, you gave the figures for the Williams Oilomatic, if I remember, $194,000 in 1937?

A. Yes.

Q. And seventy-three thousand and something in 1938?

A. Yes.

Q. $61,000 in 1939; $17,000 in 1940; and $18,000 in 1941. How do you account for the decline in your business with Williams Oilomatic in the years subsequent to 1937?

A. I think I know that their business declined in about that proportion.

Q. You mean their total sales?

1443 A. Yes.

Q. For the years 1938, 1939, 1940, and 1941?

A. Yes, their company was gradually reducing its price and our prices were steadily being reduced, too, and, in addition, I know from what I know of the company—

Q. It was a little less than half in 1938 as compared with 1937?

A. Yes, and in addition I know their volume was steadily dropping.

Q. Do you have access to their books?

A. I talk to them quite frequently about their business. I am personally acquainted with some of their men and I know the Eastern burner manufacturers made quite heavy inroads on their business.

Q. About what proportion of their business did you figure you had?

A. I would have to guess at that. I think in 1937 we probably enjoyed all of it, or at least the lion's share of it, maybe 90 percent of it, and in the years 1938, 1939, 1940, and 1941 I believe that Mercoid and Minneapolis-Honeywell made inroads on some of the business we were enjoying.

Q. Now, you gave the Timken sales in 1935 and 1936. There were no sales in the later years?

A. They were very small. If I have it, I can give
1444 it to you. We only sold $38.95 worth of controls in 1937. I can explain, because I happen to know personally the product we turned out was a very bad one and due to our failure to turn out a device which would function properly with their burner, they discontinued the use of our product.

Q. Now, the Electrol Company, you gave the 1937 figures, but you didn't say what you sold in later years.

A. Electrol, I can give that to you. In 1937 it amounted to $12,000, $12,153; in 1938 it was $8,585; in 1939 it was $4,595; in 1940 it was $3,662; in 1941, $1,879.

Q. Hoban Manufacturing Company?

A. No sales.

Q. In any of the years?

A. We had a contract apparently in the year—March 3, 1939, but according to my records we made no sales to them.

Q. Master Oil Burner Company?

A. Master Oil Burner, $1,558 in 1938; $1,124 in 1939; $49 in 1940; and $561 in 1941.

Q. Montag Stove?

A. No sales in 1938. $462 in 1939; $978 in 1940; $7,741 in 1941.

Q. Micro-Westco?

A. No sales in 1937; $3,145 in 1938; $1,388 in 1939; $813 in 1940; $843 in 1941.

Q. You have given us Pan-American?

1445 A. Yes.

Q. Standard Products Manufacturing Company?

A. Standard Products?

Q. Yes.

A. We had a contract in the year 1940, but no sales. There was a signed agreement but they didn't buy anything.

Q. Brown Oil Burner Equipment Company?

A. Brown Oil Burner Equipment Company, Cambridge, Massachusetts; no contract. Sold nothing in 1938; nothing in 1939; nothing in 1940. Sold them $1,608.87 in 1941. There was another one, Burner Parts & Service, right next to it, if you want it.

Q. Was that mentioned?

A. Yes, it was. $37 in 1940 and $2,409 in 1941.

1446 Mr. Haycraft: Mark these as Commission's Exhibits 207-A and 207-B for identification.

(The documents referred to were marked Commission's Exhibits Nos. 207-A and 207-B for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibits 207-A and 207-B, and ask you whether or not you recognize Mr. Penn's signature on 207-A, and whether or not the figures contained in Commission's Exhibit 207-B are taken from the records of your Company, and are correct?

A. That is Mr. Penn's signature in a letter written to Mr. I. D. Royal, on September 13, 1940.

I don't know what he requested, Mr. Haycraft. Can you enlighten me? Your letter merely states—

Q. (Interposing) You recall him asking for that information at the time he called on you?

A. As I said before, I didn't hear all the conversation between Mr. Penn and Mr. Royal.

Mr. Royal came to visit several times later, and visited me, and I did hear part of it that day, but I don't recall that he asked for this.

Mr. Haycraft: Well, subject to correction, if that isn't correct. I would like to offer that in evidence.

The Witness: Well, I would imagine that is cor-

1447 rect.

Mr. Freeman: Mr. Haycraft, if you will tell me as the Attorney for the Commission that this was the document furnished to you by Mr. Albert Penn of the Penn Electric Switch Company, and the attached memorandum was part of this letter, we will concede it.

Mr. Haycraft: As far as I can go on it is that I found it in my files. Mr. Royal so reported.

The Witness: If it was attached to this letter as part of Mr. Penn's communication, I would say it is perfectly correct.

Mr. Haycraft: That is as far as I can go. I will assume it is.

Trial Examiner Sheppard: All right, I think I will take it on the statement of both of theese gentlemen, and let it be accepted.

Mr. Haycraft: If you find out afterwards that it isn't correct, and you want to correct it, it will be all right to do it.

Trial Examiner Sheppard: That is right.

Let it be accepted under those conditions, Miss Reporter, Exhibits 207-A and 207-B, for whatever use either of these gentlemen want to make of it.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 207-A and 207-B, were received in evidence.)

1448 By Mr. Haycraft:

Q. It gives the figures, the total sales figures by units for the years 1938, 1939, and 1940?

A. To those companies, I presume that is correct.

Q. And it is specific for certain companies named on it?

Trial Examiner Sheppard: Does it tell for 1937?

Mr. Freeman: 1937, 1938 and 1939.

Mr. Haycraft: Yes, 1937, 1938 and 1939 are the three years. That is all he asked for.

Trial Examiner Sheppard: All right.

Mr. Haycraft: I might say that for your information, if you will allow me to do that, Mr. Royal is now dead, and we can't call him, but he reported "That in compliance with the writer's request they agreed to furnish and forward a statement of the total number of controls of different units they made and sold during the years 1937, 1938, and 1939, and the statement of the number of units sold in each year to the nine concerns listed on there."

He says that such a tabulation was received in a letter from Mr. Albert Penn, dated September 13, 1940, and that is what our record indicates.

Trial Examiner Sheppard: Is that the date of that letter?

The Witness: Yes, that is perfectly correct.

Mr. Haycraft: Because I haven't any way of call-
1449 ing Mr. Royal.

I would like to have these marked as Commission's Exhibits 208 and 209 for identification.

(The documents referred to were marked Commission's Exhibits Nos. 208 and 209 for identification.)

By Mr. Haycraft:

Q. I show you Commission's Exhibits 208 and 209, and ask you if you can identify those two documents as being published and put out by your company?

A. Yes, sir, they both are on here.

Q. Can you give the approximate date that they were put out or used?

A. I can give you approximately, I think, when this was used.

Q. What would be the approximate date?

A. The Penn Comparative Application Chart was used, to the best of my knowledge, in the years 1935, 1936, and 1937. Maybe 1938, and, in fact, it is a reference we often refer to even now.

Q. How about the other one?

A. The other one is merely an explanation of how you use the Comparative Chart.

Q. That is the other exhibit?

A. Yes, sir.

Mr. Haycraft: I offer them in evidence.

1450 Trial Examiner Sheppard: Any objection?

Mr. Freeman: None.

Trial Examiner Sheppard: Let the Exhibits 208 and 209 be accepted.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 208 and 209 were received in evidence.)

By Mr. Haycraft:

Q. Now, in this selling to the Century Engineering Corporation, which you say was standard on Penn controls, was that for their entire business, or just for the business they did with the Crane Company, for the Crane Company?

A. Some years it was for Crane, and other years it was on their own. We have both types of name plates, the one strictly with the word Century, strictly for Century, and another name plate under the name Crane, for Crane sales.

Q. As to the Crane Company sales, there wasn't much chance for competitors to get in there after the set up was established, was there?

A. Yes, their dealers, not their dealers, but their branches numbering some 125 odd are permitted to buy anything they see fit to use, and while the Penn controls

were used as standard by the Crane Company, an educational program was put on by us to incorporate the sale of the so-called Crane controls, branch managers were
1451 permitted to buy any control, and did buy from competitors.

Q. They bought, but the Century didn't buy from any other for use on their Crane Company?

A. I wouldn't know.

1452 Q. On their Crane account. They didn't have any Crane name plate by anyone else?

A. It would be my hunch—

Q. Let us get something a little stronger than a hunch. Let us get your knowledge.

A. All right. I feel satisfied that if a branch desired Minneapolis, or some other make of control, that the Century Company would have provided them for the Crane Company. I know the two organizations quite well and know the mechanics sufficiently to say that.

Q. Well, did they have a stock of plates, name plates, other than the one—

A. (Interposing) You mean the Century Company?

Q. Yes.

A. No, the controls came in furnished from the control manufacturer to Century, provided with plates.

Q. My question was whether or not, to your knowledge, any controls for use on Crane burners were equipped with name plates other than those you furnished.

A. Not that I know of.

Q. As to their dealer business, their general dealer business, do you say you also furnished some name plates for that?

A. No, the Crane Company doesn't deal through dealers.

Q. I am talking about Century.

1453 A. Century, yes, we provided name plates for the Century Company with their name "Century" stencilled.

Q. What year did you do that?

A. I would have to guess at that, Mr. Haycraft. I would say, though, 1937, possibly 1938, and then it was discontinued and started again in either 1940 or 1941 because of the insistence on the part of some of our Eastern distributors.

Q. Now, did you have a contract with Gilbert & Barker?

A. No, sir, we did not.
Q. Or the Delco?
A. No, sir.
Q. Or the American Radiator & Standard Sanitary Corporation?
A. No, sir, we did not.
Q. But you did sell the Crane Company through the Century, that is, you sold controls for Crane?
A. To Century for Crane, that is right.
Q. Is that Crane furnace, is that a Crane furnace with Century burners on it or did the whole thing come under the name of Crane?
A. The burner was furnished to the Crane Company in a crate and the Crane Company provided its own furnaces or boilers, as the case may be, and they also sold furnaces without burners or boilers, depending upon the application.
1454 Mr. Haycraft: That is all, Mr. Examiner.
Trial Examiner Sheppard: Anything else, Mr. Freeman?
Mr. Freeman: Yes.

Redirect Examination by Mr. Freeman.

Q. Mr. Henning, in connection with these patents you referred to, you referred to an anticipating thermostat. Is the anticipating thermostat that your company sells in competition with Minneapolis-Honeywell's T-11 thermostat?
A. It is.
Q. And likewise your thermostat is in competition with Perfex's thermostat that employs heat anticipation?
A. That is correct.
Q. And the primary controls, both of the intermittent ignition and constant ignition type that your company makes and sells, is sold in direct competition with Minneapolis-Honeywell's R-116 and R-117?
A. That is correct.
Q. And likewise you sell in competition with the primary controls made and sold by the Perfex Corporation, its No. 5200 and No. 5500, is that correct?
A. That is correct.
Q. And in your thermostats that you referred to, are they sold in competition to Mercoid's Senso-therm?
1455 A. That is correct.

Q. And the primaries of the intermittent ignition type made and sold by your company, are they sold in competition with the K. M. I. Pyratherm of the Mercoid Corporation?

A. Yes.

Q. And are your constant ignition primary controls sold by your company in competition with the Mercoid K. M. Pyratherm?

A. That is correct.

Q. So that your primary controls are in competition with both kinds, that is, your constant ignition and intermittent ignition type are in competition with at least three other companies?

A. They are.

Q. And that is likewise true of limit controls?

A. That is correct.

Q. And likewise true of thermostats?

A. Yes.

Q. There are other companies that make thermostats with which your company competes?

A. Yes.

Q. Could you give me a name or two?

A. General Electric make their own thermostats; also, there is a thermostat made by the Samsel Company. I think they are located in Mendota, Illinois.

1456 Q. And how about White-Rogers?

A. White-Rogers make thermostats, too. We are in competition with those.

Q. And how about additional companies that you are in competition with, with respect to limit controls?

A. The same would apply.

Q. That is, White-Rogers make limit controls?

A. That is correct.

Q. And you sell in competition with White-Rogers?

A. We do.

Q. As well as in competition with Mercoid, Perfex, and Minneapolis-Honeywell?

A. Yes.

Q. I didn't ask you anything about volume of, in round figures, Mr. Henning, of Gilbert & Barker.

It was not one of the companies mentioned in the subpoena, but it was mentioned by Mr. Hayeraft. Can you give us, either percentagewise or otherwise, how you stand with respect to sales of controls to Gilbert & Barker?

A. I would have to guess at it, not having brought the figures, but it would run from $150,000 to $200,000 per year during the time they have been purchasing from us.

Q. You get the major portion of Gilbert & Barker's business?

A. We have enjoyed it for some several years.

1457 Q. How about Standard Sanitary?

A. We have enjoyed that business for some several years, and it runs in like volume.

Q. So that while some of these special accounts show a decrease in overall dollar volume for the years which Mr. Haycraft referred to, your overall business has been on the upgrade, is that correct?

A. That is correct.

By Mr. Haycraft:

Q. I will ask the witness to look at the last exhibit identified, showing the volume of sales for—

Mr. Freeman: Why don't you extend to me the courtesy of asking these questions and you will have an opportunity to recross-examine later?

Mr. Haycraft: I thought you were through. You stopped.

Mr. Freeman: No, I am not.

Mr. Haycraft: I will withdraw the question.

Mr. Freeman: I will withdraw my remarks, too.

Will you read the last question?

(The record was read by the reporter.)

By Mr. Freeman:

Q. There was a slump in the general business conditions for the year 1938?

A. That is correct.

1458 Q. And I take it that your company went along with the curve made by general business for that period of time?

A. The only year that we showed a loss in the history of the company, as far as I know.

Trial Examiner Sheppard: Was that in 1938?

The Witness: 1938, yes, sir.

By Mr. Freeman:

Q. By "loss", you mean where the company didn't make a net profit?

A. Yes.

Mr. Freeman: That is all. You may recross-examine.

Recross Examination by Mr. Haycraft.

Q. Your sales in 1938 were substantially less than in 1937, weren't they, your total sales?

A. Yes, sir.

Q. And your 1939 sales were about the same as 1937, weren't they?

A. Yes, they have increased again. I might explain that the Penn Company moved its plant July 5, 1937.

We went to all of our customers, some 1,500 odd, and prevailed upon them to purchase as much as they could in the year 1937 in order that we might conveniently move our plant from Des Moines, Iowa, to Goshen, Indiana.

1459 Q. This was in 1937?

A. Yes. This unbalanced the two years, the years 1937 and 1938, so that we showed a higher ratio of sales in 1937 with respect to 1938, otherwise the curve would have been the steady increase which we have had of so much per year, even though the year of 1938 was not a very good business year from our standpoint.

Some companies bought an entire year's supply.

Trial Examiner Sheppard: In 1937?

The Witness: Yes, in order to avoid what they knew would be a shut-down of our plant for maybe many months when we moved to our new building in Goshen.

Trial Examiner Sheppard: That took place in 1938?

The Witness: We moved July 5, 1937, so we got heavy orders in the early part of that year and filled those orders before we moved our plant, and while the plant was being moved to Goshen some departments continued to operate in Des Moines, Iowa, building up sales there, before we dismantled the machine tools.

By Mr. Haycraft:

Q. How long was this plant out of production?

A. The plant was out of operation only in part, of course, as we moved one department after another, but I would be safe in saying we were disrupted for the remainder of that year in some department or other,

1460 and then the year 1938 was a difficult one for us to get organized, but the sales, of course, were lean that year because of the overbuying on the part of our customers the previous years.

Q. How were your sales in 1937 as compared with your sales in 1936?

A. They were higher than the year 1936.
Q. How did the 1938 sales compare with 1936?
A. 1938, I don't know.
Mr. Haycraft: That is all.

Redirect Examination by Mr. Freeman.

Q. How did your sales in 1939 compare with 1938?
A. Higher than 1938.
Q. And how did your sales in 1940 compare with 1939?
A. Considerably higher again.
Q. How about your sales in 1941 with respect to 1940?
A. Still higher again.
Q. So outside of the moving period and a general decline in business, your company has enjoyed a rather steady upgrade in the manufacture and sale of oil burner controls since you started in business in 1932?
A. That is correct.
Mr. Freeman: That is all.

Recross Examination by Mr. Haycraft.

1461 Q. How about the potential of the oil burner business in controls during those years 1940 and 1941 as compared with the previous years, generally?
In other words, was there a great increase in the volume of building requiring oil burner equipment during those years?
A. I m not sure, Mr. Haycraft, but I feel that there was. 1941 was a very good year, also 1940, in the application of automatic equipment generally. By that I mean domestic ice machines and oil burners and stokers, that business has just reached its—well, it is past the infancy and going into mass production, was at the start of the war, by everybody, and it was a growing business, although business in general might be on an even keel.
Q. And would you say, then, that that business, that your increase in sales during 1940 and 1941, particularly, that that was probably not at the expense of any other of your competitors but due primarily to the increase in the business generally, that is in the oil burner business?
A. It could be. I imagine there would be a little of both, but, generally speaking, the trend was a bigger volume because of increased potential.

Mr. Haycraft: That is all.
Mr. Freeman: That is all.
Trial Examiner Sheppard: Anything else?
1462 Mr. Freeman: That is all. May we go off the record?
Trial Examiner Sheppard: Off the record.
(Discussion off the record.)
Trial Examiner Sheppard: On the record. The Examiner asks Mr. Henning to send the information suggested by Mr. Haycraft, to write me a letter to Washington and send it to me, and I will put it in the record.
The Witness: Yes, I will do that.
Trial Examiner Sheppard: You are excused.
(Witness excused.)
Trial Examiner Sheppard: We will adjourn at this time until 2:30

(Whereupon, at 1:00 o'clock noon, a recess was taken until 2:30 p. m., this day.)

1463 Afternoon Session.

2:30 p. m.

Trial Examiner Sheppard: All right, gentlemen, come to order. Miss Reporter, you can show Mr. Charles B. Sweatt, who has been previously sworn in this case, resumes the stand at the instance of the respondent.

I want to state to the counsel on both sides that I am allocating Commission's Exhibit 210, inasmuch as Mr. Henning will send it to me and it will be marked and taken into the record as Exhibit 210. After I receive it, I will study it and it can be studied by any of you in connection with his testimony.

(The document referred to was marked COMMISSION'S EXHIBIT 210 and received in evidence.)

CHARLES B. SWEATT was thereupon recalled as a witness for the Respondent and, having been previously sworn, testified further as follows:

Direct Examination (Resumed) by Mr. Gilpatric.

Q. Mr. Sweatt, what year was Minneapolis-Honeywell organized?
A. In 1927.

Q. Did it have any predecessor companies?

A. It was made up of a consolidation of two pre-
1464 decessor companies, Minneapolis Regulator Company—that was originally founded in 1885—and the Honeywell Heating Specialties Company. That went back originally to about 1906.

Q. Were these predecessor companies of Minneapolis-Honeywell engaged in the same lines of business that it has been since?

A. Broadly speaking, yes.

Q. Following the consolidation of the two predecessor companies to form the respondent, did Minneapolis-Honeywell acquire any other temperature control business?

A. In 1931, they acquired the assets of the Time-O-Stat Controls Company of Elkhart, Indiana, which, in turn, had been formed through a consolidation or purchase of assets—I don't recall exactly which—of several other companies; among whom were the Absolute Contactor Corporation and the Time-O-Stat Company of Milwaukee.

Q. Does Minneapolis-Honeywell continue the operation of the Honeywell plant at Wabash, Indiana, and the Time-O-Stat plant at Elkhart?

A. The Time-O-Stat plant at Elkhart was operated for a short period after the purchase, and was later sold. The Honeywell plant was doing a very small amount of work from about 1933 through to 1940, and, since that time, it has been devoted exclusively to war work. The products made there were, however, largely those for an industrial division.

1465 Q. Have Minneapolis-Honeywell and its predecessor companies followed a policy of advertising their lines of controls?

A. Very decidedly. Minneapolis Heat Regulator Company was one of the oldest national advertisers in the country. It was a pioneer in the business of temperature control and was advertising nationally back in the late 1880's and continuously followed that practice from that time to date. The Honeywell Company likewise were national advertisers and in the, oh, at least last five years before the consolidation, they were likewise doing a considerable volume of national advertising.

Q. Have other control manufacturers followed the same policy, to your knowledge?

A. So far as I know, the national advertising of any other control company has been very small.

The only one that I can recall at the present moment is Penn Electric Switch Company, who, in recent years, have been doing some national advertising in some of the smaller publications like "Business Week" and what are generally termed "executives' publications".

Q. What medium has Minneapolis-Honeywell used for this advertising that you speak of?

A. I think we have used practically every known advertising medium. The broad mass national magazines such as the Saturday Evening Post, Life, Time,
1466 Colliers, American Magazine, Good Housekeeping and practically every one of the large national publications, in addition to the, oh, what might be termed the overall coverage, we have used mediums that were directed directly to the home owner or the prospective home builder, such as, oh, "Better Homes and Gardens", which has a circulation of around two millions; "The American Home", which likewise has a circulation of better than two million.

Q. Have you used trade publications also?

A. Well, I would like to finish my answer.

Q. Oh, yes.

A. I hadn't quite finished the other forms of advertising.

Q. Go right ahead.

A. We have used billboards. We have used radio over the national networks, from coast to coast. We have used newspapers widely and have done a great deal of direct "by mail".

In normal times, when building was active, we received in our office every day a complete list of all prospective home builders, that are gathered by the Dodge Corporation. Those people are aggressively circularized, not only the individual home builder, but where there are architects and heating engineers given, we likewise circularized them directly by mail.

By Trial Examiner Sheppard:

1467 Q. That is in all of the 48 states?

A. Yes.

By Mr. Gilpatric:

Q. Does this advertising that you spoke of go on every year or only the years when your business is doing well?

A. No, we have been believers in national advertising,

and have consistently advertised. We have never believed that old adage, that mouse trap fable, that someone will beat a path to your door. We have gone out and told people what we had to sell and why we thought it was good and why they ought to have it in good years, as well as bad years.

Q. Years like 1931 and 1932?

A. 1931 and 1932. I have some figures here covering that.

Q. Just give us generally some indication of the extent of your advertising expenditures.

A. Well, since the consolidation, or from the formation of Minneapolis-Honeywell Regulator Company in 1927, through 1941, we have spent on national advertising pretty close to four million dollars, $3,946,276.30, to be exact.

Q. Now, that includes the sales mediums that you have mentioned; trade newspapers and—

A. The trade newspapers and the professional advertising as well.

I notice here that in the year 1931, we spent approximately $275,000.00.

1468 Trial Examiner Sheppard: Well, that is interesting. I didn't know that you did advertising on that scale. Has that been curtailed since the war activity?

The Witness: We have carried on our normal advertising expenditures during the war period. We know that after the war, we are going to be back in business again and we can't afford to come back into the new scheme of things as a forgotten company, so we are endeavoring to keep our name before the public and show them that in the post war period we are going to have even better lines than we had before the war.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Gilpatric:

Q. Now, Mr. Sweatt, you might tell us something about your policy with regard to engineering research and development, generally.

A. Well, our business is a highly technical business. We have always been leaders in the field and we have felt that to maintain that leadership, we had to be ahead of the procession in the development of new and better controls.

We have always spent very substantial sums of money in engineering and development work, not only creative
1469 engineering of new devices, but a constant redesigning and improvement of our products, to present them in a better way and at a lower cost.

It is rather interesting to note—I had our comptroller prepare some figures that would show the expenditures of money from the formation of Minneapolis-Honeywell through 1941—that we spent almost as much money in research development and engineering work as we did in advertising. The figures are $3,913,982.88.

Q. That is for advertising? Or, rather, that is for research development?

A. For research development and engineering.

Q. You mentioned a moment ago about the Dodge reports on new home construction and how you endeavored to reach the home owners through your advertising and direct mail solicitation. What other means have you used to create a demand for your products?

A. Oh, we have always carried what is termed in advertising circles as a "full schedule", which means usually a full page each month in all of the leading trade and professional publications. For example, "Fuel Oil", a professional publication of the oil burning field. "Oil Heat" is another one.

1470 In the general heating field it is read by miscellaneous dealers. The various trade journals, such as "The Plumbers' Trade Journal", "Domestic Engineering", the "American Artisan", and the "Warm Air Field." In addition to that, we have used the leading professional publications in the architectural and heating and engineering field, such as "Heating, Piping and Air Conditioning", "Architectural Record", "Architectural Form", "Heating and Ventilating Magazine", which go into the hands of the contractors and some go into the hands of the heating engineers and the architects who have a distinct influence on the specification of products.

Q. Well, now, during testimony earlier in this case, Mr. Lockrae described generally the sales organization set-up. Do your salesmen approach directly the home owners as well as the trade?

A. They approach home owners in two different ways. While they don't attempt to cover every new home that is going up, any home of any size or of any substance—well,

let's say above the $10,000 class—we always endeavor to call on those people because they are in a position to buy substantial volumes of controls.

The small house owner usually doesn't buy enough controls to warrant that personal solicitation.

The other contact that our salesmen have with home
1471 owners is through rendering the service to them, if they are, perhaps, having difficulty with our controls, or something of that nature.

Q. Tell us something about the growth of your sales organization, to which Mr. Lockrae referred in his testimony, and the reasons for it.

A. Well, I have to take issue with Mr. Lockrae's testimony. He was speaking from memory, I think, and picking a figure out of the air. We at the present time have 39 branch, or what we term district offices, scattered from Maine to California.

Q. Have you a map of those, showing—

A. Yes, I have.

Mr. Haycraft: Did you say district or branch?

The Witness: Branch and district offices.

Mr. Haycraft: Branch and district offices?

Trial Examiner Sheppard: I would like to have that as an exhibit in this case, Mr. Gilpatric. Suppose you mark it as Respondent's Exhibit 104, have Mr. Haycraft examine it, and if there is no objection I will accept it.

Mr. Gilpatric: The respondent offers the map which is referred to by Mr. Sweatt as Respondent's Exhibit 104.

(The document referred to was marked Respondent's Exhibit 104 for identification.)

1472 By Mr. Haycraft:

Q. These black dots, are they the district offices and the stars the branch offices?

Trial Examiner Sheppard: Will you explain that?

A. The stars represent manufacturing plants—the two major manufacturing plants are in Philadelphia and Minneapolis—and the dots indicate either the branch or the district office.

By Mr. Haycraft:

Q. You don't make any distinction?

A. On this we make no particular distinction. I think our distinction between a branch office and a district office is the number of men employed. One of our branch offices

may have as high as 60 to 70 people employed and a district office may only have four or five people.

Trial Examiner Sheppard: I see.

The Witness: It depends upon the size of the territory.

Trial Examiner Sheppard: The principal offices are in the bigger cities, are they?

The Witness: They are pretty well scattered throughout.

Trial Examiner Sheppard: They are the black dots?

The Witness: The black dots, yes, sir.

Trial Examiner Sheppard: I see. O. K.

1473 The Examiner accepts that exhibit, Respondent's Exhibit 104, for the record.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 104, was received in evidence.)

The Witness: The growth of the branch office system really started with the advent of the oil burner business. Before the oil burner was introduced, controls were very simple and few in number. We manufactured really two basic types of room thermostats. We made three basic types of limit controls.

Trial Examiner Sheppard: What year was that?

The Witness: Well, this goes back into 1919 and 1920. And then we had at that time three types of what were then called "primary controls." They were motor operated devices; one they operated by gravity weight, and one they operated by means of a spring like a clock spring, and the third was an electric motor. In those days they were designed to open and close the draft check, with hand-fired coal burning boiler.

After a while the oil burner came into the picture and the controls changed greatly. They became very complicated, very much more complex. The average plumber was able to install the average damper regulator set without much difficulty, but the oil burner in the early days

1474 really required a whole new set-up. The oil burner manufacturer generally went out and found a dealer who specialized in the sale of oil burners. Many of them sold nothing else but oil burners and they sold them and sold them completely installed, so that that meant an entire new group of people coming into the field that had to be educated in controls from the ground up.

Our first branch office was opened in Chicago about 1919.

The second in Philadelphia in 1921. The third in New York in 1924; and from then on they were established at a fairly rapid rate.

Trial Examiner Sheppard: You have 39 now, did you say?

The Witness: We have 39 in the United States, five in Canada, and we likewise have a foreign subsidiary in London and one in Stockholm, Sweden, as well as distributors in most other countries.

By Mr. Gilpatric:

Q. Well, now, these branch offices had what function, or have what function at the present time?

A. They had three main functions: One, they carried a complete line of our controls on hand; they were the headquarters for our sales group who covered the surrounding territory, calling on the manufacturers, the jobbers, and the dealers, the architects, heating engineers, and
1475 home owners. Their third function was that of service. We maintain a complete service set-up of specialized service engineers, so that we were able to educate all of these new people coming into the heating field.

Many of the specialty sales organizations that were handling oil burners had been in other lines completely foreign—like a washing machine merchandiser or vacuum cleaning sales organization—they knew nothing about heating. Our men were experienced in the heating field. We constantly had running—in some parts of the country since back in the early 1920's—a service school for the service men and installers of these various burner dealers. We hold them not only in our branch offices, but particularly in the little towns—for instance, we have gone out into the outlying territories; for instance, we may hold a school for men in Chicago over a period of maybe four or five nights and then we may go out to Peoria, Illinois, and hold that same school for people in that vicinity. Many times people will come as far as 100 miles to sit in and attend those schools and learn how to service the equipment.

Trial Examiner Sheppard: Do you have a lecturer there or somebody to instruct?

The Witness: We have the men in our different branch offices who are fully equipped to do that. We have big demonstrating boards and charts and sample parts of
1476 the different equipment so that they can go on continuously.

By Mr. Gilpatric:

Q. Now, in soliciting sales from, say, manufacturers, for the moment, what is the principal function your salesmen serve? What is their approach?

A. Well, our salesmen calling on the customers have got to be a pretty high grade and high type of individual. They have not only got to be good salesmen but they have got to be good engineers. They have got to understand oil burners. They have got to understand the application of the equipment to the burner.

Many times the manufacturer is planning on a new type of burner and that may take considerable time and effort in getting the proper application of controls to it.

Q. Have you found, in your experience with oil burner manufacturers, that your policy of advertising your product and pushing its acceptance with home owners has proven a sales advantage?

A. Oh, very decidedly so, because, after all, the average manufacturers is in business to sell oil burners and if he finds, as he frequently does, that his trade want Minneapolis-Honeywell controls, why, he will supply them to them, and our contacts with the home owner and with the dealer, with the jobber, have been very successful in promoting that demand.

1477 Q. You mentioned earlier the problem of service and what your branch offices did generally in that regard. What has been the policy of your company for serving controls which you sold and which you distributed?

A. Well, we have always adopted the policy of trying to keep every Minneapolis-Honeywell and every other control giving good service and satisfaction to the user.

1478 We have a very wide variety of models, a very wide variety of types—many of those are now no longer manufactured, but we still maintain repair parts and giving repair service on them. We started—I don't know whether our competitors do likewise—but back in the early 1920's on what we termed a "revolving stock". People are notoriously procrastinators, Major. They generally let their heating problems go until the last minute and then as soon as we get the first cold wave, they start thinking about their equipment, and we have a tremendous service peak. Everybody wants their equipment looked after and they all order at that time. It would be impossible for us to maintain on a year-round basis a big enough staff of men to handle that

particular service peak. Therefore, we established what we call revolving stock service. We maintain in our stock in Minneapolis a representative number—that experience has determined is necessary, of all the popular types of controls that have ever been sold in any quantity.

Q. How many would you say that they stock?

A. Well, in the Minneapolis stock, we have got approximately 24,000 units, representing 950 different models.

We likewise carry on hand in our different branch offices the same type of revolving stock, and I would imagine we probably have from eight to ten thousand additional controls scattered in our branch stock, for the same pur-

1479 pose.

I would like to explain how this revolving stock works. We have the controls that are ready for use and if some owner or dealer sends us in a defective control or a damaged control, we immediately take off the shelf a similar control that would perform a similar function and of approximately the same age as the old control and we ship that to him that very same day. Otherwise, he would have to wait for us to sit down and repair the old equipment and he might be without controls for maybe as long as two weeks—in the peak, it might be as long as six weeks—but in this way, we carry on an immediate and a prompt service and, in the same way, the dealers locally can bring in that equipment to our branch office, getting usable pieces of equipment that work just as well or better, as a matter of fact, than the one he turns in, on which there is a flat price for overhauling, and he can take that immediately back to his user and give him heat that same day.

Q. What would you say would be an average number of control units that are serviced, that were serviced there in your factory under the system you described, during the last two years, 1940 and 1941?

A. We will average from one hundred to one hundred ten thousand units a year, coming in for repair.

Q. Do the bulk of those units consist of what you

1480 might call current models?

A. Yes, the majority are current models, because there are many more of the current models in the field than there are of the very old timers.

Q. By the way, what is the average life span of your temperature controls?

A. Well, some of them last entirely too long. We have equipment coming in for repairs that is thirty-five years

old. It all depends on the type of equipment. For example, the original electric motors that we made for the American Nokol Company back in 1922 are still coming in for repairs.

Q. Does your company make it a practice to guarantee controls for any period of time after shipment?

A. We do. We give to our manufacturers an eighteen-months guarantee; to the dealers a year guarantee. That extra six months for the manufacturer is to take care of the period that it may remain in his stock.

Every instrument is coded by date, so that when it comes back to us for repair; we know exactly how long it has been out of the factory. However, we never are arbitrary about that. If a dealer comes in with a control that may have been two years or three years old, a control that doesn't show evidence of abuse or wear, and says that it had only been installed two or three or four months before and had gone bad, we will take his word for it and repair it

1481 for him without charge.

Q. And I take it that during the guarantee period—

A. During the guarantee period there is no charge at all.

Q. Can you give us any idea about how often your salesmen in the branch offices are called on for minor service problems?

A. Well, not a great many times, because we have endeavored to take care of that by that educational program I have described with the dealers.

If you allowed the dealers to, they would be very glad to use our organization as their service organization, but we do not do that—only in extremely troublesome cases do we go out and, then when we do go out, we insist that that dealer or his service man accompany us so that they, in turn, can be educated on the job. If the dealer service man accompanies our man, that takes any temptation away from him to dump the service load on us and, also, we do it for another reason—that, after all, our controls are just part of the installation. If the man goes out alone and then later on, say, something goes wrong with the oil burner; then the dealer says, "Your man did something to it". So that we not only protect ourselves, we protect ourselves in two ways.

But our service to the dealer is primarily one of education of his men, of assisting him if he has a com-

1482 plex installation or if he has an extremely difficult service problem that he hasn't been able to solve. Then we will very happily assist him.

Q. Did you make it a practice to furnish service manuals to your customers?

A. We do. We have very complete manuals that are available for the manufacturer and for the dealer with each individual piece of equipment, and we pack an instruction sheet, which gives all the installation and service data on it.

Q. Tell us whether or not that service policy of yours has contributed not only to the demand for your controls among home owners, but to good will among dealers.

Mr. Haycraft: I am going to object to the leading question, Mr. Examiner. I think the witness can testify without its being put in his mouth.

Trial Examiner Sheppard: Well, I don't know. Do you understand what he wants to get from you there, Mr. Sweatt?

A. I think I understand what he is driving at.

Trial Examiner Sheppard: Well, I will give it whatever weight I think it is worth. Go on and tell us about it.

The Witness: Well, now, Miss Reporter, will you read me the question so that I get it straight.

1483 (The question above referred to was read by the reporter.)

A. Well, very decidedly yes, because through the availability of our service to the dealer, he has something that he greatly appreciates. We render many services to the dealer, not only actual service on maybe a device that has gone wrong, but advice on an installation. As I say, we maintain stocks in the branch offices. If a dealer happens to have a set of controls on hand that is designed for a steam boiler and he gets an order to install an oil burner for a warm air furnace, he can come into the branch office and bring in his steam boiler control and we will hand him, over the counter, a control for warm air furnace in even exchange. He doesn't have to wait to write to the manufacturer to get that control.

And, in the same way, our method of handling service takes a great burden off of the manufacturer. Most manufacturers instruct their dealers to handle their service direct—either with the nearest Minneapolis service branch or with the factory—so that feature from the manufacturers' standpoint, it is of value to him. From the dealers' standpoint, it is of interest to him, and it is one of those things which, I think, have created the demand for Minneapolis-Honeywell products that we have.

Q. During the Commission's case and in a stipula-
1484 tion of facts, the Commission's Exhibit 1 that has been referred to, the three channels of trade and distribution which have been recognized by your company in selling those controls; the manufacturers, wholesalers or jobbers, and dealers.

1485 Will you define for us what Minneapolis-Honeywell includes within the first of those classifications, namely, manufacturers?

A. Well, we sell through what we term the "historic channels of trade" in the heating industry that have been there ever since I have been in this industry, which is now pretty nearly a quarter of a century, and I guess it was there long before I got into it—which is, to the manufacturer, who in turn sells to the wholesaler, who in turn sells to the retailer. We define, as a manufacturer, a concern who manufactures and fabricates heating equipment,

Q. You include besides oil burne manufacturers, who have been referred to principally he , furnace manufacturers and—

A. Oh, yes, furnace manufacturers, boiler manufacturers, stoker manufacturers, gas burner manufacturers.

Q. What, if any, precaution do you take so as to avoid treating as manufacturers, concerns which are really not entitled to that treatment?

A. Well, we make a pretty thorough investigation of manufacturers, or so-called manufacturers' facilities, to determine whether or not he is really a legitimate manufacturer and a legitimate fabricator of a product.

Many concerns will buy a completely packaged outfit
1486 in their own name and, in turn, resell it with their name on it. I think, in New York, we had some testimony of some people around Brooklyn that would buy burners with a private brand name and then resell them.

We have never regarded those people as manufacturers unless they have manufacturing facilities and actually do manufacture burners or some closely allied product such as boilers or furnaces.

Q. Now, turning to the wholesaler and jobber classification. What does that comprise?

A. There are three general classes of wholesalers. The first is, in the heating industry, generally termed a "jobber" and he handles a miscellaneous line of heating equipment—usually also plumbing equipment—for example boil-

ers, furnaces, radiators, valves, traps, fittings of all kinds that he sells to the heating contractor, so that the heating contractor, let's say, who is going to install heating equipment in a home can go to one jobber and get everything he needs for that installation.

The second general classification is what we term a distributor. He generally is operating on a wholesale basis, selling to the dealers, but instead of handling a broad line of, many times competing equipment, he generally has an exclusive agency for a certain type of boiler or he may have an exclusive agency for a certain type of fur-
1487 nace and so on. He operates a good deal as the broader coverage jobber does, except that he generally does not handle a complete line. He warehouses the equipment and sells it to the contractor, who installs it.

The third general type is what is known as the manufacturer's agent. He generally has the exclusive representation for a number of lines for various manufacturers, but he generally does not stock any of it, he simply takes the order, transmits it to the manufacturer and the manufacturer bills it directly to the dealer and he receives a commission on it.

Trial Examiner Sheppard: Where do you put the fellow in your classification that buys these heaters and then sells them like we had in New York?

The Witness: Well, he is the dealer.

Trial Examiner Sheppard: He is a dealer?

The Witness: The dealer, we define as a concern who is running a heating business. He is usually a heating contractor, making a complete installation, sells to the consumer.

By Mr. Gilpatric:

Q. In the distribution of your controls, do you stress sales to any particular one of these three channels?

A. Well, we stress our sales to the manufacturer. We endeavor to sell the manufacturer first—

1488 Q. (Interposing.) Why?

A. —because it simplifies your selling job.

If a manufacturer, for example, is standardizing on our product, he, in turn, is selling and calling on many of these various contractors and your cost per unit of sale is much lower than it is otherwise. It simplifies your selling job to a certain extent.

Q. In what situations then do you sell directly to wholesalers and jobbers?

A. Well, there are many, many types of controls that the manufacturer doesn't handle. The manufacturer usually handles the equipment—that is what we term "original equipment"—with his product, where it is a part of it or accessory to it.

Now, the oil burner manufacturer, the majority of this business is with the standard room thermostat, the limit control and the primary control. Now, in addition to that, there are many other types of controls that are used in a heating installation. There may be a motorized steam valve. There may be a hot water circulator. There may be a low water cut off. There may be extra limit controls of various kinds for some of the more complex and complicated hook-ups. And it is that type of equipment that the dealer needs, to complete an installation, that we sell to the wholesaler and dealer.

1489 Q. During the earlier testimony it was said that the solicitation of oil burner accounts by Minneapolis-Honeywell salesmen goes on throughout the year and was not simply a matter of getting a contract signed and not calling on the customer until the next year. Can you explain the policy behind that statement?

A. Well, I think it is obvious that when a customer signs a contract, it is just the first step. We call on all of our manufacturer customers constantly throughout the year.

In the first place, we want to keep our ear to the ground and find out if maybe any of our competitors are getting a larger share of the business than they had before.

Q. Does that happen?

A. That happens very frequently. We want to be on hand to give that manufacturer the sort of sales help or service that we can. Our salesman, in calling on a manufacturer, may call on five or six or maybe seven people in a company, depending upon the size—the purchasing agent, the general sales manager, maybe the president of the company, he may even call on the treasurer of the company to collect past due items. He will check with the stock room man to see whether they are low on any controls and then go up to the purchasing agent and get an order for them.

Many concerns have a service manager, and he checks
1490 with that service manager to find out if anything has cropped up, any particular trouble, that might have arisen with the controls out in the field. Many times you can detect those things that way before they become trouble-

some, so that that contact is continuous, month in and month out, twelve months out of the year.

Q. Now, were you speaking simply of manufacturers who purchase your lines of controls?

A. Well, not entirely. I think probably we spend more time with manufacturers that we were not getting a volume of business from than from our good customers. There is always an unfortunate tendency in that way, maybe, on the part of salesmen, to think he will concentrate on a new account and sometimes, we have found, to our sorrow, that he neglects the old accounts and doesn't get the new account and loses the old account, as well.

Q. Well now, what about manufacturers who have actually standardized—as you have defined that term earlier—on Minneapolis-Honeywell controls? It isn't necessary, is it, to devote further sales efforts to him?

A. It certainly is, because very few manufacturers who standardize do not offer other makes of controls to the dealers, and many times we will find that a competitor will have established a lower price with that manufacturer, so that the manufacturer will put out a new sales sheet,
1491 showing a lower cost on our competitor's product than on ours, which will, perhaps, markedly increase the volume to that competitor, and that sort of situation will give our men a real sales job, to convince the manufacturer that Minneapolis-Honeywell controls are really the ones to push.

Q. Do you have any method in your organization of checking up on how the sales to different accounts run throughout the year?

A. Oh, yes, we keep our regular monthly record and we have before us, as soon as the statistical department gets it out, which is usually about the tenth of the following month, a complete summary of each one of our customers, with our sales to them that month, for the year to date, and for the same month of the previous year and for the year to date, the previous year, so that whenever we think that a customer is slipping some place, we can get on the job quickly and find out just exactly what may have gone wrong. Many times we find that it is simply a matter that he became a bit overstocked. His sales may have dropped off and, in that case, we know that everything is fine.

Q. How do you go about testing, out in the field, new equipment?

A. We do that in two ways. We do a considerable

amount of testing by experimenting on members of the organization—much to my wife's disgust sometimes—
1492 and if everything goes well there, then we will ask our different manufacturers to put a limited number of those new devices in the field for field tests, so that we get the benefit of seeing what is going to happen when the average installer installs them and you get them scattered out in widely varying circumstances—different types of boilers, different types of furnaces, in different territories.

Q. Does that require continuous contact with the engineering department of the manufacturers who do that work?

A. That does. And also with the service organization of the manufacturer.

Q. Well now, if you have your manufacturers well sold, what is the need for sales effort in the case of wholesalers and these retails who often buy the burners equipped with your controls?

A. Well, there are two reasons. One is that we want to continue to have the pressure put on the manufacturer from the demand from the dealer and wholesaler for Minneapolis-Honeywell controls and, likewise, there is a substantial volume of business to be obtained in what we term the "plus control market". So that there are two very good reasons for it.

Q. A number of the witnesses have testified, I believe, that your prices, Minneapolis-Honeywell prices have run higher than competitors' prices. In view of that fact,
1493 how do you account for the position that Minneapolis-Honeywell has attained in the control industry, as evidenced by the statements in the stipulation, that it sells about 60 per cent of the total volume in a particular year?

A. Well, I think that really a number of the things that I have covered this afternoon contribute to it. I
1494 have covered our advertising. I believe that Minneapolis-Honeywell has a public acceptance that no other type of control has. We have certainly pursued a very vigorous policy of merchandising and sales coverage. Some of our competitors just hit the high spots. I mean they go after the big accounts. We have always pursued the policy of covering aggressively every manufacturer, no matter how small he is, because we have had experience that a great many of our large customers today were very small fry when they started out and if we had not cultivated them when they started out and rendered them the helpful service

that we tried to, they probably would not be as loyal to Minneapolis-Honeywell today.

Q. Can you give us some examples of that type of account, that started small and ended up large?

A. Well, I can remember calling on Mr. Williams of Williams Oil-O-Matic Company back in 1921, when he was making oil burners in one small setion upstairs of his garage in Bloomington. I remember when Quiet Heat Manufacturing Company was a very, very small concern. In fact, we were selling them, I think, when they started in business.

The Aldrich Company of Wyoming, Illinois, started out—I think, if I am correct, Mr. Aldrich left Williams Oil-O-Matic and started his own business in a very small way—and he has grown constantly and steadily until now, I think he is considered one of the most important factors in
1495 the industry.

Q. You used the term, Mr. Sweatt, "plus control market". What do you mean by that?

A. Well, I think I would define that as being the extra controls that are not normally handled by the manufacturer. The type of controls which I have outlined that we sold to the jobber and to the dealer.

Q. What was the trend in your sales for the year, 1938, in comparison with the year before or the year after, about which we have heard somewhat today?

A. Well, 1937 showed a sharp upward trend in the oil burner industry and all the oil burner manufacturers thought "Ah, the day has arrived. We are now an accepted product and we are going to town in a big way," and the oil burner business practically dropped out from under us in September of 1937 and the sales in the last quarter of 1937—where, normally, they are the largest quarter—were comparatively small.

When we went out to interview our customers at the end of 1937 and the beginning of 1938, we found a great many of them—in fact, all of them—were pretty well loaded up with controls. In the meantime, the start of a business depression no one knew was going to happen had begun. They were all holding back and, as a result of the two fac-
1496 tors—1938 was not nearly as good a sales year for the industry. It affected, I think, most of the control manufacturers rather adversely, in that most of their customers carried an over substantial inventory, and their pur-

chases in 1938 were much smaller than they probably would have been—even with the business recession.

Q. And that was true of your company particularly?

A. That was true of our company very specifically. Our sales dropped way, way down in 1938.

Q. Apropos of a question that was asked this morning, how many shares of stock of your company were outstanding in 1939?

A. In round figures, 622,000 shares of common stock.

Mr. Gilpatric: You may cross examine.

Trial Examiner Sheppard: We will take a short recess now.

(Short recess taken.)

Mr. Gilpatric: I have one more question, Mr. Examiner.

By Mr. Gilpatric:

Q. Mr. Sweatt, you stated that you, yourself, had been connected with the business of manufacturing controls for nearly a quarter of a century. What about the other members of your family in respect to that business?

A. Well, my father was connected with the business since approximately 1889 and, of course, I have been very
1497 closely associated with it all of my life. He was very active in the business up to the time of his death, in 1937. My brother, likewise, was brought up in the business and in the tradition, and he, I think, as the record shows, is now president of the company.

Mr. Gilpatric: All right, Mr. Haycraft.

Cross-Examination by Mr. Haycraft.

Q. How large a corporation is it now?

A. Well, in what terms, Mr. Haycraft?

Q. Capitalization.

A. Well, there are, as I said, 622,000 shares of common stock, with a considerable block of preferred.

Q. What is the par value of the stock?

A. No par value. I can't recall the exact net worth of the corporation, but it is something better than ten million dollars.

Q. And what proportion of your business—I think maybe you have answered this question—but what proportion of your business is devoted to the manufacture of automatic temperature controls for domestic heating?

A. Around eighty per cent.

Q. I think you had available there your advertising figures and your research figures. Could you give us those figures for the years of, say, beginning with 1936 through 1941?

1498 A. Yes, sir. I can give them to you. As a matter of fact, I have them typewritten, if you would like to have them.

Q. Yes, if you want to make it as an exhibit.

The Witness: Do you have any objection?

Trial Examiner Sheppard: Yes, that would be the best way to handle that.

By Trial Examiner Sheppard:

Q. Just tell us what that is, Mr. Sweatt.

A. In 1936—

Mr. Haycraft: No, just identify the paper. That will be sufficient.

Mr. Gilpatric: This being Respondent's Exhibit 105.

A. This paper is a recapitalization of advertising expense and engineering research and development expense of Minneapolis-Honeywell Regulator Company for the years 1927 to 1941, inclusive.

Mr. Gilpatric: At the suggestion of Mr. Haycraft, I would like to offer Respondent's Exhibit 105 in evidence.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let the document be accepted.

(The document referred to was marked RESPOND-

1499 ENT'S EXHIBIT 105 and received in evidence.)

By Mr. Haycraft:

Q. Now, do you have your sales of these controls—take for the last, 1936 to 1941—you don't need to go back any further, but just to show the percentage-wise of your advertising and research.

A. No, I have no figures of total sales with me.

Trial Examiner Sheppard: If you want to, I will have Mr. Sweatt send them to me. They are sending something anyway, and I might as well ask him to do that if you want.

The Witness: It is, by the way, a matter of public record.

By Mr. Haycraft:

Q. Are they in the Census Report?

A. No, they are in the Securities and Exchange Commission.

Q. For those years, you mean?
A. Yes, since 1927.
Q. That would be the over-all sales figure?
A. Over-all sales figure.
Q. Now, do you have with you the units of automatic temperature controls for domestic purposes, such as we have been discussing here at this proceeding?
A. No, sir, I haven't them.
Q. That is either by dollars or by total number? I think I have those figures somewhere. I think you prepared
1500 part of them for us.
A. I think they are somewhere in the record.
Mr. Gilpatric: I think I gave them to you in connection with the stipulation about the 60 per cent.
Trial Examiner Sheppard: It is in Exhibit 1.

By Mr. Haycraft:

Q. Now, I believe you testified that your sales of automatic temperature controls dropped off in 1938, as compared with 1937. Do you know the percentage of drop off, or do you have anything in mind as to the exact figures for those two years?
A. No, I haven't, but a pretty good cross section is shown there on Exhibit 84.
Q. Commission's Exhibit 84?
A. In Commission's Exhibit 84.
Q. That shows 1937 and 1938. Well, that is for a number of companies?
A. Yes, I think that gives a fairly good cross section of respective companies.
Q. Well, I notice here that so far as Quiet Heat Company is concerned, that their sales were substantially increased in 1938 over 1937. How do you account for that?
A. I think that Quiet Heat sales increased every year from the time they entered business.
Q. They didn't suffer a relapse?
1501 A. Evidently not.
Q. How do you account for that? Do you know anything about the peculiarities on their behalf that would account for that?
A. Well, they were very aggressive merchandisers and I think were making inroads on the old line companies who were operating on a very different basis than they were.
Trial Examiner Sheppard: Now, this gentleman who

testified this morning said they had a continual rise since September, 1938; didn't he?

Mr. Haycraft: Yes, but he dropped off in 1938. Everybody dropped off, excepting a few. The Quiet Heat did not, and that is what I am trying to find out.

Trial Examiner Sheppard: Oh, the Quiet Heat did not?

Mr. Haycraft: Did not. They showed a substantial increase in 1938 over 1937.

The Witness: I think they just about got started in 1936, if I am not mistaken.

Mr. Haycraft: That is all.

Mr. Gilpatric: Are you through, Mr. Haycraft?

Mr. Haycraft: Yes, I am through.

Mr. Freeman: Are we all through?

Mr. Gilpatric: Mr. Examiner, may I go off the record a minute.

1502 Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record. All right, Mr. Sweatt, you are excused. Thank you very much. I have enjoyed your statement; and we will recess, Miss Reporter, until eleven-thirty tomorrow, to accommodate some arrangement for the respondent.

Mr. Gilpatric: Thank you.

(Whereupon at 4:00 p. m., November 30, 1943, the hearing in the above entitled matter was adjourned.)

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 11

FEDERAL TRADE COMMISSION, PETITIONER

vs.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 14, 1951
CERTIORARI GRANTED MARCH 3, 1952

In the

United States Court of Appeals

For the Seventh Circuit

No. 9584

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order to Cease and Desist Entered by the Federal Trade Commission.

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1503 Room 1123,
New Post Office Building,
Chicago, Illinois,
December 1, 1943.

Met, pursuant to adjournment, at 11:30 a. m.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Messrs. Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and Paul J. Chase, Esq., 15 Broad Street, New York, New York, and Messrs. Bair & Freeman, by Will Freeman, Esq., 135 South La Salle Street, Chicago, Illinois, Attorneys for respondent.

1504 Proceedings.

Trial Examiner Sheppard: All right, Miss Reporter and gentlemen, we will reconvene the hearing pursuant to the adjournment yesterday and be on the record for anything you have to offer.

Mr. Freeman: All right. We offer in evidence as Respondent's Exhibit 112—we reserved a few numbers for some other exhibits, if the Court please—the petition of Minneapolis-Honeywell Regulator Company, the respondent in this case, filed in the United States District Court for the Northern District of Illinois, Eastern Division, and now pending before the Honorable John P. Barnes, Judge of said Court.

The petition was filed requesting an order of the United States District Court compelling J. W. Owens, a witness duly subpoenaed by the Federal Trade Commission, and served on J. W. Owens on November 5, 1943, to appear before the Trial Examiner, W. W. Sheppard, on behalf of the respondent, on November 29, 1943.

J. W. Owens did appear on November 29th, but contrary to the subpoena, refused to submit any documents or records and upon advice of counsel refused to answer any

of the questions with respect to contracts, price structure and other data specifically requested in the subpoena duces tecum, which, as I have stated, was duly issued by the
1505 Commission upon a formal application made by this respondent.

I personally appeared before Judge Barnes this morning, and Mr. Snyder, counsel for J. W. Owens and the Mercoid Corporation, likewise appeared.

Judge Barnes heard oral arguments on behalf of the respondent in this case and likewise in behalf of J. W. Owens. The only question the Court was in doubt about was whether or not the respondent could make application to the Court to compel the witness to respond to the subpoena issued by the Federal Trade Commission.

The Court carefully considered Section 9 and there found, and I quote:

"And in case of disobedience to a subpoena, the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documentary evidence."

But the Court, after consideration, felt that the application to him, that is, the request to invoke the authority of the United States District Court, should come from the Commission instead of the respondent.

The Court stated that the Commission, who issued the original subpoena, should either join or make the application direct to compel J. W. Owens to respond and answer questions in accordance with the subpoena, or the
1506 Commission should definitely state why it will not.

He then stated that if the Commission refused to appear before him, he would then tell us what he would do. So much for the proceedings before his Honor, Judge Barnes, this morning.

And I now ask counsel for the Commission, Mr. Haycraft, if he has any authority to bind the Commission or appear before Judge Barnes in behalf of the Commission, as counsel for the Commission, and ask that the Court issue an order directing J. W. Owens to appear in accordance with the duly issued subpoena of the Commission.

Mr. Haycraft: I have no such authority.

Mr. Freeman: And I now ask you, Major Sheppard, whether you have any authority in behalf of the Commission where you might appear for and in behalf of the Commission or sign a petition in behalf of the Commission

as its Trial Examiner in this case so that we might then appear before Judge Barnes for the order requested.

Trial Examiner Sheppard: I don't think I have the authority, Mr. Freeman. If I thought so, I would do it in a minute, but my authority simply goes to the presiding over these hearings and hearing the testimony which is adduced before me.

Mr. Freeman: In view of the answers made by Major Sheppard and Mr. Haycraft, we will endeavor to se-
1507 cure, either by telephone or telegraph, authority of the Commission to use the Commission's name in connection with our petition or at least get the Commission directly to ask the Court in our behalf to produce J. W. Owens.

Trial Examiner Sheppard: All right.

Mr. Gilpatric: We will recall, Mr. Examiner, Mr. C. B. Sweatt for further examination.

Trial Examiner Sheppard: All right, come around, Mr. Sweatt.

Mr. Freeman: Before I forget, if the Examiner please, I offer in evidence Respondent's Exhibit 112 for identification.

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 112, was received in evidence.)

G. B. SWEATT was thereupon recalled as a witness for the respondent, being previously duly sworn, testified further as follows:

Direct Examination (Continued).

Trial Examiner Sheppard: Miss Reporter, show Mr. Charles B. Sweatt as previously sworn and recalled for further examination by respondent.

1508 By Mr. Gilpatric:

Q. Mr. Sweatt, during your cross-examination yesterday you were asked whether you had with you any figures, either by dollars or by total number, of the sales of controls by your company during the period 1937 to 1941.

You said you thought you could get those figures, but you didn't have them with you. Have you endeavored to find those figures and, if so, state what you developed?

A. I have endeavored to get the total figures, but was unable to do so. I did, however, find in our various figures that have been prepared something I think will equally serve the purpose.

I have a tabulation of our sales of primary oil burner controls to manufacturers by those years and, of course, that is really the measuring stick because each oil burner takes a primary control.

I find that in the year 1937 we sold 193,000 primary controls.

Trial Examiner Sheppard: What year?

The Witness: 1937.

By Mr. Gilpatric:

Q. Go ahead.

A. In the year 1938 that dropped 90,000 primary controls, down to 103,000, which, as I pointed out yesterday, was an abnormal drop, and many of our customers at
1509 the start of 1938 found themselves quite heavily loaded with inventory.

I think that is borne out by the fact that in the year 1937 there were 210,000 oil burners sold, and in 1938 179,000, so that the proportionate drop in oil burner sales was not nearly as great as our drop.

I think I pointed out that the bottom dropped out from the oil burner business in the last quarter of 1937. I think that is further shown by the fact that oil burner sales in 1937 dropped below 1936 sales for the total year.

There were 220,000 burners sold in 1936. The first three quarters of 1937 were very good in sales—

Trial Examiner Sheppard: Those burner figures are from the burner manufacturers all over the country?

The Witness: They are from a compilation of Fuel Oil and Oil Heat, which is the recognized trade journal of the industry, and they in turn take them from the Department of Commerce figures, which carry the reports, I believe, of 90 percent of the industry, and those figures are accepted as the correct ones by the oil burner industry.

Trial Examiner Sheppard: You don't make burners at all?

The Witness: No, sir.

Trial Examiner Sheppard: You just make the controls?

The Witness: Yes.

1510 Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. Do you also have, to complete the picture, the 1939, 1940, and 1941 figures?

A. As I pointed out, there is that carry-over of controls from 1937 to 1938, and that is fairly obvious from these figures.

In 1939 our sales were 159,000; in 1940, 177,000; and it was only in 1941 that we reached the 1937 figure again, where we sold 201,000 units. It is rather interesting to note that in the same time in 1939 there were 236,000 burners sold.

In 1940 there were 302,000; and in 1941, 333,000, so that in that period between 1937 and 1941 burner sales increased 59 percent over the 1937 figures. Our sales increased 4 percent over the 1937 figures.

Trial Examiner Sheppard: 4 percent?

The Witness: Yes.

Trial Examiner Sheppard: All right. Is there any other statistical information that you have?

The Witness: Those are the only figures I felt would be pertinent.

Mr. Gilpatric: That is all I have from Mr. Sweatt.

Trial Examiner Sheppard: Any questions, Mr. Haycraft?

1511 Mr. Haycraft: No, I have no questions.

Mr. Gilpatric: Thank you, Mr. Sweatt.

(Witness excused.)

Mr. Gilpatric: I would like to have Mr. Lockrae take the stand.

A. H. LOCKRAE was thereupon recalled as a witness for the respondent and, being previously duly sworn, testified further as follows:

Direct Examination.

Trial Examiner Sheppard: Miss Reporter, show Mr. A. H. Lockrae, having been previously sworn in this case, appears on the stand again at the request of the respondent.

Mr. Gilpatric: I would like to have this marked as Respondent's Exhibit 106-A to Q for identification.

(The book referred to was marked Respondent's Exhibit 106-A, 106-B, 106-C, 106-D, 106-E, 106-F, 106-G, 106-H, 106-I, 106-J, 106-K, 106-L, 106-M, 106-N, 106-O, 106-P, and 106-Q for identification.)

By Mr. Gilpatric:

Q. Mr. Lockrae, I hand you Respondent's Exhibit for identification 106-A to Q and ask you if you will state for the record what that exhibit consists of.

A. This exhibit consists of the Development and 1512 Progress of Minneapolis oil burner controls.

Q. From what sources are the cuts or figures contained in the exhibit taken?

A. They were taken from various catalogues, Minneapolis-Honeywell catalogues, Honeywell catalogues, circulars, printed circulars of the company, and individual catalogue pages of the company.

Q. Do you have with you the various catalogues and circulars to which you referred from which those figures and cuts were taken?

A. I do.

Q. What about the cuts on Respondent's Exhibit 106-E, from what source were they taken?

A. The figures or the cuts on 106-E and 106-F were injected just for informative purposes, and 106-E was taken from the handbook of Oil Burning, a publication that was put out in 1926, and the oil burners depicted on 106-F were taken from manufacturers' advertising matter. I just wanted to show you the difference between a gun type burner and a rotary type burner.

Mr. Gilpatric: Off the record.

Trial Examiner Sheppard: Off the record.
(Discussion off the record.)
Trial Examiner Sheppard: On the record.

By Mr. Gilpatric:

1513 Q. Mr. Lockrae, did you prepare this exhibit or have it prepared under your supervision?
A. It was prepared under my supervision.
Mr. Gilpatric: The respondent offers in evidence Respondent's Exhibit 106-A to Q, inclusive.
Trial Examiner Sheppard: Any objection?
Mr. Haycraft: No objection.
Trial Examiner Sheppard: Let it be admitted.
(The book referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 106-A, 106-B, 106-C, 106-D, 106-E, 106-F, 106-G, 106-H, 106-I, 106-J, 106-K, 106-L, 106-M, 106-N, 106-O, 106-P, and 106-Q, was received in evidence.)

By Mr. Gilpatric:

Q. Mr. Lockrae, what were the first concerns to manufacture oil burners?
A. American Nokol Company, Williams Oilomatic, and Kleen-Heet started the manufacture of burners in the early 1920's.
There was one other manufacturer who was absorbed by American Nokol Company in about 1919, who manufactured a burner prior to the three companies named. This was the Doble Steam Car Company, and they were manufacturing it about 1917.
Mr. Haycraft: How do you spell that?
1514 The Witness: D-o-b-l-e.

By Mr. Gilpatric:

Q. Mr. Lockrae, what was the earliest type of burner, the type manufactured by these companies that you have mentioned?
A. Doble manufactured a pot type and American Nokol continued with this type burner, and I would refer you to Exhibit 106-E; the upper right-hand corner depicts the early Nokol pot type burner.
Williams Oilomatic manufactured a low pressure or emulsifying type of burner. It was equipped with a nozzle and the oil was fed into the combustion chamber under low pressure.

Kleen-Heet also made a pot type burner and later was the first, if not the first was among the first, manufacturer to come out with the high pressure or gun type burner, as we call it today.

Q. What sort of controls, if any, did the early pot type or vaporizing type burner use?

A. Well, I would refer you to Exhibit 106-A, the upper left-hand figure, which shows the Minneapolis Heat Regulator spring wound type of motor.

You will notice the crank on the right and the home owner had to wind it up after each 72nd operation. The crank arm which you see in the center operated a 1515 chain that went to the oil valve and as the thermostat called for heat the crank arm would make a one-half revolution. It would open the valve and allow the oil to run into the pot of the burner where it was ignited. This type of control depended on a trip bucket type of safety, which is shown in Exhibit 106-A, the lower figure.

You can see there where the chain attached to the arm of the valve. As that arm was raised, the oil flowed to the pot. When it was lowered, it was shut off. You will also note where the name trip bucket originated, simply a bucket hanging on the arm of the valve.

If the oil was fed into the pot of the burner and failed to ignite, it ran back through a return line and ran into this pot, or into the bucket, I should have said, and the weight of the oil in the bucket caused it to trip and close off the oil valve.

Now, some of the burners used a motor to obtain the induced draft, that is to blow the air into the combustion chamber in order to obtain combustion. If a motor was used, then the early custom was to employ a simple toggle switch which tied into the chain, in turn operated by the motor, so that when the spring thermostat came on the motor would start up the same time the oil valve opened and shut down the same time that the oil valve closed.

Trial Examiner Sheppard: Does that lower figure 1516 on Exhibit 106-A, is that a part of that up there?

The Witness: No, that was a separate unit. We did not manufacture that unit.

Trial Examiner Sheppard: I see.

The Witness: But this one was manufactured by Bissell Company of Kansas City and was a very popular early model.

Trial Examiner Sheppard: I see that, but you did manufacture the one at the top?

The Witness: Yes, sir, and the thermostat and limit control that functioned it.

By Mr. Gilpatric:

Q. What other companies, Mr. Lockrae, manufactured these early control models?

Mr. Haycraft: May I ask a question before you get to that?

Mr. Gilpatric: Surely.

Mr. Haycraft: As long as he is talking about it here, it might save time.

Mr. Gilpatric: All right.

By Mr. Haycraft:

Q. Where were these various things, these respective devices, located in connection with the burner?

A. Well, the trip bucket was installed adjacent to the burner. As a matter of fact, a lot of them had the
1517 trip bucket built right into the burner. The motor was mounted on the wall, as you can see from the mounting brackets, simply screwed to the wall, and then the wires from the thermostat led to the motor.

And, incidentally, that motor was actuated by dry cell batteries.

Mr. Haycraft: All right.

The Witness: I might add, if you please,—pardon me. What was your question?

Mr. Gilpatric: You may continue with your statement.

The Witness: That is all right.

Mr. Gilpatric: Will you read my question, please?

(The question above referred to was read by the reporter.)

The Witness: In those early days both Minneapolis Heat Regulator Company and Honeywell Heating Specialties Company manufactured the spring type motor and they also manufactured electric motors, which later became more popular, and I would refer you to page 106-B, which shows the Minneapolis Heat Regulator type of motor units.

The one in the upper left-hand corner is the original, which you can note was a pretty crude affair in those days, and quite expensive, as compared with the spring type motors.

1518 The model 24 motor was its successor, and then in 1925 Minneapolis produced the type M. P. S. Program Switch.

Now, this unit had the ability of manipulating the crank arms, the same as the spring motor, but it incorporated a switching means which eliminated the use of a separate toggle switch attached to the chain.

The type M-26 motor shown is the current model of the Minneapolis-Honeywell Regulator Company.

Trial Examiner Sheppard: The one you are using now?

The Witness: Yes, sir.

Mr. Haycraft: That is for use of pot type burners?

The Witness: That was used for pot type burners.

By Mr. Gilpatric:

Q. Mr. Lockrae, you may continue with your statement.

A. Page 106-C shows the Honeywell models, the one in the upper left being the original model. The type A was its successor and was produced in 1920 and 1921 and the type D, that came into being in 1924 and 1925.

Q. When was the first thermostatically actuated relay brought out?

A. Well, with the advent of burners of the type manufactured by Oilomatic and Kleen-Heet. They were either the low or high pressure burners and they didn't
1519 have the need for the valve mechanism because the oil was injected into the burner either under low or high pressure and there was no necessity for a motor operation, which would include the crank arms and the chain and pulleys, and so forth.

All they had to do was to start the burner motor, so about 1920 Minneapolis came out with the relay shown on page 106-D.

Incidentally, that picture simply shows the panel of the relay. It was in turn mounted in a cabinet and mounted on the wall. It simply made a circuit to the burner motor when the thermostat called for heat and it broke the circuit to the motor burner when the thermostat called for less heat.

A trip bucket still was required where this control was used at that time.

Q. When did Minneapolis Heat Regulator Company introduce a line of limit controls?

A. Well, we looked upon the introduction of limit con-

trols as the first major advance in control art. That occurred as early as 1917.

The limit controls not only kept the temperature or pressure of the heating system within safe limits, but in addition they could be set so that the temperature would be limited; in other words, the limit control would stop the burner ahead of the thermostat's demand for less
1520 heat and avoid overcoasting, as we call it, or overshooting of the room temperature. You were able to get a better temperature control through the use of a limit control and today no heating system is considered complete without a limit control. Most ordnances call for their use.

Trial Examiner Sheppard: But you didn't have limit controls when they first started, did you?

The Witness: When the oil burners first started, that was about the time we introduced our limit controls. Doble, according to the best information we have, started in 1917, and we had limit controls as far back as 1917.

Trial Examiner Sheppard: I see.

By Mr. Gilpatric:

Q. When were the first completely automatic systems brought out by Minneapolis and by Honeywell?

A. If you will refer to page 106-G, it shows the first Minneapolis Heat Regulator fully automatic control system. It was sold for trial purposes in 1924 and in volume in 1925.

We looked upon this system and the one shown on page 106-H, which was the Honeywell system, as being our second major advance in the art of oil burner control.

Q. Mr. Lockrae, let me interrupt you there. The figure on page 106-G and H came out on the labels of Minneapolis-Honeywell Regulator Company rather than the labels
1521 of the predecessor companies. Will you explain that?

A. Yes, I can do that very easily. It was a lot easier for us to get these clear cuts from Minneapolis-Honeywell's later catalogues than it was from the early variety of catalogues, and that is why they were used.

Q. But these same units were, in fact, manufactured by the predecessor companies at the time you have indicated?

A. That is correct.

Q. How did the system, then, the Minneapolis system, as shown in Respondent's Exhibit 106-G, operate?

A. It was a relay actuated control and it also included a safety switch.

Now, that safety switch was made up of a piece of resistance wire, which functioned a strip of bi-metal, and when the thermostat called for heat the relay would come in and close the circuit to the burner motor and the ignition means. At the same time that safety switch would start to heat, and if the protectostat which sighted the flame did not respond within the timing of the safety switch, the burner was automatically stopped and it could not be started again.

So, with that arrangement, it was able to eliminate the odorous, messy control that had been used before, I mean the trip bucket type of safety.

Q. Mr. Lockrae, you referred to the protectostat.

1522 I show you Respondent's Exhibit 107 for identification—will you mark it, please, Miss Reporter?

(The document referred to was marked Respondent's Exhibit 107 for identification.)

By Mr. Gilpatric:

Q. (Continuing.) —and ask you whether that is the control to which you referred.

A. This is the current version of that control.

Trial Examiner Sheppard: Is there a picture here of that?

The Witness: On 106 G, Major.

Mr. Gilpatric: There it is.

Trial Examiner Sheppard: I see.

Mr. Gilpatric: The respondent offers in evidence 107 for identification, Exhibit 107.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let it be accepted.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 107, was received in evidence.)

Trial Examiner Sheppard: That is what you call a limit control?

The Witness: No, sir, that is the combustion safety control.

1523 Trial Examiner Sheppard: Combustion safety control?

The Witness: Yes.

Mr. Haycraft: Where is it placed?

The Witness: It is installed so that it sights the flame. In other words, the nozzle here, as you will see, is detachable, and that was put right into the brick work, or some manufacturers mounted it right alongside the blast tube so that this end was looking at the flame, and there is a metal diaphragm in there and the radiant of energy from the flame would cause that diaphragm to buckle and as it buckled the movement was in the direction, where the tension was applied, and in that small movement, which we amplified, we were able to close or open up the contact.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Gilpatric:

Q. Proceed, Mr. Lockrae.

A. We looked upon that control as our third major control contribution, and it is rather interesting to note that although that control was made back in 1924 and 1925 and did not have universal usage because of its size, yet our post-war oil burner control embodies the feature of obtaining safety from the flame reactance, and it is built into 1524 and made a part of the oil burner, so this principle that we originated that long ago is still good.

Trial Examiner Sheppard: Yes.

By Mr. Gilpatric:

Q. At what price did this early Minneapolis automatic system sell for, to your largest customers?

A. Well, in 1924—no, I beg your pardon—in 1928 this system sold to the largest users for $40.15, a set. That included the system that you see there.

Trial Examiner Sheppard: I see.

By Mr. Gilpatric:

Q. Referring to—

A. Page 106-G.

Trial Examiner Sheppard: Yes, $40.15.

By Mr. Gilpatric:

Q. Now, what about the type of system that the Honeywell Company offered at this time?

Mr. Haycraft: Just a moment, before you leave that. Will you have him describe the other things on this page, as to what function they performed?

Mr. Gilpatric: Yes.

Trial Examiner Sheppard: And have them all together.

Mr. Haycraft: He has now described the protectostat. Now, if you will refer briefly to the others.

1525 Mr. Gilpatric: All right.

By Mr. Gilpatric:

Q. Will you go ahead and describe the relay and the thermostat?

A. The thermostat, room thermostat, is the upper right-hand figure of page 106-G. The limit control is the figure beneath the thermostat, and this figure shows the upper view and side view of the limit control as well as the separate well, which was installed in the boiler, and then the stem of the instrument went on the inside of that well so that you didn't have to drain your boiler if you had trouble with the control and it protected it and sealed the water away from the instrument.

Mr. Haycraft: It was a hot water control?

The Witness: That is a hot water control.

The protectorelay is the figure directly beneath the protectostat in the lower left.

By Mr. Gilpatric:

Q. Now, Mr. Lockrae, do these various units which you have described comprise the set which you referred to as selling for $40.15?

A. Yes, sir, it comprises the four instruments.

Q. In other words, at that time what we now refer to as a primary consisted of two units?

A. It consisted of the relay and the protectostat.

1526 Q. The set was four rather than three controls?

A. That is correct.

Q. But functionally, the two were the same?

A. Functionally, the two were the same.

Q. Now, will you describe the Honeywell system?

A. Instead of using the relay type of control, the Honeywell principle involved an electric motor, which is shown in the lower left of figure 106-H. On the end of this motor was a switching means and through this switch we controlled the circuit to the burner motor and also the ignition and the safety circuits.

To the right of the motor switch is the combustion safety control, which was installed in the stack and was actuated by changes in the stack temperature.

The vaporstat which is shown is a Honeywell type of

limit control ordinarily used with the steam system, and the room thermostat, which is shown just to the right of the vaporstat.

Mr. Haycraft: Here again you had to have the two to get your primary?

The Witness: You had to have the motor switch and the combustion safety control working together to control the operation of the burner and its safety.

By Mr. Gilpatric:

Q. Which you now get by your protectorelay?

1527 A. Which we now get by one unit, which is our protectorelay, or it has been referred to as the stack control, primary control.

Q. Now, what novel feature did this motor switch system that you have referred to embody?

A. Well, in the early days certain timing functions were necessary in the control of an oil burner. It was often required to have the ignition come on ahead of the opening of the oil valve or the starting up of the burner motor and gas was all that they had for ignition means in those early days.

So where a gas valve was required, it was mounted on the left side of the motor and it would open as the motor revolved. We built those motors so that it would take anywhere from 30 seconds up to as high as 10 minutes to move the crank arm 180 degrees. That made this unit extremely flexible from a timing standpoint because we could open that gas valve slowly or we could bring it on a couple of minutes ahead, if they required it that long. We could also synchronize the switching means in the switch so that the burner motor would start up at a certain time and the oil valve would open at a certain time, depending on the sequence that the manufacturer required.

Mr. Haycraft: Was there any recycling feature to this system?

1528 The Witness: Well, we look upon that as being our fourth major advance in the control art, because incorporated in the switch was a means which permitted the burner to start up once more if the flame should go out.

By Mr. Gilpatric:

Q. You are referring to the motor?

A. The motor switch.

Q. On page 106-H?

A. On page 106-H.

Now, that was highly desirable and it is highly desirable today because if you got some water in the oil or a nozzle may be partially clogged and if the flame goes out, then the circuit employed in the Honeywell system and in those that we are selling in volume today had the ability to stop the burner and then after waiting a certain length of time it would allow the burner to start up again normally.

If it didn't start, then it went on Safety, and you had to manually manipulate the safety switch before it would again start, but that recycle saved an awful lot of service calls and it has been really an outstanding feature in oil burner control design.

Q. Is there any feature of the Honeywell combustion safety control shown in that same page, Respondent's Exhibit 106-H?

A. Yes, sir. We look upon that as our fifth advancement because it was the first control that was actuated
1529 by stack temperatures and sold commercially.

When the burner started up, of course, the stack was relatively cool, but as soon as the combustion took place the temperature in the stack rose. There is a piece of bi-metal on the end of the shaft, as you will note, and that would expand as the stack temperature increased. It in turn manipulated a switching means in the head of the instrument, which all fitted into the circuit employed, so that if the stack remained cold it would indicate that your burner had not started, you had no fire. Then you would go on safety, or you got a recycle with this system, and gave it one more chance to start and then it would go on safety if you got an extinguishment of flame.

Now, if the burner just started up and you got no flame, then it would immediately go on safety.

Q. Yesterday in the testimony of Mr. Henning, he referred to the purging period. Is that the period between the first attempt to stop the operation of the—

A. That is right, as soon as the stack temperature recedes the burner is stopped. Then there is a period of time while the stack temperature is falling, and the bi-metal element of the control is cooling, where the burner stands idle.

Well, now, any unburned gases that might have accumulated from the time that the flame disappeared, and the control stopped the burner, would all have an oppor-
1530 tunity to get out of the combustion chamber and on

up the stack before the burner started up again, and that was what he referred to as the purge period.

Q. If that wasn't the case, if you didn't have that purging period, what might happen?

A. Well, if the burner was allowed to come back on again, you would have a combustion chamber full of gases.

Trial Examiner Sheppard: It would maybe blow up?

The Witness: And you would have your boiler doors flying off or something of that sort.

By Mr. Gilpatric:

Q. Mr. Lockrae, for what price to your largest buyers did this Honeywell system shown on Respondent's Exhibit 106-H, the set of instruments shown on that page, sell in 1927 and 1928?

A. Well, in 1927 that system sold for $42.10.

Now, that price varied as to whether it has a gas valve on it, whether it had a double track or single track, but that was approximately the price.

Then later, after the Minneapolis-Honeywell consolidation, we had the two systems, the protectorelay type of system and the motor switch system, and the manufacturers selected the type that best fitted their needs, and at that time the motor switch system sold at $40.15, exactly
1531 the same as the protectorelay system. They simply took their choice.

Trial Examiner Sheppard: That shows here?

The Witness: Yes, sir.

By Mr. Gilpatric:

Q. What type of circuit was employed in the two systems, or, rather, in the Minneapolis system to which you have referred?

A. I would ask you to look at Exhibit 106-I. Prior to the advent of the Minneapolis system shown on Exhibit 106-G, all of the motors, electric motors and spring wound motors, and the relays, had contained a circuit which we designate as our series 20. That is shown in Exhibit 106-I at the top of the page.

Now, that circuit, in order that you might understand the operation of the motor, if you will refer to the diagram you will note the thermostat on the left.

Trial Examiner Sheppard: Yes.

The Witness: There is a piece of bi-metal, a spiral bi-

metal with contact blade attached to it, a vertical blade. That blade operates between the B and the W contacts.

Now, the B is the cold contact and the W is the warm contact. Now, as the room temperature is receding, the bi-metal would cause the blade to move to the left and
1532 establish the B or cold contact.

Now, that completed a circuit through the motor and would cause it to start up. Now, in the first few degrees of travel, the cam part of the maintaining switch would take hold and permit the motor to run its full starting cycle or 180 degrees, and the burner would be in the running position.

Now, as the burner delivered heat and the room temperature started to rise, the thermostat blade would leave the blue contact and travel across the gap.

Trial Examiner Sheppard: Towards the W?

The Witness: Towards the W contact. As soon as it hit the W contact, that was the point at which the thermostat was to stop the burner. Then your circuit was again completed through the motor and its maintaining switch and it normally would return to the off position and shut down the burner.

However, in that circuit there was a defect and there was a transfer difficulty. If you can imagine the thermostat blade coming over and making contact with the W or warm contact, but visualize some dirt on the contact or on the blade, and even though it were in the proper position, yet the electrical current did not flow through that contact, there would be nothing there to stop your burner. The motor would stay in the on position with nothing to
1533 establish safety.

Well, we wanted to get away from that condition and you understand the same circuit was used in the Honeywell motor switch as well as in the Minneapolis motors and motor switch.

By Mr. Gilpatric:

Q. What did you do about that defect?

A. Well, obviously, we wanted to make an oil burner just as safe as was humanly possible, and we evolved the ingenious circuit that was given the name of our series 10, and that is shown in the diagram at the bottom of page 106-I.

Again we used a thermostat with a bi-metal element, a horizontal blade, and you will note that there is really a

double blade in that thermostat. You will also note that the blue and white contacts are on the same side of the blade.

Now, as the room temperature would recede the blade would make contact with the white contact post, but nothing would happen until the temperature had receded far enough for the flexible blade to—or, I should say, the stiff blade to make contact with the blue contact post.

Now, as soon as both of those contacts were made, then the relay would pull in and start up the burner. Now, at the same time the relay pulled in to start the burner, con-
tact No. 1, as shown in the diagram, was closed. We
1534 called that our maintaining contact.

Now, the burner is running and as it produces heat the room begins to warm up. The blue contact, the one that made last, now breaks first, but nothing happens because the circuit is now being held through the maintaining contact No. 1 of the relay, and the white contact of the thermostat.

As the room temperature continues to rise and reaches the predetermined setting of the thermostat, the white contact would open and then the burner would stop.

Now, there were several distinct advantages in this circuit. We got away from the inherent fault of the series 20, where you had to make a circuit to break a circuit. In the series 10 we didn't have to do that. We made a circuit to start the burner and we broke the circuit to stop the burner and in the construction of this thermostat you might wonder why you couldn't accomplish the same results with just one contact and the blade, but then a condition is prevalent where vibration exists. A street car may be going down the street or someone may slam the door.

Well, with a single contact you get a vibration and your relay would chatter. It could come in and out like this (indicating), which would eventually burn up the contacts, but with this sort of an arrangement just as soon as the
blue made, after the white had been completed first,
1535 just a momentary contact there would bring the relay in and as it came in it established your holding circuit, and that eliminated all of your chattering.

Trial Examiner Sheppard: How long have you been using that?

The Witness: That has been in use since the inception of the Minneapolis Heat Regulator fully automatic control

system, as shown on page 106-G. That was in 1924 and 1925.

By Mr. Gilpatric:

Q. And it is still being used today?

A. Still being used, in all of our oil burner primary controls today.

Q. And it is an important factor?

A. It is an extremely important factor, because we are able to use a lighter thermostat construction and we get greater sensitivity as the result of that.

Trial Examiner Sheppard: Mr. Lockrae, when did you first begin to use the primary control?

The Witness: Well, it all depends, now. We shouldn't confuse the term "primary control." You might look upon the old spring motors and the electric motors as the primary controls but the first automatic primary controls were in 1924 and 1925.

Trial Examiner Sheppard: That is what I meant, 1536 because that was just a further development from the first things you mentioned there.

The Witness: That is right.

Mr. Gilpatric: Mr. Examiner, this might be a good place to break off for lunch. Would that be all right?

Trial Examiner Sheppard: Yes. How long do you gentlemen want?

Mr. Freeman: How about a recess until 2:30?

Trial Examiner Sheppard: All right, we will adjourn at this time until 2:30 p. m.

(Whereupon, at 12:30 p. m., a recess was taken until 2:30 p. m., this day.)

1537 Afternoon Session.

2:30 o'clock p. m.

Trial Examiner Sheppard: All right, gentlemen, let's proceed now. Miss Reporter, we will convene the hearing.

I will call your attention that there is another exhibit, Respondent's Exhibit No. 112 that I have laid up here for you. Show that it is accepted now.

(The document referred to was marked RESPONDENT'S EXHIBIT 112 and received in evidence.)

A. H. LOCKRAE, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination by Mr. Gilpatric.

Q. Mr. Lockrae, when we recessed for luncheon you had been describing the series 10 circuit shown on Respondent's Exhibit 106-I.

A. I think I covered that subject, except I would like to say that we look upon this circuit as being our sixth major contribution to the control art.

Q. Now, after the consolidation of the Minneapolis Company and the Honeywell Company in 1927, which of the two systems that you have described this morning was continued as the standard system of Minneapolis-Honeywell Regulator Company?

1538 A. Well, following the consolidation we offered the system shown on Exhibit 106-G and also the system on Exhibit 106-H to oil burner manufacturers, and they could take their choice—which they did—and their choice depended upon the type of burner that they were manufacturing. If a burner was of the conventional gun type, no timing sequences were involved, they logically adopted the Minneapolis Protectorelay system. If a rotary burner was involved—for example, where they had to have timed ignition and gas pilot, and so forth—they continued to use the DSS motor switch previously manufactured by Honeywell, and as I said previously, both of these systems sold for $40.15 to the largest buyers and each system contained a primary control, combustion safety control, limit control and plain pattern thermostat.

Q. During these years 1920 through 1928, what, if any, changes had taken place in burner design?

A. Well, there was a general improvement in burner design, notably electric ignition that had come into effect and had replaced gas ignition on all of the gun type, high or low pressure burners. It was more economical. It was more positive in igniting the oil and, naturally, we had to continue to build controls that would meet the changing burner characteristics.

Q. Well, what type of equipment did Minneapolis-Honeywell supply to meet these changed conditions in
1539 burner design?

A. Well, during 1928 and 1929, there were several other relays and Protectorelays developed, also different types of combustion safety controls. I would refer you to 106-J of the exhibit, in the upper left-hand corner, where we have the U-10-C relay. Now, that relay incorporates a timing mechanism, so that when the thermostat called for heat, the burner and the ignition came on at the same time, but at the end of a predetermined interval—let's say a minute, the switch would operate and open the contact to the ignition circuit and the ignition would be off. Now that was used with the intermittent ignition type of burner.

Now, at the bottom of the page, you will find the BPR Protectorelay, which was also used with the intermittent ignition type burner, but it did not have the timing ignition means. Then, to meet the demand of the manufacturers, who were concentrating on constant ignition, we brought out the U-10-D relay, which is shown at the top of the page, the right-hand side. Now, the U-10-C and U-10-D relays were used with the B3 Pyrostat or stack safety control. The BPR Protectorelay was used either with the two wire Pyrostat or the Protectorelay type of control.

The U-10-C relay in 1928 sold to the largest buyers at $33.60 net per set; the U-10-D relay for $31.60 net, per set;

and the BPR Protectorelay for $34.85 net, per set—
1540 and when I refer to "sets" I again speak of room thermostat, limit control, primary control and combustion safety control.

Q. Did Minneapolis-Honeywell develop any type of control for the pot type of vaporizing burner?

A. That burner continued to be built—as a matter of fact,—it is built in large volume today—but the, shall I say better type of pot type or vaporizing type burner em-

ployed, for the most part, a motor and fan to provide the induced draft.

In 1928, we brought out the No. 10-B-O oil valve, which is shown on Exhibit 106-K, which can be used with that type of burner, employing a motor. With this control, the thermostat called for heat. The motor was started and the magnetic oil valve, which we see on the left of the cut, would open and when the thermostat was satisfied, the valve would close and the burner motor would be stopped. Again, this control had to be used with the trip bucket type of safety.

By Trial Examiner Sheppard:

Q. Mr. Lockrae, I wish you would explain for me and also to the Commission—I haven't got a clear idea of high pressure and low pressure burners.

A. All right. The low pressure burner or emulsifying type uses a particular type of pump, and the oil is emulsified and atomized at around 15 to 20 pounds of pressure.

Now, the high pressure burner employs the pressure 1541 pump on an entirely different principle. Usually a geared type of pump. The gears are so closely meshed that they force the oil through, and they build up a pressure of from a 120 to 125 pounds. That is, the amount of pressure forcing the oil through the small hole of the nozzle and vaporizing it, gasifies it.

The low pressure burner has a nozzle with a hole in it of, I would hazard a guess, of one-quarter of an inch; while the high pressure burner has a hole of about four or five one-thousandths of an inch. That would probably be large for the average burner.

Q. It gives it in more or less of a steady stream?

A. They both make it steady, but one does it under low pressure and the other goes at high pressure.

The 10-B-O oil valve was used with a plain thermostat and limit control, and apparently I neglected to get the price of that, because I don't show it here.

By Mr. Gilpatric:

Q. What type of relay was used with the rotary burner?

A. If you will refer to Exhibit 106-L, the top of the page, we show the PRO Protectorelay and the Type C-40 Pyrostat.

The rotary type of burner still used gas ignition and, as a matter of fact, later on, when they found a means of

1542 igniting the oil with the rotary burner with electric ignition, it was highly desirable to have the ignition come on ahead of the motor or the oil supply. This would heat up the ring where the oil entered and it would vaporize and burn more readily if that was hot than if it were cold and it was common practice to have two sets of ignitions 180 degrees apart, and they would both come on at the same time and warm up in so many seconds and a minute later, the oil and motor would come on and then the ignition would start from opposite sides of the circuit and then they would fan together around the wall of the boiler; but we had to provide a timing means to make either a pre-ignition interval or post-ignition interval, because they might want ignition to come on a minute ahead of time, or they might want it to stay on two minutes, so it required the complex mechanism you see in the PRO Protectorelay, to bring about that sequence.

Q. At what price did that relay sell?

A. Well, this system—again including the thermostat, limit control, primary and combustion safety control—in 1928 sold to the largest buyers at $39.90 a set.

Q. Now, what type of Protectorelay was used with the pressure burners you have described to the Examiner?

A. Well, that is shown at the bottom of page 106-L; and to all appearances, the two relays are identical. However, the circuit was such that you got no pre-ignition, but
1543 you did have timed post-ignition. In other words, your ignition was maintained for a period of time after it first started, so that it didn't snuff out; and, incidentally, both PRO and TIR Protectorelays contain the recycling feature.

By Mr. Haycraft:

Q. Does the PRO contain intermittent ignition?

A. The PRO and the TIR were both originally designed for intermittent ignition; however, either one of them could be used with the constant ignition, if they wanted to, because they simply run it parallel—

By Mr. Haycraft:

Q. You mean interchangeable, if they wanted to?

A. Yes, but it was an expensive process. I doubt if they would use it that way, because you could procure the U-10-D relay at the same time, for constant ignition, for $31.60 a set, so that no one would pay you $8.30 a set more for this relay to use constant ignition.

Q. Just make sure you get that straight, because that is what I want to know.

A. Yes.

Q. And the PRO is usually supplied with intermittent ignition?

A. For the rotary burner PRO has intermittent ignition; the TIR has intermittent on the gun type burner.

Incidentally, both of those instruments sold for, the
1544 sets sold for the same price, $39.90.

By Trial Examiner Sheppard:

Q. Now, Mr. Lockrae, what are those other drawings there on the same page?

A. Those are the Pyrostats, the combination safety controls that were used with the relays.

Q. With the relays?

A. That is right.

By Mr. Haycraft:

Q. I had the impression that the intermittent ignition was used principally with the rotary type burner, but apparently you used it with the gun type. Will you explain what the gun type burner is used with and why.

A. Well, Mr. Haycraft, it is at the option of the burner manufacturer, whether he designs his burner for constant ignition or intermittent ignition. The same burner, the same identical burner, is also used for either constant or intermittent ignition. It all depends upon how they wire it up.

Q. I notice that on this PRO, that there are six posts; whereas here, on the TIR, there are only five. Is one wire missing there?

A. Let me see.

Q. One, two three, four, five down at the bottom, and one, two, three, four, five, six in the upper.

1545 A. That, if I remember correctly—and I couldn't tell positively without having the circuits before me—but I think that that was for the oil valves that were always used with the rotary type of burner. You see, the valves were wired so that they opened at the same time the burner motor started and, I think, that sixth was to make it easy to connect in the oil valve.

Q. You would say, then, that it was peculiar to the Protectorelay for the rotary type burner to have six posts?

A. Yes.

By Mr. Gilpatric:

Q. Mr. Lockrae, the two pairs of instruments shown on Respondent's Exhibit 106-L are today combined, in each case, in what we call a primary control?

A. That is right.

By Mr. Haycraft:

Q. You just haven't gotten to it?

A. That is right.

By Mr. Gilpatric:

Q. Now, what was the next development in your line of instruments?

A. Well, there were several other relays built from 1928 to 1931—I would refer you to Exhibit 106-M, the lower left hand corner, which shows the A-7 Protectorelay, which is simply a modification of the first relay that Minne-
1546 apolis built and is depicted on Exhibit 106-G. If you will compare the two cuts, you can see the progress of development there in those two particular controls.

By Trial Examiner Sheppard:

Q. That is A-7 you are talking about?

A. That is the relay, the line drawing of the relay, as compared with the A-7.

At about that time—1930, to be exact—we bought out the R-100 Protectorelay—there was a requirement from certain manufacturers for relays that would stop the burner just as soon as the Protectostat opened its contact and put that burner on safety. They didn't want it to recycle if anything occurred that would disrupt the flame long enough for the Protectostat to actuate, which would stop the burner.

And then the safety switch circuit came into play again and as soon as it got heated up to the proper point, it went on safety and it couldn't be started without manual attention. In 1931 we brought out the R-114 Protectorelay and it was also used with the intermittent ignition type gun burners. It was equipped with a switch, if you will notice, in between the two relay units shown at the top of page 106-M.

By Mr. Gilpatric:

Q. Well, Mr. Lockrae, before going further with that relay, will you tell us what simplification in the de-
1547 sign, if any, took place about this time, when the two units, which have been previously described as per-

forming the function of the primary—in that connection, I will have this marked as Respondent's Exhibit 108 for identification.

(The document referred to was marked Respondent's Exhibit 108 for identification.)

A. I might put those exhibits in right now, Mr. Gilpatric.

Q. Mr. Lockrae, I show you Respondent's Exhibit for identification 108 and ask you to identify that.

A. This is the Type R-101-2 Protectorelay.

Q. And, incidentally, is that a new instrument or is that taken from your revolving stock?

A. This is taken from revolving stock and has been repaired. The serial number indicates that it was made in 1932 and it was repaired in November, 1943.

By Trial Examiner Sheppard:

Q. What did you say the number on that was?

A. R-101-2.

Mr. Gilpatric: We offer in evidence the instrument that has been described as Respondent's Exhibit 108.

Trial Examiner Sheppard: All right, any objection?

Mr. Hayeraft: No.

Trial Examiner Sheppard: Let it be accepted then.

(The document referred to, heretofore marked
1548 RESPONDENT'S EXHIBIT 108 for identification was received in evidence.)

The Witness: I would also like to offer in evidence Exhibit No. 109, which is the Pyrostat which is used with the R-101 Protectorelay. This is the Type C-52-2 Pyrostat.

By Trial Examiner Sheppard:

Q. That is used in connection with 108?

A. With this relay 101.

Trial Examiner Sheppard: Yes, very well.

Mr. Gilpatric: The instrument which Mr. Lockrae has identified is offered by the respondent as its Exhibit 109.

Trial Examiner Sheppard: Let that be accepted.

(The document referred to was marked RESPONDENT'S EXHIBIT 109 and received in evidence.)

The Witness: If you will refer to—first, please, I would like to say that our code dates show that that instrument was built in 1928.

By Mr. Gilpatric:

Q. "That" meaning the R-109, Respondent's Exhibit 109?

A. That was right,—was built in 1928. It is fifteen years old before it came back to us for repair and it was repaired in November, last month.

If you will refer to Exhibit 106-N—

1549 By Mr. Haycraft:

Q. N, is that?

A. N. You will see photostats of the two instruments just offered in the exhibit.

Q. The top of the page?

A. The top of the page.

Trial Examiner Sheppard: The top of the page, yes.

By Mr. Gilpatric:

Q. What changes, Mr. Lockrae, did this Protectorelay system, R-101, involve?

A. Well, there were two major changes. If you will refer back to the PRO and TIR type Protectorelay on Exhibit 106-L, you will note that that employed three relay units, a time switch and a safety switch. Those relays were approximately the same width as the R-101, but were at least two or two and a half inches longer.

You will note that the R-101 has two relay units, a safety switch and no time switch and yet with the C-52 Pyrostat we were able to obtain the equivalent timing function with the R-101 as we obtained with the PRO or TIR before that, —the TIR, I should say, just the TIR, because the PRO hadn't—

By Mr. Gilpatric:

Q. Was Model R-101 Protectorelay superseded later by another model?

1550 Mr. Haycraft: Just before you reach that, may I ask something?

Mr. Gilpatric: Yes.

By Mr. Haycraft:

Q. This one you offer in evidence as R-101-2, what is the significance of the figure 2?

A. As we make mechanical changes, Mr. Haycraft, we designate between these pages by the suffix letter.

Q. I notice that there are more posts in this and they are arranged differently.

A. Yes, it may be that that was in the revamping of the panel in the layout.

Q. Is that what the "2" is?

A. That is what the "2" designates. The same way with the Pyrostat. That was C-52-2.

Q. You have some extra posts, 6 and 7, in the physical exhibit 108, which don't appear in the exhibit.

A. Well, without the circuit diagram, I couldn't tell you just what those denote.

Q. You say you have got the five here in line?

A. Yes.

Q. And six and seven. Those posts, what were those? (indicating)

A. Without the circuit, I wouldn't be able to distinguish that.

1551 By Mr. Gilpatric:

Q. Well, those are just simply minor structural changes, Mr. Lockrae?

A. Yes.

Trial Examiner Sheppard: That is what I figured.

The Witness. Yes. You would have to have both of them here, you see (indicating).

By Mr. Gilpatric:

Q. Mr. Lockrae, I asked you about—

Trial Examiner Sheppard: I think that there was a question and then Mr. Haycraft asked you something before he could answer. Would the reporter read that question.

(The question was read by the reporter as follows: "Was Model R-101 Protectorelay superseded later by another model?")

A. Before answering that, I would like to say that the R-101 Protectorelay, in the system with the thermostat, C-52 Pyrostat and limit control, sold in a set to the largest buyers at $34.40, as compared with the PRO or TIR, which it superseded, of $39.90.

Then, to answer the last question—

Trial Examiner Sheppard: Would you mind stating the year there?

The Witness: The R-101 first sold in 1930.

Trial Examiner Sheppard: 1930?

1552 The Witness: The R-112 Protectorelay, which is shown at the bottom of Exhibit 106-N, was introduced in 1931.

Now, the circuit arrangement and performance was identical with the R-101, but we came out with a different type of relay, as a unit, shown in the cut, and we were able to effect economies that enabled us to price this system, with the thermostat and limit control and combustion control, at $30.90 a set, or a saving of $3.50 over the R-101.

By Mr. Gilpatric:

Q. Still serving, however, the same function?

A. Still serving the same function.

Q. Now, what was the next change?

A. I would like to inject there, if I could, please; with the advent of the R-101, the timing sequence that I explained and which is accomplished through the ingenious arrangement of the C-52-2 Pyrostat, we looked upon as our seventh major achievement in oil burner control design.

Q. What is the difference between the C-52 and the C-54 Pyrostat?

A. There was no difference in function. As you will notice, the C-52 utilizes the toothed gears in order to perform its function. The C-54 employed a friction mechanism instead of the toothed gears, but the contact
1553 sequence and operation of both instruments were alike.

Q. Now, will you go on, Mr. Lockrae, to describe the next development in Protectorelay?

Trial Examiner Sheppard: That would bring you down to modern times, wouldn't it?

A. Almost.

Trial Examiner Sheppard: Almost.

A. It was in 1932 the Minneapolis-Honeywell brought out the R-116 and R-117 Protectorelays, as shown on page 106-O. They are shown at the top of the page. R-117 used with intermittent ignition burner, and the R-116 the constant ignition burner. And the distinction to be recognized, if you will look at the two cuts; the one on the right being R-117, which employs the mercury switch in the center, which is utilized to cut off the ignition mechanism, and you will notice the absence of it in R-116, because it isn't necessary if you are going to have constant ignition.

The R-116 set, including the thermostat and the limit

control, sold for $20.60 to the largest buyers; and the R-117 for $21.10.

I would like to add here that we are now talking about a set including three instruments and not four. Everything heretofore had had the separate relay and separate Pyrostat. With the advent of the R-116 and 117, we combined the function of both of those devices into one instrument.

1554 By Mr. Haycraft:

Q. This is mounted on the stack?

A. On the stack.

Q. Before that, only the Pyrostat was mounted on the stack?

A. Correct.

Q. And the Protectorelay was on the wall?

A. Was on the wall or on the burner.

Mr. Gilpatric: Will you mark this as Respondent's Exhibit 110.

(The document referred to was marked Respondent's Exhibit 110 for identification.)

By Mr. Gilpatric:

Q. I show you Respondent's Exhibit 110 for identification, and ask you whether that is a type of primary you just referred to?

Trial Examiner Sheppard: That is 116, isn't it?

The Witness: 110.

A. This Protectorelay is the type R-A-117, which superseded the R-117 just referred to. In other words, this is the new and latest model of stack control and which is in production today, but it does show you how we combined the two units into one. This mechanism (indicating) used to be the Pyrostat and this used to be the Protectorelay.

Now, they are both combined into one device and are mounted on the stack. Now, when we made that change—

1555 Mr. Gilpatric: Just let me offer this Exhibit 110 in evidence.

Trial Examiner Sheppard: Let that be accepted.

(The document referred to, heretofore marked RESPONDENT'S EXHIBIT 110 for identification was received in evidence.)

Mr. Gilpatric: In answering Mr. Haycraft's question

off the record, would you explain the difference between Respondent's Exhibit 110—that is the RA-117 and the RA-116, of which you do not have a sample.

The Witness: As shown in Exhibit 106-O, at the bottom of the page, if we removed the right hand relay unit, this control, properly rewired, would become the RA-116, for constant ignition. In other words, the function of that relay is to cut off the ignition once the fire has been established. It isn't required with a constant ignition oil burner.

By Mr. Gilpatric:

Q. In the absence of that extra relay, that is what accounts for the difference in price between the two types?

A. That is right. That is the only difference.

Trial Examiner Sheppard: In other words, without it, it is $20.60 and with it, is $21.10?

Mr. Haycraft: No.

The Witness: On this particular control—we are
1556 talking about the RA-116—a set included the thermostat and limit control and sold to the largest buyers for $13.00; and the RA-117, for intermittent ignition, sold in a set to the largest buyer at $13.75.

Trial Examiner Sheppard: That is right, I see.

By Mr. Gilpatric:

Q. Well, besides combining, as you described, Mr. Lockrae, the function of the separate Protectorelay and the combustion safety control into one unit, what other advantages did the R-116 and R-117 and subsequent models bring about?

A. Well, one of the most important facts was that these stack control Protectorelays had the same function, could be used in the same manner, as all the relays, from the original Minneapolis type. In fact, the Honeywell motor switch the U-10-C, U-10-D, the BPR, the PRO, the TIR, the R-114, the A-7, the R-100, the R-101, and the R-112.

I would like to emphasize the fact that the R-116 or R-117 or R-A-116 or RA-117 can be used wherever we would use those relays just enumerated. Now, that was highly important to us, from a standardization standpoint; to the oil burner manufacturer and to the dealer, to the wholesaler.

It is possible today, with the RA-117, to take care
1557 of any service difficulties that might be had with any

of those relays I mentioned that are used with electric ignition.

They have just one device to be stocked today, and they can answer a service call on any of those relays. As a matter of fact, I think I can say the same of the vast majority of competitive relays that are in the field today, so it was really an achievement when we came out with the stack control and it constitutes our eighth in the oil burner control design art.

Another thing; it was highly advantageous for the dealer or the installer, because in running his wires to the relay and the burner, he would have to go through the limit control, to the stack control, to the thermostat. Now, with this combined device, he would run his low volt wires from the thermostat to the Protectorelay and then he would run his hot line through the limit control, and then from there with the hot and cold line to the burner and his job of wiring was complete.

It saved I don't know how many dollars on every installation for the dealer, when we introduced this particular control.

By Mr. Haycraft:

Q. When was that? That was in 1932, wasn't it?

A. The R-116 and R-117 came out in 1932 and the 1558 RA-116 and the RA-117 came out in 1940. In other words, we carried the earlier models for a period of eight years.

Q. Well, the R-116 and R-117 for eight years, although you had your stack control—

A. (Interposing) That is right.

Q. —already with the relay.

A. That is right. The RA-models are a modification and improvement in mechanism. The principle is identically the same as the two preceding ones.

By Mr. Gilpatric:

Q. Now, what about the difference in price that appears in Respondent's Exhibit 106-O? Do you have any comment to make on that?

A. Well, R-116, with thermostat and limit control, sold to the largest buyers in 1932, for $20.60 a set. There were changes through the years, but in 1940, when we introduced the RA-116, it sold for $13.00 a set.

Q. These prices are your best prices?

A. They are the prices we give to the biggest buyers. Now, the R-117, in 1932, sold, with thermostat and limit control, for $21.10—and again there were changes in prices throughout the intervening years—but in 1940, the RA-117, which accomplishes the same purposes—only does a better job of it, sold for $13.75 a set.

One of the main improvements in the new models 1559 we have shown here is the fact that they are a lot more sensitive to low temperature conditions than the older model, and that was highly desirable, due to improvements in boilers and furnaces, to a point where the stack temperatures are so much lower now than they used to be.

Q. Well, each of those prices, which you have referred to, include the thermostat and limit control?

A. That is right.

Q. In other words, it is a set price?

A. It is a set price.

Q. And those prices continue in effect today?

A. They continue in effect today.

Q. Well, now, during the years—the years from 1932 to 1940, did you make any other type of primary and safety instruments?

A. Well, we made numerous types for different applications. As a matter of fact, I thought they were just too numerous to attempt to include in an exhibit of this kind. It would be more boring than advantageous, and I left them out.

Q. Now, what about limit controls? What took place in the development of them?

A. I would refer you to Exhibit 106-P, at the top of the page. There is shown the original Minneapolis model 7010 Pressuretrol. There is also shown an immer-
1560 sion Aquastat. The immersion Aquastat, although it has been refined in appearance, was practically the same as the cuts show. I took those from a later catalog, because I couldn't find one of the old originals. There were changes and improvements in the design, but—

By Trial Examiner Sheppard:

Q. (Interposing) About what year are you talking now?

A. Well, these earlier limit controls, as I testified this morning, some of them were developed as early as 1917, and we sold those to the largest buyers from eight to ten

dollars net, each. Now, the new limit controls shown at the bottom of the page, sell to the largest buyers for $2.50 net, each.

Q. That is the modern—

A. The modern version.

Trial Examiner Sheppard: Yes.

By Mr. Gilpatric:

Q. And the same function is performed by the modern limit controls?

A. The same functions are performed, only much better.

Q. Well, now, refer briefly, if you will, to the development in thermostat—the third unit in the set today.

A. Well, I would refer you to 106-Q, at the top of the page, where you will see the early models of plain and clock type thermostats.

1561 By Trial Examiner Sheppard:

Q. That was around 1917, too?

A. Well, those models go back, I don't know just how many years. They are at least twenty years old, perhaps older than that. Again, at the bottom of the page, we show the current, plain and clock model. The earlier ones were of the hand-wound clock variety. The new model is the electric clock model that requires no winding, no attention, and is far more accurate than the old hand-wound model. The earlier clock models, in 1928, sold for $23.50 net each, and the current, electric clock models, sell for $11.75 net, or exactly one half of what they were selling for in 1928. The plain models in 1928 sold for $5.25; and our plain models today, the T-11, sells for $2.70, which is almost, again, 50 per cent of the other.

By Mr. Haycraft:

Q. What is the model of clock here (indicating)?

A. That is the T-111.

Q. The T-111?

A. That is right.

Mr. Gilpatric: Will you mark this as Respondent's Exhibit 111.

(The document referred to was marked Respondent's Exhibit 111 for identification.)

By Mr. Gilpatric:

1562 Q. The instrument which I hand you, Respondent's Exhibit 111 for identification, is the T-11 thermostat to which you just referred, is that right, Mr. Lockrae?

A. T-11, that is right.

Mr. Gilpatric: I offer in evidence on behalf of the respondent, Exhibit No. 111.

Trial Examiner Sheppard: Let that be accepted.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 111, was received in evidence.)

The Witness: We have mentioned several times the features of heat acceleration or heat anticipation. The T-11 thermostat, offered in Exhibit 111, is of the heat accelerating variety.

You will note that we have the two contacts on this thermostat still on the same side of the bimetal. That is on one side. This is the heater (indicating) that gives you the heat acceleration. The shell with the green and white plug is the heater.

By Mr. Haycraft:

Q. What actuates the heater?

A. Here is what actually happens. The thermostat calls for heat and both contacts are closed. Your burner starts up and starts to deliver heat. Now, on the initial rise in room temperature, your blue contact will open. As
1563 soon as that contact opens, the heater is thrown into the circuit. The electrical heat goes through the heater coil and affects the bimetal and it accelerates the action of that bimetal, so that the white or second contact will be broken prematurely. That is, it reacts quicker through the application of artificial heat than at room temperature and by stimulating the action of the bimetal and, through this heat acceleration, we avoid overshooting room temperature; what happens is that your burner operations will be shorter and more frequent and as the weather gets colder, your burner operation will lengthen out and the intervals between the burner operation will come closer, so that you get an over-all effect of a close temperature that is hardly perceptible on the thermometer of the thermostat.

Q. There will be less changes in room temperature?

A. The room temperature becomes almost constant and we look upon that as our ninth major achievement in control design.

By Mr. Gilpatric:

Q. Now, Mr. Lockrae, if you could just summarize briefly, for the record, the trend in the prices of the controls, the major controls systems which you have described.

Trial Examiner Sheppard: Yes, I would like to have a little summary of that.

A. Well, I would like to say that this summary is 1564 of the more popular type of control systems. I haven't attempted to give a summary of all that we have been talking about after lunch, but these were the more popular types and sold in the greater volume.

By Trial Examiner Sheppard:

Q. That is, you mean by that, the model type?

A. That is right.

Q. The model type?

A. That is right.

Trial Examiner Sheppard: That is what I am interested in.

By Mr. Gilpatric:

Q. And each of the prices mentioned is for a set?

A. A set including thermostat, limit control, primary control, and combustion safety control, where they were used.

Trial Examiner Sheppard: That is right.

The Witness: In 1929, the PRO and the TIR Protectorelay systems sold for $39.90 net in 1930, the R-101 Protectorelay system sold for $34.40 net in 1931, the R-102 Protectorelay system sold for $30.90 per set in 1932, the R-117 Protectorelay system sold for $21.10 net per set; in 1936, the R-117 Protectorelay system sold for $20.40 net per set; in 1937, the R-117 Protectorelay system sold for $17.85 net per set; in 1938 the R-117 Protectorelay system 1565 sold for $16.25 net per set; in 1939, the R-117 sold for $14.40 net per set; in 1940, the RA-117 Protectorelay system sold for $13.75 net per set.

By Trial Examiner Sheppard:

Q. Could you give me, roughly, a percentage of decrease between 1938 and 1940?

A. I will do that. I have a note of it here.

Trial Examiner Sheppard: I would like to have that. In other words, a percentage of increase.

Mr. Gilpatric: Do you mean for the years from 1938 to 1940?

Trial Examiner Sheppard: Where he started.

Mr. Gilpatric: He started—

The Witness: I can give that to you, Major. I can go back to 1929.

By Trial Examiner Sheppard:

Q. You started in 1929?

A. Yes, 1929.

Q. I think it is roughly 50 per cent, isn't it?

A. Just a minute.

Mr. Gilpatric: It is more than that. It is 66 per cent.

The Witness: It is 66 per cent.

Mr. Haycraft: Why don't you begin in 1936?

The Witness: I just didn't figure it out. It would
1566 be easy enough to figure out, Mr. Haycraft. I just did it the other way.

Trial Examiner Sheppard: That is okay.

By Mr. Gilpatric:

Q. That was correct, wasn't it, 66 per cent?

A. 66 per cent.

Q. During the period you have covered, it is 66 per cent?

A. 66 per cent.

Q. Now, do you have any figures for a comparable period showing the trend of production of oil burners—that is both burner units and conversion burners?

A. Again, I can give you that from 1929 on.

Trial Examiner Sheppard: All right.

The Witness: And these figures were taken from "Fuel Oil" or "Oil Heat," which constitutes—

Trial Examiner Sheppard: You gave us something this morning. That is the same thing, isn't it?

The Witness: It will be included in this list.

Trial Examiner Sheppard: Included, all right.

The Witness: But they were taken from "Fuel Oil" and "Oil Heat," the industry's trade papers.

Trial Examiner Sheppard: All right.

The Witness: In 1929, 131,300; in 1930, 126,400; in 1931, 104,000; in 1932, 86,200; in 1933, 87,100; in 1934, 102,100; in 1935, 150,510; in 1936, 220,075; in 1937, 210,740;
1567 1938, there were 179,360; in 1939, there were 236,140; in 1940, 302,210; in 1941, 333,250.

By Mr. Gilpatric:

Q. Now, does that same source show the trend in installed prices for oil burners during that period?

A. These figures were taken from the same sources. And in 1929, the installed price average was $692.00; in 1930, it was $629.00; in 1931, $495.00; in 1932, $438.00; in 1933, $395.00; in 1934, $341.00; in 1935, $317.00; in 1936, $300.00; in 1937, $293.00; in 1938, $263.00; in 1939, $240.00; and in 1940, $233.00. And I am sorry, but I couldn't find prices for 1941.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: And in 1941, it was $250.00.

Mr. Haycraft: That is all.

The Witness: And in 1942, the figure is given here, but that doesn't mean much.

Trial Examiner Sheppard: I think those figures are very interesting, but I want to ask you a question about that, Mr. Lockrae.

By Trial Examiner Sheppard:

Q. I notice in both the controls that have been 1568 mentioned, that you have given us a price of, they decreased from 1929 to 1941, and also in the installation the prices show a gradual decrease from 1929 to 1941.

A. That is right.

Q. What do you attribute that to?

A. Well, it shows the acceptance of oil heating through increased volume. The people became better acquainted, through advertising the sales effort put behind the sale of oil burners. The reputable manufacturers that have gone into the business; such as Delco, General Electric, Gilbert and Barker, Williams Oil-O-Matic—nationally known people—behind the product, has all had a bearing on the increased popularity and acceptance of oil burners.

Q. Mr. Lockrae, was one of the elements of that the combination of these controls all in one?

A. That had a decided effect on the increase. There was a radical change in price when we were able to form the combination of two in one.

Q. In other words, in years gone by, all four of these were in separate units?

A. That is right.

Q. And now they are all combined?

A. Two in the combined unit.

1569 Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Haycraft: My suggestion is that we ask the witness at this time to give the relative changes in net prices to the trade on these oil burners, in the same set of statistics, rather than the installed prices.

Mr. Freeman: The net price for controls?

Mr. Haycraft: No, for burners.

Mr. Gilpatric: Would that point be made if we put this in evidence?

Mr. Haycraft: The only thing is, I would like to have it right alongside. You have given the installed price, and I would like, if you don't mind, to have the other prices right there, too.

Mr. Gilpatric: Wholesale prices?

Mr. Haycraft: Yes.

By Mr. Gilpatric:

Q. Mr. Lockrae, at the suggestion of Mr. Haycraft, will you give those wholesale prices?

By Mr. Freeman:

Q. Taken from Fuel Oil Magazine, which you gave the other figures from.

A. If I am correct, Mr. Haycraft, the figures you have in mind are these from the factory.

1570 Mr. Haycraft: That is right.

A. In 1929, $240; 1930, $195; 1931, $160; 1932, $140; 1933, $129; 1934, $118; 1935, $98; 1936, $94; 1937, $86; 1938, $79; 1939, $78; and 1940, $76; and 1941, $81.

Trial Examiner Sheppard: All right.

The Witness: It is interesting to note that our decline in control prices was 62.6 percent. No, I beg your pardon. The decline in installed prices was 64 percent.

By Mr. Gilpatric:

Q. Of burners?

A. Of burners. And the decline in M.H. controls was 66 percent.

Mr. Gilpatric: Will you mark this as Respondent's Exhibit 113-A to D for identification?

(The document referred to was marked Respondent's Exhibits 113-A, 113-B, 113-C, 113-D for identification.)

Mr. Gilpatric: The respondent offers in evidence as Respondent's Exhibits 113-A to D, inclusive, four pages from the January, 1943, issue of Fuel Oil and Oil Heat, being the pages from which certain of the statistics which Mr. Lockrae has testified to were taken.

Trial Examiner Sheppard: All right, any objection?

Mr. Haycraft: I have no objection, if it is just offered for the statistics on there.

1571 Mr. Gilpatric: It is only offered for the statistics.

Trial Examiner Sheppard: All right, it will be accepted. The Examiner will use the exhibit for statistics only.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBITS 113-A, 113-B, 113-C, and 113-D, was received in evidence.)

Mr. Gilpatric: Will you mark this as Respondent's Exhibit 114 for identification?

(The document referred to was marked Respondent's Exhibit 114 for identification.)

By Mr. Gilpatric:

Q. Mr. Lockrae, I hand you a chart marked Respondent's Exhibit 114 for identification and ask you to describe it for the record.

A. Exhibit 114 shows the trend in oil burner installed prices from 1929 to 1941, inclusive, these figures being taken from Respondent's Exhibit 113.

The chart also shows the Minneapolis-Honeywell Regulator Company prices from 1929 to 1941, inclusive.

Q. To which you have testified?

A. To which I have testified.

Mr. Gilpatric: The respondent offers in evidence the chart described by Mr. Lockrae as Respondent's Ex-
1572 hibit 114.

Trial Examiner Sheppard: Any objection?

Mr. Gilpatric: We do not offer the years 1927 and 1928 nor the year 1942, which are not covered in the evidence.

Trial Examiner Sheppard: Then the intermediate years?

Mr. Gilpatric: Between the years 1929 and 1941, inclusive.

Trial Examiner Sheppard: All right, with that explanation, it will be accepted.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 114, was received in evidence.)

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Gilpatric:

Q. Before leaving the subject, Mr. Lockrae, I would like to ask you one question about your thermostat model T-11, Respondent's Exhibit 111.

Could you describe very briefly the difference between this thermostat and the two-wire type thermostat which has been referred to in earlier portions of the evidence?

A. Well, the two-wire thermostat simply has a 1573 blade and a contact mechanism and they are usually of the snap acting variety. This snap action is performed through the use of a magnet or else of a mercury switch type.

The two-wire thermostat, the mechanism is considerably heavier, and we have always contended we can get greater accuracy with the lighter structure of the three-wire type than of the two-wire.

Trial Examiner Sheppard: And that is what you are making now?

The Witness: And the T-11 is the three-wire type. We also make the two-wire type of thermostat.

By Mr. Gilpatric:

Q. Is your present model of primary, that is, your R. A.-116 and 117, especially designed to function in cooperation with this type of thermostat?

A. Correct. Every thermostat is designed to take the proper type of heater to correspond with the primary control with which it is to be used. If the thermostat is used with a gas valve or a stoker relay, the heater plug characteristics are different. You would have to use a different plug entirely for these different purposes; and that all depends on the coil winding of the valve or the winding of the coil of the relay as to what those characteristics will be.

Trial Examiner Sheppard: I notice there is no 1574 clock on that.

The Witness: This is a plain pattern thermostat.

Trial Examiner Sheppard: You do make them with clocks?

The Witness: We do make a clock thermostat.

Trial Examiner Sheppard: That thermostat you have in your hand, Mr. Lockrae,—

The Witness: (Interposing) Is the T-11.

Trial Examiner Sheppard: P-11?

The Witness: T-11.

Trial Examiner Sheppard: Now, the one that you sell with the clock, is that more expensive?

The Witness: Yes, sir. As I testified, the plain thermostat, the T-11, sells today for $2.70 net and the electric clock thermostat, the T-111, for $11.75.

Trial Examiner Sheppard: That is right. I remember that now. There is a picture of it in here.

The Witness: That is right. Those prices are for the largest buyer.

Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. Now, Mr. Lockrae, in the stipulation which counsel for the Commission has put in evidence there are set forth various price brackets on the basis of which Minneapolis-Honeywell sold their manufacturers during the years 1575 1937 through 1941.

Will you tell us, generally speaking, how those prices were established?

A. Trade prices, that is, our list prices or competitors' list prices, are published; also the discounts which they give to the dealer or the wholesaler are also published, and our list prices are pretty generally established on the basis of competitive list prices for similar products.

Q. What about your manufacturers' prices, though?

A. Well, when we establish a list price, then we have a base discount which we give to the dealer. Now, if we sell to the wholesaler, who in turn must sell to the dealer, we have to provide a margin of profit to cover the wholesaler's services.

Now, when we sell to the manufacturer and that manufacturer in turn sells to the wholesaler, we likewise have to establish a margin of profit on our controls for the manufacturer who is serving the wholesaler. That, then, established what we might term our bracket 1 prices.

Trial Examiner Sheppard: To the manufacturer?

The Witness: To the manufacturer.

By Mr. Gilpatric:

Q. Well, now, what about the differences between the bracket 1 and the other brackets shown in Commission's Exhibit 1, generally speaking?

1576 A. Well, it has been standard practice as long as I can remember throughout the year to correlate all the competitors' prices that we can get our hands on. We have always maintained files for that purpose and when we get reports in from our salesmen giving prices at which they can buy competitive controls, then we get prices in from other salesmen with the same kind of information from concerns of similar size and we can pretty well match up and tell just about what our competitors' prices are, and up until the inception of the Robinson-Patman Act, as a matter of fact, until we established I believe it was our 1939 prices, the competitive price situation was quite a factor in the establishment of our various bracket prices.

Trial Examiner Sheppard: Would you say that is most important?

The Witness: Well, it certainly is important.

Trial Examiner Sheppard: In other words, competition?

The Witness: Competition.

By Mr. Gilpatric:

Q. Does that account for the changes in bracket quantities as well as bracket prices in between the years?

A. Yes, sir, because competitors, like we, were finding conditions changing and they had to change bracket structures for one reason or another, for the same reason

1577 we did, and again we had to make our bracket quantities somewhat—be guided somewhat by the bracket quantities of our competitors.

Q. You testified for Mr. Haycraft that prior to the enactment of the Robinson-Patman Act your company made no detailed distribution cost study, is not that true?

A. That is true.

Q. Now, how did you go about making a cost study which you began after the Robinson-Patman Act went into effect and which you referred to in your testimony during the Commission's case?

A. Well, we used the tools which we had at hand. We have always had a system of maintaining sales reports

and when one of our salesmen calls on a manufacturer he writes out a report, a copy of which is kept in his branch, and others copies sent on to us.

We, of course, knew the salaries we were paying these various salesmen and we had an accurate record of each salesman's expenses, automobile travel, and what not, so we took those manufacturers' reports of the various salesmen and segregated them by their calls on manufacturers in the various brackets and then by simple arithmetic, knowing the number of calls that were made, the salesman's salary and his expenses, we could establish an average price per call, and we built up the first figures
1578 we have ever had to act as a guide.

At the same time, we took our indirect expenses and our branch operations and our home office sales and indirect expenses.

Trial Examiner Sheppard: In other words, your cost of doing business?

The Witness: That is right. We allocated those expenses over the sales volume in the various brackets which we were studying.

By Mr. Gilpatric:

Q. On what basis?

A. That was on a percentage basis, cost to sales.

Q. In other words, you allocated your direct selling expenses in accordance with the number of calls as shown by the manufacturers' reports?

A. That is right.

Q. But your indirect selling costs and overhead, that is, both branch and home office, were allocated on the basis of sales?

A. That is right, and from a compilation of those figures we were able to obtain some idea of our cost of selling, the cost of selling a set of controls in our various price brackets.

Q. Now, did you make any further computation to arrive at some selling price or set of prices on the basis
1579 of these figures?

A. Well, after we made up this first set of figures, we did use that as a yardstick.

Q. You mean in connection with future selling prices?

A. That is right.

Q. Well, have you ever made a comparison between your actual selling prices in the year 1939 and what you

have called your allowable selling prices under this cost study that you made after the Robinson-Patman Act went into effect?

A. We made such a study based on 1939 selling prices.

Q. Have you the figures showing the comparison to which you refer?

A. I have.

Mr. Gilpatric: Mark this as Respondent's Exhibit 115 for identification.

(The document referred to was marked Respondent's Exhibit 115 for identification.)

By Mr. Gilpatric:

Q. I show you Respondent's Exhibit 115 for identification and ask you if that is the comparison to which you referred.

A. That is the comparison to which I referred.

Q. Does that exhibit also show a comparison between over-all spreads between your top and bottom bracket prices in the years 1939, 1940, and 1941?

A. It does.

1580 Q. The spread figures being taken from Commission's Exhibit 1, the stipulation showing, or referring to bracket prices for those years?

A. That is correct.

Mr. Gilpatric: I offer that in evidence.

Mr. Haycraft: When was this cost study made?

The Witness: That was in 1938, based on 1937 figures.

Mr. Haycraft: Do you have that with you?

The Witness: Yes, that is the one, Mr. Haycraft, that we gave the Commission, if you recall.

Mr. Haycraft: It is not in evidence, though.

Mr. Gilpatric: The Commission has it in its record.

Mr. Freeman: You will get a chance to cross-examine with respect to it.

Mr. Haycraft: I will object to this until the other one is in, and I have had a chance to cross-examine on the other one. You are getting your cart before the horse. You are talking about something that isn't in evidence and I haven't had a chance to cross-examine on it yet.

Mr. Freeman: We have a right to put it in. We will connect it up, and Mr. Lockrae is going to continue to testify in respect to it. You can make your objection, if you want to.

1581 Mr. Gilpatric: You have that cost study and you can cross-examine him with respect to it.

Mr. Haycraft: It is not in evidence, though.

Mr. Freeman: Well, you seem to put things in rather quickly from your Federal Trade Commission files.

Trial Examiner Sheppard: What is the other matter you are talking about?

Mr. Haycraft: The witness has testified to a cost study he made in 1938 and has compared that with some later prices. I am objecting to the exhibit and the exhibit is objectionable on the ground that no proper foundation has been laid for it, for the introduction or the receipt of the cost study in 1938, and I haven't had a chance to cross-examine on that study in 1938.

Trial Examiner Sheppard: Where is the other sheet? Can we get that and put it in now?

Mr. Haycraft: I don't know why not. You might as well start with the foundation.

Trial Examiner Sheppard: And have the whole thing before us at one time.

Mr. Gilpatric: Mr. Examiner, this subject matter of the 1938 cost study was brought up not by me the first time but by Mr. Haycraft in this case, and all we are doing here is bringing out certain results of that study and comparing them with actual prices.

1582 Now, if he would like to have us put in evidence this rather voluminous detailed cost study, why, we will do so.

Mr. Haycraft: Why, certainly.

Trial Examiner Sheppard: You say Mr. Haycraft has that?

Mr. Gilpatric: Well, a copy of this together with a letter from the witness, Mr. Lockrae, was sent to Mr. Royal on February 25, 1939.

Trial Examiner Sheppard: Mr. Haycraft didn't put it in the record.

Mr. Gilpatric: No, I don't think he considered it a part of his case.

Trial Examiner Sheppard: Well, he said he hadn't cross-examined on it.

Mr. Gilpatric: He referred to the study in his direct examination of Mr. Lockrae.

Mr. Haycraft: He testified that there was such a study that had been made, but I didn't examine him on it.

Mr. Gilpatric: It seems to me if Mr. Haycraft wants

to cross-examine about it, he can put that study in as part of his cross-examination. I don't care. However you want it done.

Trial Examiner Sheppard: I just want to make it simpler for all of you. If this ought to be cross-
1583 examined on first, whatever you call that—

Mr. Gilpatric: (Interposing.) This is a 1938 cost study made by the respondent.

Trial Examiner Sheppard: Yes.

Mr. Gilpatric: After the Robinson-Patman Act became law.

Trial Examiner Sheppard: Now, Mr. Haycraft, would you prefer that we take this into the record now?

Mr. Haycraft: Yes, I think I ought to be allowed to cross-examine on that before they lead up to this.

Mr. Gilpatric: You see, Mr. Examiner, the exhibit being proffered, Respondent's Exhibit 115 for identification, is the end result of the cost study to which Mr. Haycraft referred and which is simply the work sheets.

Trial Examiner Sheppard: The working sheets?

Mr. Gilpatric: Yes, and he can cross-examine on that if he wants to. Naturally, that is his privilege, if we offer the end result as part of our case, but we are not offering that.

Trial Examiner Sheppard: You don't want to prove the preliminary?

Mr. Gilpatric: That is right.

Trial Examiner Sheppard: I don't see why we couldn't do this, Mr. Haycraft, and you can have that before you.

1584 Mr. Gilpatric: He has got it right in his file.

Mr. Haycraft: No, I haven't, Mr. Examiner. I understood we weren't going into the Robinson-Patman on this trip and I didn't bring it along.

Mr. Gilpatric: I will let him have this copy. This is simply historical.

Mr. Haycraft: It is a very important point in the Robinson-Patman defense.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: Let us take a 10-minute recess.

(A short recess was taken.)

Trial Examiner Sheppard: On the record.

Mr. Gilpatric: Now, referring again to Respondent's

Exhibit 115 for identification, I want to point out that it is not our purpose at this time to attempt to justify the figures in this so-called 1938 cost study.

We want to show, however, that following the enactment of the Robinson-Patman Act, Minneapolis-Honeywell made a sincere bona fide attempt to find out what the law requires of it and to act accordingly.

We are only interested in showing the end result of this cost study and we are not asking that it be introduced in evidence or accepted, the underlying figures. We
1585 are not trying to demonstrate their accuracy and, therefore, we simply offer the summary or the end results shown by Respondent's Exhibit 115 for identification.

If Mr. Haycraft wants to examine into the background of those figures, he is free to do so, but we are not offering it as part of our case, the computations, and the work sheets that are behind these figures.

Mr. Haycraft: They are more than work sheets, Mr. Examiner. They are the cost study.

Mr. Freeman: That is work sheets, Mr. Haycraft. Call it whatever you want.

Mr. Haycraft: I am going to object to it unless the offer is made of the cost study and an opportunity given me to cross-examine the witness on it.

Trial Examiner Sheppard: That is what I want to do, give you an opportunity to study it and go through it and make whatever examination you want.

Mr. Gilpatric: Mr. Examiner, we are not foreclosing Mr. Haycraft from cross-examining on the basis of these figures. In fact, we are giving him that opportunity when we offer the figures we are including in Respondent's Exhibit 115.

We are simply not putting in evidence as part of our case for any purpose the work sheets that go to make up the cost study itself.

1586 Now, Mr. Haycraft can have this copy of the cost study and he can cross-examine if he wishes.

Mr. Haycraft: I submit, Mr. Examiner, that is not proper, to submit figures of this kind without the cost study which is the basis of it.

Mr. Gilpatric: You can offer it as part of your cross-examination.

Mr. Haycraft: I won't do it. It is his study, not mine. I won't be bound by it.

Mr. Gilpatric: I think we are proceeding in the proper fashion, Mr. Examiner, and I press my offer with the statement that Mr. Haycraft is free to have this underlying data to cross-examine on.

Trial Examiner Sheppard: Does it make any difference whether you cross-examine now or later? I will do whatever you want. I will defer your cross-examination.

Mr. Haycraft: It doesn't make any difference. There ought to be an exhibit put in evidence which is the cost study. This isn't any cost study, Mr. Examiner. It is just some summary figures taken from the cost study. The only proper way, I submit, is to offer in evidence the cost study itself, then I can cross-examine.

Mr. Gilpatric: Mr. Examiner, I will have it marked for identification, but I am not going to offer it.

Mr. Haycraft: He wants the benefit of the cost
1587 study but he doesn't want it going in.

Mr. Gilpatric: Not at all. We are relying on the fact that the cost study was made and this reflects the end result.

Trial Examiner Sheppard: Are you prepared to cross-examine now?

Mr. Haycraft: No, I want to cross-examine when they get through. I won't be able to cross-examine today; probably not until Friday.

Trial Examiner Sheppard: I mean during the trip here?

Mr. Haycraft: Yes.

Trial Examiner Sheppard: All right, I will defer the ruling on that until we get into the cross-examination and, in the meantime, Mr. Haycraft, you can take this white sheet and give it what study you want so you can be prepared to use it in connection with Exhibit 115.

Mr. Gilpatric: Mr. Examiner, how can he cross-examine on it? It is not in evidence. In fact, we don't even have to give it to him. I think the exhibit should be taken in evidence subject to his right of deferred cross-examination.

Trial Examiner Sheppard: I thought he wanted to use it, like you have done in compiling the exhibit, and he in getting information to cross-examine on.

1588 Mr. Gilpatric: He can, but in the meantime it seems to me our offer of the summary, the end result, should be accepted so we can proceed with our case and he can have his right of cross-examination and examination of the underlying data.

Trial Examiner Sheppard: I have no objection to taking

it in right now, if you want to interrogate him further on it.

Mr. Gilpatric: Yes, on this exhibit.

Trial Examiner Sheppard: I don't understand it myself. I want somebody to tell me more about what it is.

Mr. Gilpatric: We will, your Honor, as soon as it is in evidence.

Trial Examiner Sheppard: Then we will accept that exhibit subject to the objection of Mr. Haycraft and let it be accepted for further inquiry by yourself and later by Mr. Haycraft when he wants to cross-examine on it.

(The document referred to, heretofore marked for identification Respondent's Exhibit 115, was received in evidence.)

Mr. Haycraft: I want the record to show that counsel for the respondent declines to offer in evidence the cost study that was made upon which this was based.

Mr. Gilpatric: I think the record shows that sufficiently.

1589 Trial Examiner Sheppard: Just let the record show that. Proceed, Mr. Gilpatric.

By Mr. Gilpatric:

Q. Mr. Lockrae, will you explain how this exhibit, Respondent's Exhibit 115, has been prepared, for the record and for the Trial Examiner's information?

A. The figures that we used under the heading "Allowable Selling Price" were taken from the figures compiled in 1938. Then we listed in 1939 our actual bracket selling prices current that year.

Q. Did the cost study which produced those figures take into consideration—

Mr. Haycraft: (Interposing.) I am objecting to any interrogation as to the cost study unless the study is before the witness.

Mr. Gilpatric: You yourself raised this in your examination of Mr. Lockrae during the Commission's case. You asked him about this study.

Mr. Haycraft: I can't help it if you didn't object to it.

Mr. Gilpatric: Well, it is in evidence.

Mr. Haycraft: It is not in evidence. That is what I objected to. It is really interrogating this witness on this cost study and he cannot do that unless the cost study is here in evidence.

1590 Trial Examiner Sheppard: I don't exactly understand the point, gentlemen. It seems to me if Mr. Lockrae has used the information on the cost study to compile what he got here in Exhibit 115, that it wouldn't hurt to have it in the record for what it is worth, either for yourself or for the Commission or for Mr. Haycraft.

It may not be especially useful because the summation here that Mr. Lockrae has made, if I get it correctly, in 115, is derived from the information in the other book.

Mr. Gilpatric: That is correct, but—

Trial Examiner Sheppard: (Interposing.) And the two sort of go together, and if you want to put it in now I will accept that right now, so that Mr. Haycraft will have both before him in getting ready for his cross-examination.

Mr. Gilpatric: Well, Mr. Haycraft several times remarked to us that we shouldn't tell him how to run his case, and I don't think he ought to tell us how to run our case.

All I am asking Mr. Lockrae here is to tell us whether these figures which are in Respondent's Exhibit 115 now in evidence exclude certain types of charges. He has already said they include selling costs, and I simply want him to exclude the things they don't include.

Mr. Haycraft: I object to any interrogation upon
1591 an exhibit not even offered or in evidence.

Mr. Gilpatric: I am asking about an exhibit which is in evidence.

Mr. Haycraft: But your question always goes back to your basic study, the cost study that was made.

Mr. Gilpatric: You are free to cross-examine on that and go into that to your heart's content.

I don't think it is a proper objection to the question I asked, the question that was asked of Mr. Lockrae.

Trial Examiner Sheppard: Well, I have accepted 115, gentlemen, and you can examine him on that as much as you please.

Mr. Haycraft: I didn't object to that, but he goes back of that in this question. He asked him whether or not in making the cost study upon which this is based he took into consideration certain things.

Mr. Gilpatric: I will reframe my question.

Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. In the figures shown in Respondent's Exhibit 115, did you take into consideration such charges as for service, shipping, packing, accounting, and the like?

A. I did not.

Mr. Haycraft: Wait a minute, please. Don't answer. I move to strike out that answer.

1592 Trial Examiner Sheppard: It may go out until I hear the objection.

Mr. Haycraft: I object to that, Mr. Examiner, because the question by its very terms requires the witness to take into consideration the cost study, and that is the matter that I am talking about, and I insist it should be in here as supporting this exhibit so that I can cross-examine him on it.

How am I going to cross-examine him on this last question if I don't have the exhibit which he refers to, in his mind?

Mr. Gilpatric: Mr. Examiner, at the outset of this case you made a remark with which I agree, that the objections be few and far between. Now, when we get into our case I think Mr. Haycraft is being unduly technical.

Mr. Haycraft: My objections have been few and far between.

Trial Examiner Sheppard: I think you have both been fine in that respect.

Mr. Gilpatric: I only have these two more questions with regard to this subject, and then I will not press this line further.

Trial Examiner Sheppard: All right, proceed.

By Mr. Gilpatric:

Q. Will you answer my question?

1593 A. The cost study did not include the items you have just mentioned.

Mr. Haycraft: I move to strike the answer on the grounds that I stated, that I do not have the document, that the document is not in evidence that he is talking about in his answer.

Trial Examiner Sheppard: I am going to overrule that and let it be considered in connection with Exhibit 115.

By Mr. Gilpatric:

Q. The other question I had was, Mr. Lockrae, in making up the figures in Respondent's Exhibit 115, was any

attempt made to estimate differences in the manufacturing costs between sales made in one bracket as contrasted with another?

Mr. Haycraft: Same objection.

Trial Examiner Sheppard: I will let you answer.

A. There was no consideration given to varying manufacturing costs as between brackets. The same figure was used covering the cost of a set of controls in all brackets.

By Mr. Gilpatric:

Q. Now, Mr. Lockrae, it was brought out in testimony here before, both in respect to Penn Electric Switch and your company, that certain manufacturers did not actually sign contracts for the purchase of controls. That is a fact, is it not, with respect to your company?

1594 A. That is true.

Q. How do you account for that condition?

A. Well, there were some concerns who simply did not do business on a contract basis with anyone, and then there were other concerns who, before they could sign a sales agreement, it had to go through the long drawn out legal processes of their legal departments, and the delays, and so forth, that were attendant to that sort of procedure were objectionable and we didn't insist on those companies signing contracts or sales agreements.

Q. Can you give us some examples of the two types of situations you have outlined?

A. Well, Williams Oilomatic is typical of the first one. They just didn't want to do business on an annual sales agreement basis and we were not insistent that they do that.

Q. What about Timken?

A. Well, we had Chrysler, for one, and Petro was another one. I believe the Norge Corporation in Detroit was another one. There were several of them.

Q. Which class of cases were the ones you have last named?

A. Those were the ones who had to go through all of the legal procedure before a contract could be signed.

Q. Well, now, when a manufacturer declined to sign one of your annual purchase contract forms, what was your practice?

1595 A. Well, we treated them just the same as though they had signed the contract.

As far as prices were concerned, it was our usual custom to write them and send them a contract and the prices were shown therein and we had information from them that they would observe the terms of sale that were outlined in the sales agreement or contract.

Q. Even though they didn't sign a contract?

A. Even though they did not sign a contract.

Q. But these companies still got the benefit of the prices specified in the formal contract?

A. That is right.

Q. Suppose the manufacturer in question purchased fewer controls than the contract specified, then what happened?

A. Well, it would all depend on the conditions the following year and the competitive situation that might have existed at that time. We might have put them in a higher price bracket or we might have left them where they were or we might have given them a better bracket, all depending on conditions that existed.

1596 Q. Suppose during the year in question the manufacturer's purchases exceeded the quantity specified in the formal contract which was never signed?

A. We would treat them just the same as though they had signed the contract. If they exceeded the quantity limitations of the price bracket in the given year, they would be entitled to our next lower price, and would have gotten a retroactive credit, just the same as though they had signed the contract.

Q. Will you explain how these retroactive credits operated?

A. Well, all of our quantity brackets have a minimum and maximum number of units or sets of controls. For example, we have three hundred to, say, three thousand instruments. Now, if this manufacturer contracted in that bracket, but his purchases any time during the year exceeded three thousand instruments, he would automatically go into our next lower price bracket, and he would be given a retroactive credit in the form of a credit memorandum to be absorbed by future purchases equalizing his price to the new bracket basis.

Q. That could take place at any time during the year?

A. Any time during the year that our tabulation figures, and we keep those up monthly, would show that he had exceeded the bracket he started out in. Then he would

1597 be entitled to and would get the retroactive credit.

Q. At what prices were or are future sales made?

A. They would be made at the lower bracket price that he had earned.

Q. Was such a retroactive credit ever extended to Oil-O-Matic Burner Corporation?

A. Yes. We had two retroactive credits to Oil-O-Matic Burner Corporation.

Q. Do you recall in what years?

A. We had one in 1939, and there was another one in 1940, at which time they earned our lowest prices.

Q. That company is also referred to, is it not, as ABC?

A. That is correct.

Q. And Mr. J. H. Hirsch is connected with that company?

A. Mr. J. H. Hirsch is the president of that company.

Q. Was this retroactive credit situation the matter that was referred to in the testimony of Mr. Owens, of Mercoid, when he said that he was told by Mr. Hirsch that it would cost ABC money if they bought controls from Mercoid?

Mr. Haycraft: I object to that question, Mr. Examiner. It requires the witness to read the mind of two men, both Mr. Owens and Mr. Hirsch, and I think that is a little too much.

Trial Examiner Sheppard: Yes, objection sustained. I don't see how you can do that.

1598 By Mr. Gilpatric:

Q. Did Mr. Hirsch ever tell you about that incident?

Mr. Haycraft: That is objected to.

The Witness: We discussed that incident.

Mr. Gilpatric: On what grounds do you object?

Mr. Haycraft: On the grounds it would be hearsay.

Mr. Freeman: He can certainly testify to what somebody told him. That isn't hearsay.

Mr. Haycraft: It usually is.

Trial Examiner Sheppard: It is usually hearsay, all right. But I will let him tell about that, if he told you, Mr. Lockrae, because if you are so intimate with the Respondent here, that I think you can testify to that.

The Witness: Well, I discussed that with Mr. Hirsch.

Mr. Haycraft: Discussed what.

The Witness: It was in the question, as I understood it.

Mr. Haycraft: I object to the question. The question was ruled out.

Mr. Gilpatric: Not the second one.

Mr. Haycraft: The second question didn't state.

Trial Examiner Sheppard: I thought you asked about what the gentleman told you?

1599 Mr. Haycraft: Let us find out what you are talking about.

By Mr. Gilpatric:

Q. Did Mr. Hirsch ever talk to you, Mr. Lockrae, about the attempts of Mercoid Corporation to sell ABC its makes of controls at the times when ABC was about to earn retroactive credits in the year 1939, and in the year 1940?

A. Mr. Hirsch told me that he discussed that situation with Mr. Owens one time, and that he told Mr. Owens that he couldn't logically take on more Mercoid controls at that time, because if he did, it would cost him money.

Q. Namely—

A. Namely the fact that it would not enable him possibly to earn this retroactive credit.

Mr. Haycraft: I move to strike the answer, Mr. Examiner.

Trial Examiner Sheppard: I will give it what value I think it is worth in connection with the whole situation. That other gentleman testified in this case, did he?

Mr. Haycraft: Hirsch did not. Owens did.

Trial Examiner Sheppard: I know Mr. Owens did.

Mr. Haycraft: Hirsch did not.

Trial Examiner Sheppard: I don't think he testified. Go ahead.

1600 By Mr. Gilpatric:

Q. Mr. Lockrae, you referred, I believe, did you not, during your examination by Mr. Haycraft, to the situation that exists where a burner manufacturer sells burners to a furnace manufacturer without controls, and then the latter, namely, the furnace manufacturer, buys the controls from your company?

A. I did.

Q. Now, under those conditions, do you, or do you not include as part of the volume of the burner manufacturer, on the basis of which their price bracket is determined, the controls which go to the furnace manufacturer for

equipment on the burners that the furnace manufacturer buys from the burner manufacturer?

A. We allow the burner manufacturer the credit on the controls which we sell to the furnace manufacturer, and which are in turn used in conjunction with the burner manufactured by the oil burner manufacturer.

Q. Will you explain why you have followed that practice?

A. Well, it came into being a number of years ago, and its inception was due to a situation that was created in this way.

The burner manufacturer and the furnace manufacturer both might be customers of ours, and customers of long standing. All at once they get together, and the
1601 furnace manufacturer decides to buy this particular oil burner manufacturer's burner. Now, if we sold those controls directly to the furnace manufacturer, then the burner manufacturer immediately thought he had a logical complaint, that he was going to lose the profit on the resale of those controls.

Not only that, but he complained bitterly that he was also going to lose the volume credit on those controls.

Now, he would come back at us with the thought that when I buy controls from your competitors, they give me a price that is commensurate with my over-all or potential volume. You don't do that. You only give me credit for the controls that I purchase from you.

Now, those controls are going to be used in my burner, by this furnace manufacturer, and while I realize that his purchases from you are just as great as mine, and I am going to lose the profit, that is inevitable, and at least you can give me credit for the volume on my purchases, and come somewhere near complying with what your competition is doing when they give me a price based on my potential.

Q. By credit, you mean you take into account the volume of controls sold to the furnace manufacturer?

A. That is correct.

1602 Q. When you extend the price to the burner manufacturer?

A. That is correct.

Q. Now, what specifically, if you can tell, what burner manufacturers actually complained about this situation?

A. Well, I recall rather distinctly that Mr. Hirsch of ABC Company complained about this, and a complaint

arose in our dealing with Micro-Westco, in view of the fact that they were going to merchandise their burners to furnace manufacturers. Those furnace manufacturers in turn were buying controls direct from us. There were several instances like that.

Q. Can you think of any other specific instance?

A. Nu-Way Corporation was another one. Cleveland Steel Products was another instance when they were selling their burners to Fox Furnace Company.

Mr. Gilpatric: All right, Mr. Examiner, we can break off there.

Trial Examiner Sheppard: All right, Mr. Lockrae, we will have to finish you up at some other time.

We will adjourn at this time until ten o'clock tomorrow morning.

(Whereupon, at 4:45 o'clock p. m., the hearing was adjourned until 10:00 o'clock a. m. of Wednesday, December 2, 1943.)

1603

Room 1123,
New Post Office Building,
Chicago, Illinois,
December 2, 1943.

Met, pursuant to adjournment, at 10 a. m.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Messrs. Cravath, de Cersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and

Paul J. Chase, Esq., 15 Broad Street, New York, New York and

Bair & Freeman, by Will Freeman, Esq., 135 South LaSalle Street, Chicago, Illinois, Attorneys for Respondent.

1604 Proceedings.

Trial Examiner Sheppard: All right, gentlemen, we will come to order.

Let the reporter show the hearing reconvened, pursuant to adjournment yesterday.

Mr. Gilpatric: We are going to interrupt, if we may, Major, the testimony of Mr. Lockrae, so that we can put on this man.

Trial Examiner Sheppard: All right.

A. A. JEFFREY, was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Trial Examiner Sheppard: Let the reporter have your full name.

The Witness: A. A. Jeffrey.

Trial Examiner Sheppard: And your address, sir?

The Witness: Cedar Rapids, Iowa.

Direct Examination by Mr. Gilpatric.

Q. All right, Mr. Jeffrey, will you state the company with which you are connected and your position with it?

A. Acme Oil Burner Company, Cedar Rapids, Iowa.

Q. What type of oil burner does your company manufacture?

A. High pressure atomizing type.

1605 Q. Under the trade name of Acme?

A. Under the trade name of Acme.

Q. When did you commence the manufacture of oil burners?

A. October, 1932.

Q. What has been your sales territory for your burners?

A. Well, we had distribution, or partial distribution, of the northern half of the United States, east of the Rocky Mountains.

Q. Do you sell to any large distributors?

A. Well, we have A. Y. McDonald Company; Dubuque, Iowa; Allis Chalmers Manufacturing Company—through their LaPorte, Indiana branch, or LaPorte, Indiana plant, they call it—and Morrison Steel Products, Incorporated, Buffalo; Fleck Company, Philadelphia, and Camden, New Jersey.

Q. Are the burners which you sell to customers you have just named in turn sold to them under the name of Acme, or do they put their own name on the burners?

A. Those companies that I named are our largest distributors and the burners are manufactured by us. They leave our plant with their name plate. In other words, they are known as a name burner. Our name doesn't appear on the burner.

Q. So that to that extent you might be said to be a private name manufacturer?

A. Private name manufacturer.

1606 Q. What makes of controls do you use on your burners?

A. Well, we have used Minneapolis-Honeywell, Penn Electric Switch, Mercoid, and some Perfex.

Q. Have you purchases of any particular make predominated?

A. The majority of the burners,—that is the controls—purchased by us in the last, well, the last five years, have been Minneapolis-Honeywell.

Q. Why have you preferred Minneapolis-Honeywell controls?

A. Well, in our opinion and from our experience, we consider them the best controls.

Mr. Gilpatric: Will you mark this as Respondent's Exhibit 116-A, 116-B, 116-C, 116-D, 116-E and 116-F, for identification.

(The documents referred to were marked Respondent's Exhibit 116-A, 116-B, 116-C, 116-D, 116-E and 116-F for identification.)

By Mr. Gilpatric:

Q. Mr. Jeffrey, will you state for the record just what the paper is that I have identified as Respondent's Exhibit 116-A through F, for identification?

A. Well, these sheets are regular dealer prices, the regular dealer price set-up, for 1941, 1942.

Mr. Gilpatric: The respondent offers in evidence the price sheets mentioned as Respondent's Exhibit 116-A through 116-F, both inclusive.

1607 Trial Examiner Sheppard: Are those your prices to the dealer?

The Witness: Yes, sir.

Trial Examiner Sheppard: Yes. Covering those years, what are they, '41 and '40?

By Mr. Gilpatric:

Q. This happens to be for the year 1942. Do you have similar prices for previous years?

A. '41 and 1942 are identical.

Q. As a matter of fact, you show 1941 net prices here, but you have indicated 1942 at the top?

A. That is right, the prices are identical for 1942.

Trial Examiner Sheppard: All right. Any objection?

Mr. Haycraft: I would like to know the purpose of the offer.

Mr. Freeman: What was that?

(The record was read by the reporter.)

Mr. Freeman: You don't have to tell him the purpose of the offer. It is just evidence, part of our case.

Mr. Haycraft: I object to it as irrelevant and immaterial.

Mr. Gilpatric: Mr. Examiner, we are charged here with having affected competition among oil burner manufacturers. This is part of our showing as to the effect, if

any, of Minneapolis-Honeywell's practice upon oil
1608 burner competition. We are going to connect all this up, in the course of our case.

Trial Examiner Sheppard: All right, for that purpose, I will take it and consider it. Let it be accepted as Respondent's Exhibit 116-A through 116-F.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBITS 116-A, 116-B, 116-C, 116-D, 116-E and 116-F for identification, were received in evidence.)

By Mr. Gilpatric:

Q. Mr. Jeffrey, I notice that this exhibit, Respondent's Exhibit 116-A to F, consists of six pages, which shows, first your burners listed with Minneapolis-Honeywell controls; then with Penn Electric Switch controls and, finally, with Mercoid controls. Is that the manner in which you have customarily offered your burners equipped with controls?

A. That was our general practice in setting up our price arrangement.

Q. Was it optional with the purchaser whether his burner would come equipped with one or the other makes of controls?

A. Oh, that was also optional with our distributors and dealers. They could order burners from us, specifying the controls that they preferred.

Q. Did you charge different prices for different makes of controls that your burners were equipped with?

1609 A. Well—

Q. (Interposing) Well, you show the controls listed separately and I am asking you whether—as between different makes, you have listed different prices for the controls?

A. Well, there was so little difference in the price of the controls of the various manufacturers that we established a uniform price on different controls manufactured by the different manufacturers all on the same basis. In other words, if you buy a Minneapolis-Honeywell Aquatherm from us at a firm price, you could also buy a Penn Electric Switch Company Safetrol for exactly the same price.

Q. You mean thermostat, don't you? An Aquatherm is a thermostat?

A. Oh, yes, well, they used to call that—Cen—I don't recall that. Let's see.

Q. Well, the corresponding equipment.

A. Thermostat, yes, thermostat. Mercoid calls theirs Sensatherm. The same held true with the other controls.

Q. In other words, the corresponding equipment?

A. Corresponding heat controls were all the same prices, whether Penn, Mercoid or Minneapolis.

Q. You simply absorbed any difference in cost to you between the makes?

A. The difference was so small, we absorbed that.

Q. Were Minneapolis-Honeywell prices higher or
1610 lower than the other makes?

A. They were a trifle higher.

Q. Now, when you equipped one of your burners with a set of controls, did you make it a practice to include in that set one make of all three units, or did you use one make of thermostat with another make of primary?

A. Well, the general practice was to ship controls of one manufacturer. The only occasion on which controls would be mixed would be in a case of necessity, where the stock was in such condition that we couldn't ship a complete set of one manufacturer's make—which, of course, was very, very seldom.

Q. Did you have contracts with the Minneapolis-Honeywell for the purchase of their make of controls during the years '37 through 1941?

A. Yes, sir.

Q. Did you also have contracts with other control manufacturers during those years?

A. We had contracts during those years with Penn Electric Switch Company; Mercoid Corporation; and with Perfex for two years.

Trial Examiner Sheppard: Did you say Perfex?

The Witness: Perfex.

Trial Examiner Sheppard: Perfex. And, of course, Minneapolis-Honeywell?

1611 A. And Minneapolis-Honeywell.

By Mr. Gilpatric:

Q. Did you consider that your contract with Minneapolis-Honeywell prevented you from purchasing controls from other control manufacturers?

Mr. Haycraft: Objected to as irrelevant and immaterial.

Mr. Gilpatric: Irrelevant and immaterial? Well, that is one of the issues in this case.

Mr. Haycraft: What he considered, Mr. Examiner, is not relevant in this case.

Mr. Freeman: The best evidence in the world is what this man testifies to in that respect.

Trial Examiner Sheppard: I will let him testify.

The Witness: What was the question again?

Mr. Gilpatric: Read the question, please.

(The question above referred to was read by the reporter.)

A. There was no clause in the contract that we had with Minneapolis-Honeywell Regulator Company that in any way restricted our purchases of controls from other manufacturers.

By Trial Examiner Sheppard:

Q. Well, what I wanted to get from you, Mr. Jeffrey, is despite the various contracts that you had with other manufacturers of controls, did you feel free to make 1612 purchases from others?

A. Yes, we did.

Q. And did you, in fact, do that all the time?

A. Yes, we did that.

Trial Examiner Sheppard: All right, that is what I want to know.

By Mr. Gilpatric:

Q. And all during the years that I have referred to, 1937 to 1941, is that right?

A. We purchased controls during those years from all the different manufacturers.

Q. Will you tell us, Mr. Jeffrey, at what prices you sold your burners, any particular model, wholesale to your largest distributor, say, in 1941?

A. Well, our base price to the larger manufacturers, such as McDonald, on the model U burner was $39.50, less controls. The model U-1 burner was $43.50, less controls.

Q. That is slightly less than your price to dealers, as shown on Exhibit—.

A. (Interposing) That is slightly less than our dealer prices.

Q. Have you been aware of the fact, Mr. Jeffrey, that some of Minneapolis-Honeywell's customers who pur-

chased controls in larger volume got somewhat better
1613 prices than your company?

Mr. Haycraft: I object to the leading question; no foundation laid.

Trial Examiner Sheppard: Repeat that.

(The question above referred to was read by the reporter.)

Trial Examiner Sheppard: If that is within your knowledge, I will let you testify to it.

A. We were aware of that fact.

By Mr. Gilpatric:

Q. Did that fact hurt the sale of your oil burners?

Mr. Haycraft: Objected to as calling for a conclusion, his opinion.

Trial Examiner Sheppard: That, I think, is competent, because this man evidently knows the effect of Honeywell's business—whatever you can, I will let you testify.

The Witness: What was the question again?

(The question above referred to was re-read by the reporter.)

Trial Examiner Sheppard: In other words, did it affect your sales at all?

The Witness: No, it didn't.

By Mr. Gilpatric:

Q. Mr. Jeffrey, did your company make it a practice, during those years I have referred to, the years 1937
1614 to 1941, to advertise its make of burners extensively?

A. We did very little advertising, inasmuch as we were a private name manufacturer.

Trial Examiner Sheppard: Are there many of those private name manufacturers? I think that is the first time that I have heard that special designation.

The Witness: Well, I believe there are a few manufacturers.

Trial Examiner Sheppard: Just a few of them?

The Witness: Yes.

Trial Examiner Sheppard: How many would you say?

The Witness: Well, I wouldn't hazard a guess.

Trial Examiner Sheppard: I see. Half a dozen or so?

The Witness: There might be.

Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. What about service expense? Does your company have much expense of that nature?

A. Well, the service item was very firmly fixed in my mind—for the year 1941, our entire service expense was $26.45. And for the year 1942, we had no service expense. By that, I mean service expense outside of our plant.

Q. Did any of your larger distributor customers buy controls direct from the control manufacturer?

A. Well, it was a general practice with McDonald
1615 and Allis Chalmers and Morrisson to buy their controls direct. The only occasion where we furnished burners to those companies with controls was where we handled their shipments direct.

Trial Examiner Sheppard: On other occasions you just sell them your burners, and they equip them themselves?

The Witness: That is right, Major, except if they would send us an order for a burner.

Trial Examiner Sheppard: I see.

The Witness: It would be shipped from our plant to, say, Los Angeles, California, and then we would include the controls on their order.

Trial Examiner Sheppard: I get you.

By Mr. Gilpatric:

Q. Your customers, then, in that case, were free to buy controls direct, if they chose, from the manufacturer?

A. Well, we left it optional with our customers to buy their controls wherever they wished.

Q. Do you happen to know what makes of control A. Y. McDonald usually put on their burners after purchasing them from you?

A. Well, I believe—in fact, I know, that A. Y. McDonald Company furnish a majority of Penn con-
1616 trols with the burners.

Q. Mr. Jeffrey, I neglected to ask you earlier, what happened, if in a particular year, your purchase of controls from Minneapolis-Honeywell exceeds the particular quantity specified in your contract?

Trial Examiner Sheppard: Did you say "exceeded"?

Mr. Gilpatric: Exceeded.

A. When our purchases exceeded the amount specified in our contract, we received a rebate check from Minneapolis-Honeywell.

By Mr. Gilpatric:

Q. Retroactive credit, you mean?

A. Retroactive credit to adjust our price to the next higher bracket.

Q. What, if anything, happened, if you didn't make your contract quantity?

A. Well, I don't know whether they were just good hearted or not, but they never billed us for any extra prices, in our experience in business.

Q. Again during the years 1937 through 1941, did your oil burner sales increase or decrease?

A. Well, we were fortunate enough to show an increase each year.

Trial Examiner Sheppard: From what year was that?

1617 Mr. Gilpatric: In '37 through '41.

Trial Examiner Sheppard: '37 through 1941.

By Mr. Gilpatric:

Q. Have you any figures you could state for the record as to your sales volume during those years?

A. 1937—

Q. Make an approximation.

A. —our sales volume was about $85,000.00; and in 1938, we run about $90,000.00; and we run about $91 or $92,000.00 in 1939; 1940 and 1941, were leveled at about—let's see, in 1941, we went just slightly over $100,000.00 worth of business, in 1940 and 1941.

Q. Did your company operate at a profit during those five years?

A. Yes, they have.

Q. Do you remember what prices you have been paying during the years 1941 and 1942 for pumps for your burners?

Mr. Haycraft: Objected to as irrelevant and immaterial. Pumps aren't involved in this case at all.

Mr. Gilpatric: Mr. Examiner, I want to show the make-up on the cost, generally, of a burner, because the effect on burner competition of the control prices is an issue in this case, it is in the complaint, and I have got to bring it out through the men who pay the prices. Minneapolis-Honeywell isn't in a position to testify.

1618 Mr. Haycraft: I have no objection to the witness testifying, Mr. Examiner, as to the portion of the cost of the burner that the controls represent, but I sub-

mit that any other device of the burner has no place in this record.

Mr. Gilpatric: I think it should be in the record for the information of the Commission.

Mr. Haycraft: What possible relevancy could there be? Supposing if they were more or less, supposing they were exceeding or discriminating in prices; that isn't involved in this case.

Trial Examiner Sheppard: I rather agree with Mr. Haycraft on that proposition, but if you gentlemen think it is necessary in your case, I will let you answer, Mr. Jeffrey. And you better read the question, too, so that he will know.

(The question above referred to was read by the reporter.)

A. For Sunstrand fuel units we paid $7.00, and for Webster units, we paid $9.50.

By Mr. Gilpatric:

Q. Single stage or double stage?

A. Those are both single stage units.

Q. What about transformers, Mr. Jeffrey?

Mr. Haycraft: May it be understood my objection goes to all of this extraneous matter?

Trial Examiner Sheppard: Yes, let Mr. Haycraft 1619 have a general objection to all this line.

A. Transformers in 1941?

Q. Or your current prices?

A. $4.65.

Q. And fans?

A. $1.90.

Q. And, finally, motors?

A. Motors. Let's see. Motors, $7.24. Those are 1/6th horsepower, single phase.

Trial Examiner Sheppard: Are those all the equipment in a burner?

The Witness: Those are all the equipment in a burner.

By Mr. Gilpatric:

Q. If you add to these prices that you have given to us the cost of your controls, you have the principal elements, do you not, of your manufacturing cost?

A. How is that again.

Mr. Gilpatric: Will you read the question?

(The question above referred to was read by the reporter.)

A. Yes, we do.

Mr. Gilpatric: That is all.

Trial Examiner Sheppard: I want to ask you one question before Mr. Haycraft starts. Mr. Jeffrey, there is something that has sort of worried me ever since
1620 I have been trying this case. I think you can answer me. You make a burner you call the U burner, don't you?

The Witness: Model U.

Trial Examiner Sheppard: What is the other model?

The Witness: Model U-1.

Trial Examiner Sheppard: Supposing you have an order from one of your customers for controls, and they specify Minneapolis-Honeywell, for your U burner; and, in the same mail you get an order from another customer for the U-burner, with the request for Mercoid controls. Now, bearing in mind—those two burners sell at the same prices, do they?

The Witness: That is right.

Trial Examiner Sheppard: Bearing in mind the higher cost of the controls of the respondent as compared with the lower cost of the controls of Mercoid, placed on this burner, would it affect the dealer's price to those two?

The Witness. No, it wouldn't.

Trial Examiner Sheppard: You would sell them the same burner equipped with Mercoid at the same price you would your U burner equipped with Minneapolis-Honeywell?

The Witness: That is right.

Trial Examiner Sheppard: All right, you may cross-examine.

By Mr. Gilpatric:

1621 Q. You just made a little more profit when you sold the burner equipped with Mercoid?

A. Slightly more profit, that is right.

Cross-Examination by Mr. Haycraft.

Q. Do you have any of those contracts with you from Minneapolis-Honeywell for the years 1937 through 1941? Do you have any of those agreements with you?

A. No, I haven't.

Mr. Haycraft: I would like to ask the respondent to produce them at this time.

Mr. Gilpatric: We haven't got the contracts here. Do you want some information about them?

Mr. Haycraft: The witness testified that there weren't any restrictive clauses in them, so I would like to have the contract to see what the contract says. I would like to see whether this contract is any different than the rest.

Mr. Gilpatric: The contracts for these years were in the standard forms that you have in evidence as Commission's Exhibit 2 through—

Mr. Haycraft: (Interposing) It may have been a standard form, but I would like to see how they were filled out as to the requirements and form and the type.

Mr. Freeman: You can check your stipulation,
1622 Commission's Exhibit 1. All information with respect to the filling out is therein contained. It is all in the record.

Mr. Gilpatric: We can give you the quantities if you want them specified in the case; Mr. Lockrae has that information here.

Mr. Haycraft: He has the quantities? Does he have the price?

Mr. Gilpatric: Well, once you know the bracket you can deduce the price from the stipulation.

Mr. Haycraft: Well, I will ask Mr. Lockrae, then, if he will let me have the quantity purchased each year and the bracket that the witness used.

Trial Examiner Sheppard: Have you got that, Mr. Lockrae?

Mr. Lockrae: I think I have.

In 1937, the contract called for 100 sets or 300 units and that was our bracket 1, and the price was $23.85 for the intermittent ignition set of controls.

In 1938, the contract called for 50 sets or 150 units and the price was $21.05 for the Intermittent ignition set of controls.

In 1939, the contract called for 50 sets or 150 units and the price was $18.10 for the set of intermittent ignition controls.

In 1940, the contract called for 150 units or 50
1623 sets. The price was $18.10 for the set of intermittent ignition controls.

And in 1941, the contract called for 1050 units and the price per set was $16.45 for the intermittent ignition set of controls.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. Now, do your records show much were actually sold?

Mr. Lockrae: They do. I can give you that information.

Mr. Haycraft: During those years.

Trial Examiner Sheppard: And the figures you just mentioned is what the contract called for?

Mr. Lockrae: That is right.

In 1937, Acme purchased 512 units; in 1938, they purchased 639 units; in 1939, they purchased 969 units; in 1940, they purchased 1,366 units; in 1941, they purchased 1,269 units.

Mr. Haycraft: Now, do any of these purchases entitle them to rebates or refunds?

Mr. Lockrae: Yes, sir, Mr. Haycraft. Let me get those figures straight.

In 1940, they had a first bracket contract, which called for 50 sets or 150 units, and their purchases actually amounted to 1,366 units, and they earned, and did

1624 receive a retroactive credit, so that—

Mr. Haycraft: (Interposing) So that their net price was what that year?

Mr. Lockrae: Their net price then dropped to $17.25.

Mr. Haycraft: Hold it a minute. Seventeen what?

Mr. Lockrae: $17.25 for the intermittent ignition type, because their actual quantity purchases exceeded the bracket which they were in.

Mr. Haycraft: There was over 400 sets?

Mr. Lockrae: Yes, roughly that.

Mr. Haycraft: Were 300 sets the minimum in bracket 1?

Mr. Lockrae: No, 150 sets.

Mr. Haycraft: In bracket 1?

Mr. Lockrae: Yes.

Mr. Haycraft: All right. In 1941, they didn't get a rebate?

Mr. Lockrae: No, sir, not in 1941. You see, they contracted for 1050.

Mr. Haycraft: Yes.

Mr. Lockrae: And they actually purchased 1269 which is not sufficient to put them in the next bracket.

By Mr. Gilpatric:

Q. The next bracket in 1941 called for how many minimum?

1625 Mr. Lockrae: Well, that would be 350 sets, or 1050 units.

Mr. Gilpatric: No, I said, the next bracket after that.

Mr. Lockrae: Oh, the next bracket. That would be Bracket 3. That would be 1000 sets, or 3000 units.

Trial Examiner Sheppard: Let the record show that the information furnished by Mr. Lockrae was in view of the fact that the witness testified he does not have the contract or the records.

Mr. Haycraft: All right.

By Mr. Haycraft:

Q. Now, Mr. Jeffrey, do you recall approximately how many burners you sold in 1937 equipped with controls?

A. No. I don't.

Trial Examiner Sheppard: I will tell you what I can do, Mr. Haycraft. If you want the number of burners that this gentleman sold in those years, I will have him write me and use it.

Mr. Haycraft: Do you have those records?

The Witness: Yes, we do.

Trial Examiner Sheppard: Could you write me a letter; Mr. W. W. Sheppard, Federal Trade Commission, Washington, D. C., and give that information, the number of burners that you sold?

1626 Mr. Haycraft: The number with controls and the number without controls in the years 1937 through 1941.

The Witness: Is that Sheppard?

Trial Examiner Sheppard: Yes. And I will tell you now, gentlemen, and you can make a note of it, I am going to put that letter in the record for the use of both of you, and it will be Respondent's Exhibit 107; just so as to have it connected with Mr. Jeffrey's testimony.

The Witness: Any specific address?

Trial Examiner Sheppard: Just "Federal Trade Commission," and you can take your time about doing that, Mr. Jeffrey. We are in no hurry for it.

By Mr. Haycraft:

Q. Now, you stated that you sold—

The Witness: Just a minute. Let me interrupt you a minute. What years did you want those for?

Trial Examiner Sheppard: 1937 through 1941, inclusive.

The Witness: You are interested only in the burners we sold with controls?

Trial Examiner Sheppard: And without.

Mr. Haycraft: And without. You sold some without, too?

Trial Examiner Sheppard: You sold some with and some without, too?

1627 The Witness: Yes.

By Mr. Haycraft:

Q. Now, you stated that you, you testified that you sold your burners for $39.50, less controls. What year was that?

A. 1941, 1942.

Q. And the other was $43.50?

A. That is the larger burner, Model U-1.

Q. What was the price, with controls?

A. The price of the Model U burner, with Minneapolis-Honeywell controls or Mercoid controls or Penn controls, was $65.50; and the Model U-1 with the controls was $70.50.

Q. Now, had that been your price for the preceding years, or had you sold for more or less than that?

A. The price had been a little higher in previous years.

Q. What were the prices in 1938 and 1939?

A. The Model U burner in 1939 and 1940 was $42.50, or $43.50, and the Model U-1 was $48.50.

Q. Making a total price of how much, with controls?

A. Well, I couldn't answer that, because I don't know just what our control price set-up was, back that far.

Q. Well, it was a little higher?

A. It would be a little higher, because—

Q. Than it was in 1940 and 1941.

A. Because the control prices were a little higher.

Q. Would you say that you probably got around

1628 $70.00 or $75.00 for your burners, equipped?

Mr. Freeman: What year are you talking about?

Mr. Haycraft: 1938 and 1939.

Mr. Freeman: And what burner are you talking about?

Mr. Haycraft: U burner and U-1 burner.

A. Our prices weren't that high. Model U burner controls at that time would have been about $69.50, and the Model U-1 would have been about $72.50, but those figures are only estimated. I can't give them as accurate. I would have to check the prices.

By Mr. Haycraft:

Q. What proportion of your business, your oil burners, were manufactured for these distributors under the private names?

A. Ninety per cent.

Q. So only about ten per cent of your business went to the dealers?

A. That is correct.

Q. Under your own name?

A. Yes, sir.

Q. I believe you stated that you got a little less for the burners to these distributors than you did to the dealers. What would you say was the difference there?

A. We got about a $5.00 differential.

1629 Q. $5.00 differential?

A. That is right.

Q. So that would give you a price to the distributor of about $5.00 under the price you have given us?

A. Well, the distributors' prices, as I stated before, on the Model U, was $39.50 for 1941 and 1942; and the dealer's price was $44.50, which is a differential of $5.00. The same differential holds true on the Model U-1.

Q. So that the dealers' price then was $5.00 more than the price you have given to us, on the final prices? I mean, the total price, including controls?

A. What was that?

Q. The prices that you gave us of $39.50 and $43.50,—and when you include the controls, you said they were under $65.50, and $72.50. Those are the distributors' prices?

Mr. Freeman: He said $70.50.

Mr. Haycraft: $70.50.

A. $65.50 and $70.50. Those are our dealers' prices.

By Mr. Haycraft:

Q. Those are your dealers' prices?

A. That is right.

Mr. Gilpatric: One is the dealer and one is that distributor, I understood.

Mr. Haycraft: Well, I understood that the purchase
1630 price was $69.50.

The Witness: That is right. That is the dealers' price.

Mr. Freeman: All in accordance with Respondent's Exhibit 116.

Mr. Haycraft: Please, may I attempt to ask a question without being interrupted?

By Mr. Haycraft:

Q. And the dealers' price on those two burners was $60.50 and $65.50 complete—your distributors' prices?

A. Well, I didn't make the distributors' prices with controls.

Q. That is what I am trying to get at.

A. I made distributors' prices less controls.

Q. That is right, but you did sell some with controls, didn't you?

A. Well, that I couldn't—

Q. You made direct shipments of controls?

A. We made direct shipments of controls. Those shipments were made at our cost, plus freight and expense to our plant. Control were handled on an accommodation basis only.

Q. Now, then, this 10 per cent of your business that you referred to earlier, with dealers direct, were those dealers located in this area that you described on your direct

1631 examination or just around where your plant was?

A. Oh, they were located—we had one dealer in Seattle, Washington, and a dealer in New York. They were scattered all over.

Q. About how many dealers did you have?

A. Not to exceed twenty.

Q. Now, you said once that some of your competitors had lower prices than you had on M-H controls. Just what did you know about that?

A. Well, I was familiar with the prices of M-H controls in the various brackets.

Q. Well, what was their lowest bracket in 1937? How much lower than what you were paying?

A. Well, that I couldn't say.

Q. 1938?

A. I couldn't say that.

Q. 1939?

A. No.

Q. You just knew they were lower?

A. Well, I not only knew they were lower, but I had seen those prices from time to time because we always try to reach a higher bracket if we possibly could.

Q. Well, do you know, do you remember how many dollars difference there was per set of controls, when you were in Bracket 1, and your competitors were in, say, Bracket 5 or 6?

1632 A. No, I don't.

Q. Are you familiar with the prices that were quoted and sold by the Quiet Heat Manufacturing Company?

A. No, sir.
Q. Never heard of them?
A. I heard of them, yes, sir.
Q. Do you know whether or not they sold in competition with you in the eastern territory?
A. Well, anybody that was in the manufacturing business, putting out oil burners, were selling in competition with us, regardless of where they were located.
Q. But you never heard of the Quiet Heat Manufacturing Company or the prices they quoted?
A. I said I had heard of the Quiet Heat and I was also familiar with some of the prices they quote.
Q. What were the prices you were familiar with?
A. Why, I believe the last card I had from them had a price of $54.50 on a burner.
Q. They circularized you, as well as their customers?
A. They circularized everybody.
Q. Now, do you have any idea as to whether or not they took any business from you in eastern territory, or in any other territory?
A. Well, I was so busy looking after my own that I didn't particularly try to keep up or find out whether
1633 they were taking any business away from me, or not.
Q. Do you know whether or not you sold as many oil burners in 1938 and 1939 as you did in 1937?
A. Yes, we did.
Q. You did?
A. Sold more.
Q. You sold more in 1938 than you did 1937?
A. Yes, sir.
Q. But your dealers—now I am not talking about these other big accounts, distributors accounts.
A. Well, to dealers?
Q. To dealers.
A. That is right.
Q. And you will furnish those figures. Do you carry your books in such a way that you distinguish between your dealer accounts and your others?
A. Yes, we do.
Q. So that could you, in making up your statement, the statement you are going to send us, could you distinguish between the dealer and the distributor?
A. We could distinguish between the dealer and the distributor and we could give you the amount they were

shipped and the model they were shipped and where they were shipped and with or without controls.

1634 Q. I don't want all that detailed information. If you would give us just a summary of your dealers' sales and distributors' sales.

A. That is right. I could do that.

Q. Now, when you say that you weren't hurt by the sales of these competitors of yours that had lower prices from M-H, what do you base that on, that conclusion?

A. Well, I don't know just how to put that—the fact that our sales increased each year—we didn't feel that our competition was doing us very much harm, as far as sales. If they had been less each year, then we would have worried about where the competition was and why we weren't getting business.

Q. Of course, you knew that business was expanding, general business, the potential business in the sale of oil burners, was expanding during those years, was it not?

A. That is right.

Q. But you say you didn't make any study, or you didn't attempt to check up among your dealers to see the extent at which Quiet Heat, or some of the other large competitors were getting into your business?

A. No, we didn't.

Q. You didn't make any study of it. I take it then that you don't feel that you were at any disadvantage at all because you had to pay substantially more for your

1635 controls than some of your competitors?

Mr. Freeman: We object to the word "substantially."

Mr. Gilpatric: There is no evidence in the record that they paid substantially more.

Mr. Haycraft: In Bracket 1, as you have indicated there, the prices you have indicated are substantially higher.

Mr. Freeman: That is your version of it.

Mr. Gilpatric: I object to the question. It assumes a state of facts not shown.

Mr. Haycraft: It is shown. It is in the record. The record is very clear on the prices. Exhibit 1 even has the prices in the higher brackets.

Trial Examiner Sheppard: There is no reason why we should fight about it.

Mr. Freeman: Why don't you put in the exact amount, rather than use the word "substantial"?

Mr. Haycraft: Am I not entitled to put my version of the question?

Mr. Freeman: We object to the question as assuming a state of facts that isn't shown.

Mr. Haycraft: I think anybody with any sense of proportion at all would know there is a substantial difference between $23.85 and about $16.00 or $17.00.

Mr. Gilpatrick: That is for the Commission to
1636 decide.

Mr. Haycraft: I can put that in my question.

Mr. Gilpatric: You can't put that in the witness' mouth.

Mr. Haycraft: I can put just as much in his mouth as I want. This is cross examination, don't forget that.

Trial Examiner Sheppard: You can answer the question in reference to both. I will satisfy both of you gentlemen. You can answer in reference to substantial, what you consider substantial; and you can leave the "substantial" out—if there is any difference whatever.

The Witness: What was the question.

(The question referred to above was read by the reporter.)

A. We didn't feel that we were put to any disadvantage.

By Mr. Haycraft:

Q. You don't feel that there is any disadvantage when you had to pay $23.85 for a set of controls; whereas some of your competitors only paid $16.55?

Mr. Gilpatric: I object to that. He has answered it once for me and once for Mr. Haycraft.

Mr. Haycraft: I submit I am asking this question.

Trial Examiner Sheppard: I will let you answer that, whether there is any.

1637 The Witness: What was that again?

(The question above referred to was read by the reporter.)

Mr. Gilpatric: What year was that?

Mr. Haycraft: 1937.

Mr. Freeman: And who were some of these competitors you referred to, Mr. Haycraft? I think you ought to tell the witness. Just give the name of one company at the present time.

Mr. Haycraft: The witness is testifying. I am not testifying. The records shows that some competitors got that price.

Mr. Freeman: Why don't you tell him which competitors?

Mr. Gilpatric: What part of the record?
Mr. Haycraft: I am looking at it right now.
Mr. Freeman: And what companies?
Mr. Haycraft: Answer the question, will you?
A. Well, we were not put to any disadvantage.

By Mr. Haycraft:

Q. Well, I am asking you whether or not in your opinion—

Mr. Freeman: He has already answered the question.
Mr. Haycraft: Just a moment.

By Mr. Haycraft:

1638 Q. I am asking you whether or not in your opinion you were at a disadvantage if you had to pay $23.85 and your competitors paid $16.55.

Mr. Freeman: He has already answered that to the preceding question.

Mr. Haycraft: I am entitled to cross examine this witness.

Mr. Gilpatric: You are not entitled to bully witnesses, because you want the information.

Mr. Haycraft: I am not bullying the witness. You are the bullying one here.

Mr. Gilpatric: I object to the question.

Trial Examiner Sheppard: Let him answer it again. What difference does it make?

Mr. Freeman: Will you give us the privilege of asking again and again, Major?

Trial Examiner Sheppard: Certainly, I will.

Mr. Gilpatric: All we want is a fair trial.

Trial Examiner Sheppard: Go ahead, Mr. Jeffrey.

A. We were not at any disadvantage.

By Mr. Haycraft:

Q. All right, now, in 1938, I will ask you the same question. Were you at a disadvantage when you had to pay $21.05 for your controls whereas your competitors
1639 paid $14.90?

A. No, we were not.

Q. No disadvantage to you?

A. No disadvantage to us.

Q. How much of a difference in price would there have to be in order to be a disadvantage to you?

Mr. Gilpatric: I object to that hypothetical question.

Trial Examiner Sheppard: Oh, go ahead, he may answer.

A. I would answer that in this way, if I may: That we had over the competitors to whom I think you are referring—and I am familiar with most of them—we had a lot of advantages over those competitors that offset any advantages that they might have had over us.

By Mr. Haycraft:

Q. What advantage did you have over them that counterbalanced the advantage that they had over you?

A. Well, our methods of manufacturing and our low overhead and cost involved in our methods of distributing and selling that do not pertain to their business, result in a savings we were able to obtain, which put us on practically even footing with any of our competitors. We went into all territories of the United States and were able to sell our burners and sell them advantageously, re-
1640 gardless of what competition there was in that particular territory.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. I believe you stated that during the period of years from 1937 to 1941, that the bulk or majority of the controls that you put on your burners were Minneapolis-Honeywell and you said, I believe, that you considered them the best. Is that the reason you—is that the only reason that you gave preference to Minneapolis-Honeywell controls?

A. Yes, sir.

Q. Did you standardize on Minneapolis-Honeywell? That is to say, if an order came in for a burner, without specifying the make of control, what control would you put on it?

A. If an order came in to us without the names of the control specified and our stock of Minneapolis-Honeywell controls was long, we would, no doubt, have shipped Minneapolis-Honeywell controls. If our stock of Mercoid controls was long, we would, no doubt, have shipped Mercoid. We would ship any controls that we had a surplus of stock on, in order to keep our stock leveled off. We had no uniform set-up, so far as shipping controls was concerned.

Q. But you didn't standardize on any one of the three?

A. We didn't standardize on any one set of controls.

Q. Now, you also testified that usually you would
1641 equip a burner with a set of controls that were manufactured by the same manufacturers; that is, a thermostat, a limit control and a primary control, is that right?

A. That is right.

Q. But there were exceptions—that is, where you might be long on some particular one of them and short on some particular one. Can you give us an illustration of what those exceptions would be and how you would handle it; or, rather, how you did handle it?

A: Well, you understand, of course, that that was not a general picture. That was in case of emergency, only. I will put it that way. If you had an automobile and you had a wheel off and probably couldn't get a wheel for your Cadillac, but you might, in order to get into town, on something, put a Buick wheel on it as a temporary expedient. Well, we would do that same with controls, rather than to tie up the job or hold up the operation, providing that particular set of controls would give somewhere near satisfactory service.

Q. Well, you had no difficulty in interchanging your limit controls, did you?

A. Well, we didn't have any difficulty, because we didn't make a practice of that.

Q. Only did it when it was necessary?

1642 A. That is correct.

Q. Do you recall whether or not that the contract that you signed with Minneapolis-Honeywell during the years 1937 to 1941 has the provision in it that the

"Company agrees to sell and the purchaser agrees to purchase subject to the reservations hereinafter named during the life of this contract 50 estimated sets of the company's automatic temperature controls; each set consisting of one thermostat and one limit control and one primary control. It is specifically agreed that other equipment is not to be considered as a part of the set within the terms of this contract, because the company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoice purposes. It is agreed that the purchaser's yearly purchases will consist of at least 90 per cent as many room thermostats and 100 per cent (but at the company's option, not more than 125 per cent) as many limit controls as primary controls."

Do you remember whether or not that language was in the agreement that you signed?

A. That is right.

Q. Is it your testimony that you would not consider that language as restricting you from purchasing con-
1643 trols from other manufacturers?

A. No, it didn't.

Q. What effect, if any, did that have upon your purchase of controls from the Minneapolis-Honeywell Corporation?

A. Well, as far as affecting our purchase of controls from Minneapolis-Honeywell Regulator Company, if you hadn't read the clause to me, I wouldn't even recall it.

Q. You don't remember whether—

A. (Interposing) It never affected us a bit.

Q. It was never called to your attention?

A. Minneapolis-Honeywell Company would always ship the controls we ordered provided we paid for them.

Q. Do you recall whether or not there was a clause in any contract which provided that 95 per cent of your controls should be purchased from Minneapolis-Honeywell?

A. No, sir.

Q. You don't recall whether that was in there or not?

Mr. Haycraft: That is all, Mr. Examiner.

Trial Examiner Sheppard: Anything else, gentlemen?

Mr. Gilpatric: Thank you very much, Mr. Jeffrey, you are excused.

The Witness: I will send that information to you.

Trial Examiner Sheppard: That is fine. Take your time.

(Witness excused.)

1644 Mr. Gilpatric: Might we have a five-minute recess?

Trial Examiner Sheppard: Take a five-minute recess, gentlemen. Show a five-minute recess, Miss Reporter.

(Short recess.)

1645 Trial Examiner Sheppard: On the record, Miss Reporter.

Mr. Gilpatric: I would like to recall Mr. J. W. Pauling.

J. W. PAULING was thereupon recalled as a witness for the respondent and, having been previously duly sworn, testified further as follows:

Direct Examination.

Trial Examiner Sheppard: Mr. Pauling, give the reporter your name and initials.

The Witness: J. W. Pauling, P-a-u-l-i-n-g.

Trial Examiner Sheppard: Let the record show Mr. J. W. Pauling, having been previously sworn in this case, appears on the stand at the request of the respondent.

By Mr. Gilpatric:

Q. You testified, didn't you, Mr. Pauling, before, that you are and have been for some years vice president of the Minneapolis-Honeywell Regulator Company?

A. I did.

Q. And that your work has been of a sales nature, supervision of sales?

A. That is correct.

Q. And it was you, was it not, Mr. Pauling, who handled the negotiations with Timken Silent Automatic Com-
1646 pany of Detroit, leading up to its 1936 contract with Minneapolis-Honeywell, which the record shows was signed on behalf of Timken February 19, 1936?

A. I did.

Q. Do you recognize the provision in that contract, and I now read from Commission's Exhibit 66:

"In view of the special prices listed in this agreement, it is understood that the purchaser"—meaning Timken—"will standardize on and use the company's"—meaning Minneapolis—"products exclusively, except for field test or when other makes are specified by dealer."

Do you recall that?

A. I do.

Q. Was that provision in the form of contract as you submitted it in December, 1935?

A. No, it was not. I think, as I recall, there was a phrase in the contract that we put in leading up to the "except", and from there on, why, that was Timken's insertion.

Q. Will it refresh your recollection if I show you that exhibit?

Trial Examiner Sheppard: What is the exhibit?
Mr. Gilpatric: Commission's Exhibit 66-B.
Trial Examiner Sheppard: All right.

1647 By Mr. Gilpatric:

Q. And I ask you to read the part that was not in the provision I have read when it was submitted.

A. "Except for field test, or when other makes are specified by dealer."

Q. The part in smaller type than the other part?

A. That is right.

Q. Do you know where the part of the clause beginning "except" was put in the contract?

A. In Minneapolis.

Q. I mean the part beginning "except for field test" that you specified.

A. That was put in in the Timken office in Detroit.

Q. Was the first part of that provision, the part that you testified was in the form when it was originally submitted, a customary provision in Minneapolis-Honeywell contracts?

A. No.

Q. Why, then, was that provision included in the 1936 form of contract as you submitted it to Timken?

A. Well, we were negotiating with Timken at the time and they were threatening us with a competitive situation where the prices were lower; in fact, offered us substantial orders, as I recall, if we would accept them at a lower price, and the quantity that we had, the quantity bracket that we had quoted Timken in at that time was our

1648 low bracket, and I was rather convinced that Timken were going to buy some of this competitive equipment and, if they did, I was afraid that the quantity that they would buy from us, unless some provision was made in our contract to protect that quantity, would not entitle them to the prices that we had quoted.

Q. Which were your best prices?

A. Our best prices.

Q. Did Timken, in fact, buy controls during 1935 and 1936 from other control manufacturers?

A. I believe they did.

Q. And you knew that at the time?

A. Yes, sir.

Q. Did Timken ever make good on this—

Mr. Haycraft: I move to strike the last question and answer as not having any probative value. In the first place, it is leading, but, in the second place, you do not specify the time that the witness knew that, whatever it was.

Mr. Gilpatric: I will have that clarified.

By Mr. Gilpatric:

Q. Will you state, Mr. Pauling, just what, if anything, you knew in December of 1935 about purchases by Timken of other makes of controls than your own?

A. I knew that they were buying other makes of controls.

Q. Do you know what the other makes were?

1649 A. Penn Switch.

Trial Examiner Sheppard: You say that was in 1936?

The Witness: 1935.

Mr. Gilpatric: The end of 1935, leading up to the 1936 contract.

Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. Did Timken, in fact, carry out this statement that you testified was made to you, that they were going to buy controls from other companies?

A. They did.

Q. Did that happen during 1936?

A. They bought from other competitors—from another competitor, in 1936.

Trial Examiner Sheppard: Mr. Pauling, did that particular company execute contracts with you for those two years or did they not?

The Witness: No, they did not. I think on that—I am not sure about 1935. I believe that the contract was executed in 1935, yes, with that clause in it, but if my memory serves me right, there was no contract executed in 1936.

Trial Examiner Sheppard: You mean for 1937?

The Witness: For 1937 business, yes.

1650 Mr. Gilpatric: The record shows, Mr. Examiner, that there was simply a letter—

Mr. Haycraft: Order.

Mr. Gilpatric: —letter order for 45,000 units placed by Timken with Minneapolis at the end of 1936 or early 1937.

Trial Examiner Sheppard: All right, I just wanted to know whether they had a formal contract or not. Sometimes, Mr. Pauling, you know, although the people sign these contracts, they don't buy, and they may buy from somebody else, even though they have a contract.

All right, go ahead.

By Mr. Gilpatric:

Q. Did the Timken people tell you why they added that "except" clause to the form of the 1936 contract?

A. Yes, sir.

Q. What was the reason they gave?

A. They wanted more than one source of supply and insisted on having the clause in so that they could buy other controls, if their dealers insisted on it.

Trial Examiner Sheppard: Just let me see that.

You mean the customer put that in, didn't he?

The Witness: Timken, yes.

Trial Examiner Sheppard: Yes.

By Mr. Gilpatric:

1651 Q. Who, if you know, Mr. Pauling, originated that policy of having a second source of controls for Timken?

A. The individual, do you mean?

Q. The individual or group.

A. Mr. Rockwell of Timken.

Q. When he took over the management?

A. That is right.

Q. Did he ever talk to you about that subject?

A. He did.

Q. Did he tell you why he favored that policy?

A. Yes.

Q. Will you state what he told you?

A. Well, he felt that there would be a certain danger in depending upon one source of supply. Timken were planning a rather extensive manufacturing and merchandising program at that time and, if I remember correctly, he mentioned labor troubles or a fire that would put Minneapolis-Honeywell out of business, and another reason that he mentioned was he wanted to have his vendors in competition and he did not want to depend entirely on one company.

Q. To your knowledge, did Timken ever carry out that policy of having two sources?

A. Yes, sir, they did.

Q. What was the other source of supply they ultimately used?

1652 A. Perfex Corporation.

Q. Did you know whether during the time this very contract, Commission's Exhibit 66, was in effect, Timken bought from other manufacturers, from other control manufacturers there in Minneapolis?

Mr. Haycraft: Objected to, Mr. Examiner. That is not the best evidence of what they did.

Mr. Gilpatric: I can ask him what he knows, his knowledge.

Mr. Haycraft: I object to it as not the best evidence, Mr. Examiner: It is hearsay.

Trial Examiner Sheppard: I will let you answer that, Mr. Pauling.

A. I knew that they were buying from another source.

Mr. Gilpatric: That is all I have.

Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Haycraft.

Q. How did you know it?

A. They told me.

Mr. Haycraft: I move to strike that.

Trial Examiner Sheppard: Let it stay in.

Mr. Haycraft: Mr. Examiner, the Timken men have been on the stand, two of them, and they testified in this proceeding as to what their policy was, and the fig-

1653 ures are in.

Mr. Gilpatric: Just remember what happened when I tried to cross-examine the Timken men on the stand. You objected. Now, I do the best I can without recalling Mr. Rockwell.

By Mr. Gilpatric:

Q. Was that the man that told you?

A. Yes, sir.

Mr. Gilpatric: That is all.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: That is all on that subject. You are excused, Mr. Pauling.

(Witness excused.)

Trial Examiner Sheppard: Off the record.
(Discussion off the record.)
Trial Examiner Sheppard: On the record.
Mr. Gilpatric: I will recall Mr. A. H. Lockrae.

A. H. LOCKRAE was thereupon recalled as a witness for the respondent, and, being previously duly sworn, testified further as follows:

Direct Examination (Continued).

Trial Examiner Sheppard: Show, Miss Reporter, that Mr. Lockrae is recalled to the stand for the continuation of his direct examination.

1654 By Mr. Gilpatric:

Q. During your previous testimony, Mr. Lockrae, you testified, did you not, that in a number of instances your company lost to competitors, in whole or in part, accounts of oil burner manufacturers which at one time had standardized, as that term has been defined here, on your makes of controls?

A. That is right.

Q. Are you now prepared to testify as to specific examples of those situations?

A. I am.

Q. Would you do so?

A. Well, I made up a list of manufacturers who had at one time standardized on M.H. controls and gave us the preponderance of their business and who are now using substantial quantities of competitive equipment. Braden Everedy, E-v-e-r-e-d-y.

Q. What portion of its business was lost to a competitor?

A. It is estimated that we lost 95 percent of that business.

Q. Who was the competitor?

A. Mercoid Corporation.

Q. All right.

A. Chalmers Oil Burner Company.

Mr. Haycraft: Mr. Examiner, I will have to ob-
1655 ject to this testimony unless the witness will specify as to the years that the M.H. Company had it at any time and the approximate volume of the business.

Trial Examiner Sheppard: Mr. Lockrae, can you furnish that?

The Witness: I can give you the year. This study was based on 1941 and, as I explained in previous evidence, it is estimated. It was compiled, to the best of my ability, from our own records and the statements of various salesmen who called on these various accounts.

By Mr. Gilpatric:

Q. The same source that you used in testifying for Mr. Raycraft?

A. Exactly.

Mr. Haycraft: In his testimony for me, though, he told a little more in detail about it, as to the accounts that I asked about.

Trial Examiner Sheppard: All right, go ahead. I had forgotten that he testified for Mr. Haycraft on that subject.

Mr. Gilpatric: You remember, Mr. Examiner, we reserved our right of cross-examination entirely as to Mr. Lockrae, at your suggestion.

The Witness: Eastern Oil—

Mr. Haycraft: (Interposing.) You haven't finished.

1656 The Witness: Chalmers, we estimated that the competition got 80 percent of that business, and Perfex was the competition.

By Mr. Gilpatric:

Q. What was the next company?

A. Eastern Oil, 40 percent loss, and Mercoid was the competition.

National Airoil, 25 percent, and Perfex was the competition.

Pan-American, we lost 10 percent, and Mercoid was the competition.

Sunstrand Engineering Company, we lost 25 percent, and Mercoid was the competition.

Vortex, 5 percent, and Penn was the competition.

Diesel Burners, 40 percent, and Mercoid was the competition.

Q. Mr. Lockrae, when you say "competition", you mean you are referring to the company that took the business?

A. That is right.

Q. Other companies were soliciting this business as well?

A. That is right.

Gold Star, 20 percent, and Perfex got the business.

Herco, 75 percent, and Mercoid got the business.

Lynn Products, 10 percent, and Perfex got that business.

1657 Malleable Iron Fittings, 75 percent, and Mercoid got the business.

Mr. Haycraft: 75, you say?

The Witness: Yes, sir.

Montag, 10 percent, and Penn got the business.

Rossoe, 5 percent, and Penn got the business.

Round Oak, 30 percent, and Penn got the business.

Sanmeyer, 75 percent, and Mercoid got the business.

Beckett, 20 percent, and Mercoid got the business.

The Heil Company of Milwaukee, 90 percent, and Perfex got the business.

Harvey-Whipple, 40 percent, and Perfex got the business.

Silent Glow, 40 percent, and Perfex got the business.

Wayne Oil Burner Company, 65 percent, and Perfex got the business.

Gar Wood Industries, 30 percent. Again Perfex got the business.

Anchor Post Fence Company, 85 percent. Perfex got the business.

Automatic Burner Corporation, 20 percent. Perfex got the business.

1658 Delco, 85 percent, and they manufactured their own controls.

Gilbert & Barker, 40 percent, and Penn got the business.

Timken, 50 percent. Perfex got the business.

York Oil Burner Company, 70 percent. Perfex got the business.

The Crane Company, 100 percent. Penn got the business.

Now, in addition to the 31 accounts just named, there were, according to our records, 126 other oil burner manufacturers that also used competitive equipment.

Trial Examiner Sheppard: You mean customers of yours?

The Witness: Yes, sir.

Trial Examiner Sheppard: During those years?

The Witness: During those years, particularly in 1941, when I made this tabulation.

The 31 accounts gave our competition approximately 53 percent of their business, according to the estimated figures that we compiled.

Trial Examiner Sheppard: 47 to the competitors?

The Witness: No, 53 to the competitors.

Trial Examiner Sheppard: 47 to you?

The Witness: 47 to us.

1659 Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. Mr. Lockrae, the William Oilomatic Company has been mentioned a good many times during this proceeding, to date.

Will you describe the history of your relationships with that account?

A. Oilomatic has always been a highly competitive account. In the early 1920's they used Minneapolis Heat Regulator controls. They then designed a control of their own and they used Mercoid instruments with it.

Later they split their business between Honeywell Heating & Specialties Company and Mercoid; then between Mercoid, Penn Switch, and Minneapolis-Honeywell.

They have always been one of the major oil burner manufacturers, and the volume of their purchases would entitle any control manufacturer to give them their best prices, at least from 1937 to 1941, and perhaps prior thereto.

Now, when we investigated the Robinson-Patman Bill in 1936, we were led to believe that under our bracket structure we could grant prices only commensurate with the manufacturer's actual control purchases from us, and if the manufacturer didn't purchase the quantity specified in his contract in a given year we would be remiss, unless we were definitely assured the following year that the

1660 manufacturer would give us the amount of business called for in the contract.

As the result, our yardstick for 1937 became the number of controls the customer actually purchased during 1936. We had to go by our history, although there were instances where the manufacturer's estimates of 1937 business proved over-optimistic. That oftentimes has happened.

Now, we were not cognizant of the fact that the Robinson-Patman Bill permitted us to meet competitive prices.

Q. When was this?

A. This was in 1936, 1937, about that time. As a

matter of fact, I think it was pretty general throughout this period of 1937 to 1941 before we really were cognizant of that fact.

In the case of Williams Oilomatic, that seemed to me to be a typical example of just what could happen in a situation of that kind. Our records show that in 1936 they had a selling price $2.50 higher on M. H. controls than on competitive controls and in that year they purchased 3,527 units.

Trial Examiner Sheppard: You mean from you?

The Witness: From us.

By Mr. Gilpatric:

Q. They were selling burners with your controls 1661 and other makes of controls?

A. That is right. Ours were optional equipment. So in 1937 we felt we had no recourse except to give them a contract commensurate with their previous year's purchases, and our contract actually called for 3,000 units.

As was testified yesterday, Oilomatic never has signed contracts, but we did extend them the 3,000-unit price in 1937.

Q. What happened then?

A. As the result of that price, Oilomatic, instead of charging $2.50 more as in the previous year,—

Q. (Interposing.) That is, $2.50 per burner?

A. Per burner. —(continuing) increased their price difference to $7.50 a set.

Q. Why was that?

A. Well, our 3,000-unit price was so much higher than had been given them the previous year that they claimed they had to have that differential in accordance with their regular mark-up principle, and so forth.

Then in 1938 we went in to Oilomatic and attempted to meet competition and gave them the best price we had.

Q. In other words, whether or not you were cognizant of what you were permitted to do under the Robinson-Patman Act, you met competition?

1662 A. That is right. We couldn't see that business going out the window and we went in there and gave them our best price. And as the result of that, they then reduced the price difference on M. H. controls to $2.50 a burner again.

Q. By the way, what were your sales to Williams Oilomatic in 1937, that is?

A. There were 3,527 units in 1937, and in 1937 they bought 3,258 units.

Q. What happened after 1938, when, as you testified, the price difference between Williams Oilomatic burners equipped with Minneapolis-Honeywell controls and those equipped, say, with Penn controls was reduced to $2.50?

A. Well, in this control business, in a competitive situation of this kind, our only recourse to get that business is the work that we do direct with the dealers.

Now, in 1936, with a $2.50 price difference, we had succeeded in prevailing upon a lot of dealers to use our equipment. Now, in 1937, when the price difference went to $7.50 a burner, a lot of dealers still continued to use our equipment but, in the meantime, with that great price difference, they were trying out competitive makes of controls.

As a matter of fact, I was told by the Williams organization themselves that they couldn't see the difference in value between our controls and competitors' controls 1663 of $7.50.

Now, with the sales organization thinking in terms like that, that undoubtedly influenced the dealers in the same direction and, while we didn't feel much effect of that $7.50 increase in 1938, yet we did feel it in 1939 and subsequent years.

We had to go back and resell those dealers and had to do this groundwork all over again.

Trial Examiner Sheppard: Were there many of them?

The Witness: Oh, they are scattered all over the country, Major. I wouldn't know how many dealers that they have on their list, but I know it would run into the hundreds.

By Mr. Gilpatric:

Q. What was your sales curve in 1939, 1940, and 1941 with Oilomatic?

Mr. Haycraft: How about 1938?

By Mr. Gilpatric:

Q. Well, include 1938.

A. I gave you 1938.

Mr. Haycraft: You may have given it to him, but you didn't say they were 1938; you said they were 1937.

The Witness: No, I gave a comparison between the two. 3,527 units in 1937 and 3,258 in 1938.

Mr. Haycraft: You said "the other year", that 1664 was it.

The Witness: Oh, I see.

Trial Examiner Sheppard: Now, give us the others if you have got them.

The Witness: Now, in 1939 there were 1,136 units sold to Williams. In other words, from 1936 to 1939 our sales to them dropped 66 percent, and the industry drop for that period was only 33 percent.

Through a lot of effort on our part with their dealers, combined with the fact that no price differential was established in 1939, we sold 6,365 units. Then again in 1940 they reestablished the $2.50 price differential.

By Mr. Gilpatric:

Q. Were they still getting your best price in that year?

A. They were. And in 1940 our volume dropped to 5,009 units.

Mr. Haycraft: Wait a minute. I am all mixed up here.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: Shall I list them, Mr. Haycraft?

Mr. Haycraft: Yes.

The Witness: In 1936 Williams purchased 3,527 units from us; in 1937 there were 3,258; in 1938 there were 1,136; in 1939 there were 6,365; and in 1940 there were 5,009.

By Mr. Gilpatric:

Q. How about 1941?

A. And in 1941 there were 16,349 units sold, and if you will remember again that in 1941 they eliminated the price difference.

Mr. Haycraft: Will you state right there what the price difference was in those years?

The Witness: Let me list that for you, Mr. Haycraft. In 1936 there was a difference of $2.50 in the price of M. H. controls to the dealer; in 1937 there was a difference of $7.50; in 1938, $2.50; in 1939, there was no price difference; in 1940, the price difference was $2.50; and in 1941 there was no price difference.

By Mr. Gilpatric:

Q. Each of these differences, where they existed, being per burner sold by Williams with a set of controls?

A. That is right, set of M. H. controls.

Q. M. H. controls.

Mr. Lockrae, another account that has been referred to —

Mr. Haycraft: (Interposing.) I shouldn't interrupt you here. May we go off the record?

1666 Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Gilpatric:

Q. Mr. Lockrae, will you state whether or not in the years 1939, 1940, and 1941 you gave Williams the best price?

A. In the years of 1938, 1939, 1940, and 1941 we gave Williams our best price.

Q. Why?

A. We had to give them our best price to come close to the competitive control prices that we encountered at Williams'.

Q. Whose prices were those, what other control manufacturers'?

A. Well, they purchased from Mercoid and Penn Switch and Minneapolis-Honeywell and offered those controls on their standard order forms throughout those years.

Mr. Gilpatric: Is that what you want, Mr. Haycraft?

Mr. Haycraft: That is all right.

By Mr. Gilpatric:

Q. Did Minneapolis-Honeywell's prices actually go down to the prices charged Williams Oilomatic by competitors?

A. I was told that they did not. I was told that we did not go as low as the competition.

1667 Q. You simply approached the competitive prices?

A. We approached their price. We got closer to it, and in those years where Williams had no price difference on M. H. controls, they absorbed that difference in cost themselves.

Q. Now, Mr. Lockrae, will you describe your business during the years 1936 through 1941 with Micro-Westco, another company about which you were examined during the Commission's case?

A. Micro-Westco had standardized on our controls in 1936 and 1937. In 1936 they actually purchased 10,681 units, and in view of these purchases and the general

business outlook we had no hesitancy in giving them our 12,000 quantity prices for 1937.

Q. Did they think they were going to buy that many?

A. They certainly did. They were very optimistic.

Q. What actually happened?

Mr. Haycraft: I move to strike that, Mr. Examiner. He can say what they said.

By Mr. Gilpatric:

Q. Did they tell you they were optimistic?

A. At that time—I can explain that, I think, to your satisfaction, Mr. Haycraft:

Trial Examiner Sheppard: All right, make an explanation before I rule on it.

1668 The Witness: I think I can explain that to your satisfaction.

At that time they had a new sales manager down at Micro-Westco and he was in there to do one job and that was to put over that burner. And they hired extra salesmen and they established offices in the East, and they went the lengths that they hadn't gone heretofore in merchandising their burners. And I handled that account personally, and I can say frankly that we had no hesitancy in giving them that price and we were as optimistic as they were about the possibilities in 1937.

Now, the fact that they didn't meet that quantity in 1937 was no fault of ours or the sales department of Micro-Westco Company. That was the year in which the terrific slump hit and everybody's business was down generally.

Trial Examiner Sheppard: All right, with that explanation, I will let it in.

By Mr, Gilpatric:

Q. Were they using competitive controls at the time?

A. Well, they were standardizing on our controls, and I am not certain whether they used other makes or not. It runs in my mind that they did use some Penn Switch controls in 1937.

Q. Now, when it came to 1938 prices, did your company keep them in the same bracket they had been in in 1937?

1669 A. Well, because their volume had dropped to 6,438 instruments in 1937 we weren't quite as optimistic as they were about their 1938 business, so we gave them a higher price in 1938 and those prices well in our 2,250-899 unit bracket.

Q. How many controls did you sell them at those prices in '38?

A. Well, they standardized on Penn controls in 1938 because of the fact that we increased our price, and Penn Switch came in there and took that business away from us and we only sold 732 instruments in 1938.

Q. Did you try to get back that business in 1939?

A. We certainly did; we tried to get it back, and we did get back a substantial part of it.

Q. What happened in 1939?

A. Well, in 1939 we had a general lowering of prices and whereas they had paid us $19.35 for a set of controls in 1938, our 3,000-unit price in 1939, which was extended to them, was $16.65, so that that represented a substantial reduction.

Q. How many units did they purchase at that price?

A. As a result of that price they purchased 3,098 units.

Q. Now give us the story for 1940, if you can.

A. Well, there was another change occurred down there in 1940. Instead of going out and merchandising 1670 through the dealers, they decided that they were going to capitalize on the greater volume that was obtainable through the furnace manufacturers and the boiler manufacturers.

Now, this type of business represents considerable volume and, in view of that volume and also the competitive situation that existed, we gave Micro-Westco our bottom price of $14.65 per set in 1940.

Mr. Haycraft: Fourteen what?

The Witness: $14.65. And their purchases went back up to 6,526 units. Now, that is just what they bought from us direct.

In addition to that, the other furnace companies whom they were selling, such as Lennox and Dowagiac,—oh, they had eight or twelve of them.

Trial Examiner Sheppard: Dealers?

The Witness: Oh, no, they were furnace manufacturers who bought the burners from Micro-Westco but bought the controls from us.

By Mr. Gilpatric:

Q. That is one of those dual transactions you referred to yesterday?

A. Yes, sir. So again in 1941 we continued our low

prices with Micro and that year sold them for $13.75 a set. They bought 7,017 instruments direct from us.

Trial Examiner Sheppard: Off the record.

1671 (Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: Now, we in turn sold controls to furnace manufacturers to be used with Micro's burners that Micro, of course, supplied.

By Mr. Gilpatric:

Q. The other end of this dual transaction?

A. That is right, so that the overall volume credited to Micro for that year was 33,237 instruments which, of course, more than justified our lowest price.

Q. Well, now, take another account.

A. Pardon me, I would like to make this one statement, Mr. Gilpatric: According to the information supplied by Mr. Henning of Penn Switch Company, now in the evidence, I find that in 1938 Penn quoted Micro $16.85 a set, and in September of that year $14.53 a set. And our price to them for 1938 was $19.35 a set, so it is small wonder that we only sold them 732 instruments.

Then in 1939 Penn's price continued at $14.53 a set. Our price was $16.65 a set. Then in 1940 Penn quoted them their lowest price of $14.55 and our price was $14.65.

Mr. Gilpatric: Perhaps, Mr. Examiner, before we begin another account, do you want to break off for lunch? It is about 12:15, and we would like to make a few phone calls.

1672 Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record. All right, Mr. Freeman.

Mr. Freeman: Before we adjourn, I would like to read a telegram in the record.

Trial Examiner Sheppard: All right. Mr. Lockrae, you are excused until after lunch.

Mr. Freeman: A copy of Respondent's Exhibit 112, which is the petition now pending before his Honor, John P. Barnes, Judge of the United States District Court, was forwarded yesterday to the Federal Trade Commission, Washington, D. C., attention Otis B. Johnson, with the request that the Commission join with us or ask the Court to enforce its subpoena against J. W. Owens, issued under

date of November 2, 1943, and served upon J. W. Owens on November 5, 1943.

I further want the record to show that I talked to Mr. Otis B. Johnson yesterday afternoon long distance, advising him that we were sending him a petition corresponding to Respondent's Exhibit 112 and that we had appeared before Judge Barnes, all in connection with the Commission's subpoena to J. W. Owens.

We now have a telegram from the Commission sent from Washington, D. C., at 11:46 a. m., addressed
1673 to Messrs. Bair & Freeman, 1400 Field Building, 135 South La Sallet Street, reading as follows:

"Your letter of December 1st and enclosures received. Commission will consider the matter during week of December 6th. Will advise you whether it will grant oral hearing or decide matter without oral hearing; if oral hearing is granted, it will be advised during week of December 6th as to the time.

"Otis B. Johnson, *Secretary,*
Federal Trade Commission."

Trial Examiner Sheppard: All right, then, we will recess until 2:00.

(Whereupon, at 12:25 p. m., a recess was taken until 2:00 p. m., this day.)

1674 Afternoon Session.

2:00 p. m.

Trial Examiner Sheppard: Are you ready to proceed, gentlemen?

Mr. Freeman: Mr. Hirsch, will you take the stand?

J. H. HIRSCH was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Trial Examiner Sheppard: Will you state your name, please?

The Witness: J. H. Hirsch.

Trial Examiner Sheppard: Where do you live, what is your address?

The Witness: 1823 Carroll Avenue, Chicago.

Direct Examination by Mr. Freeman.

Q. You are the president of Automatic Burner Corporation, is that correct?

A. Yes.

Q. And where is that company located?

A. 1823 Carroll Avenue, Chicago.

Q. What is its business?

A. Manufacturing and selling oil burner equipment.

1675 Q. How long have you been engaged in the sale of oil burning heating equipment?

A. The company, since 1920, and myself since 1923, January, 1923.

Q. So your experience in connection with the manufacture and sale of oil burners is of at least twenty years?

A. If you ask me, yes; some people might not think so, but I think so.

Q. And with these oil burners—

Trial Examiner Sheppard: (Interposing.) What is your position with the company?

The Witness: President.

Trial Examiner Sheppard: President, okay.

The Witness: And general manager.

Trial Examiner Sheppard: And general manager?

The Witness: Yes.

By Mr. Freeman:

Q. And with these oil burners that you have manufactured and sold in the last twenty years, do you sell controls as part of the oil burner?

A. Yes.

Q. And whose controls do you use?

A. Oh, any that the customer wants.

Q. Well, now, let's go back to about, oh, 1935 or

1676 1936, do you recall whose controls you used then?

A. Yes, we used Minneapolis-Honeywell, and I think we used some Mercoid back in there and possibly—no, I don't think Perfex had gone in business then, had they? If they were, we used some of those.

Q. Did you ever use any Penn Electric Switch controls?

A. Yes, but not for many years.

Q. Have you been solicited by Penn Electric Switch Company?

A. No.

Q. Have you been solicited by Mercoid Corporation?

A. Yes.

Q. When did that solicitation start, within your own memory?

A. Ten, twelve, fifteen years ago.

Q. And has it continued right on up to date?

A. Yes.

Q. And how about the solicitation of the Perfex Company? Have they solicited you for your requirements of oil burner controls?

A. Yes, ever since the company started.

Q. And do you recall any of the individual's names—that is, Perfex Company—that solicited you?

A. Mr. Boalt.

Q. Is that Ben Boalt?

1677 A. Yes.

Q. Now, whose controls do you use at the present time and by "present time", Mr. Hirsch, I would like to confine that to about 1941—the last year or so, due to the war effort, we will just eliminate that.

A. Well, principally Minneapolis-Honeywell, and, in a minor way, both Perfex and Mercoid.

Trial Examiner Sheppard: When your customer does not specify what controls they want, what do you use?

The Witness: Minneapolis-Honeywell.

By Mr. Freeman:

Q. Now, following the Major's question, how does the price of M-H controls compare with those of Mercoid and Perfex?

A. You mean cost to us?

Q. Yes.

A. They were slightly lower.

Q. That is Mercoid and Perfex were slightly lower than Minneapolis-Honeywell?

A. Yes.

Q. And notwithstanding the lower price of the Mercoid and Perfex controls, you still sent out burners equipped with Minneapolis-Honeywell controls when the customer did not specify?

A. Yes.

Q. The type of control?

1678 A. Yes.

Q. Why did you do that, Mr. Hirsch?

A. Well, we knew that our dealers preferred them and our price list specified Minneapolis-Honeywell shipped unless other controls were requested.

Q. And if other controls were requested, then did you ship other controls?

A. Oh, yes.

Q. That is, Perfex and Mercoid?

A. Oh, yes.

Q. You gave the customer what he wanted?

A. Gave him his choice.

Q. And whenever you sent out a burner equipped with Perfex and Mercoid controls, in accordance with a request from the customer, did you pass any savings to the customer on account of your purchase price being any less?

A. No, no, the price was the same.

Q. So that it cost you money to sell your Minneapolis-Honeywell controls?

A. Yes, if you want to look at it from that angle.

Q. Well, looking at it from any other angle, can you point out any savings?

A. Well, I have always conducted my business on the theory that I was selling oil burners, and I wasn't selling anybody else's controls. Let the control man sell his 1679 own goods. We save time in selling, and all that sort of thing, which we thought resulted in benefit to us.

Q. Was that because of Minneapolis-Honeywell's name or—

A. Yes.

Q. —or service policy?

A. Yes, they had better public acceptance.

Mr. Haycraft: That is a leading question, Mr. Freeman.

By Mr. Freeman:

Q. Tell me just why your customers, if you know, preferred Minneapolis-Honeywell controls?

Mr. Haycraft: I object to that—why his customers preferred.

Mr. Freeman: I said, "if he knows".

Trial Examiner Sheppard: I will let you testify.

A. I can only talk from hearsay. I think Minneapolis-Honeywell has better public acceptance than the other controls. They have had considerable publicity.

By Mr. Freeman:

Q. How did you get that information?

A. General knowledge.

Q. From coming in contact—

A. With dealers and the public.

Q. All right.

A. As a matter of fact, a great many concerns made a feature of advertising Minneapolis-Honeywell controls when they advertised a price "complete with Minneapolis-Honeywell controls". They would say that.

1680

Q. Now, Mr. Hirsch, when you started in the oil burner business back in 1923, what were the types of oil burners then being sold.

A. There were some steam atomizing burners sold for industrial purposes. There were some pressure atomizing burners, which one called "gun burners" and we started out in a new line of rotary burner, vertical burner. The original ABC burner was a rotary burner.

Q. Did you ever manufacture a pot type burner?

A. No.

Q. Have you had any experience in connection with pot type burners?

A. In manufacturing?

Q. Yes.

A. No.

Q. While I am asking these questions, have you ever run into any competition from pot type burners?

A. Oh, yes, that is standard, to run into that, particularly in the last several years.

Q. By "last several years", what years do you refer to, so that I can—

A. The last four or five years, they have been coming along.

1681

Q. Back as far as 1938, 1939, 1940 and 1941?

A. Yes, the pot type burner was originally designed for a small, manually controlled job, and the other type of burners were for the larger, automatic type, and I think the pot type burners have been on the market ever since I remember.

Q. Do they have pot type burners now that are automatically controlled?

A. Yes.

Q. Have you actually lost any business to that type of burner in recent years?

A. I can only answer that question by inference. I think I can say "yes".

Q. Have you had any experience when you tried to sell an oil burner with the rotary or gun type and found yourself without that business because of the pot type burner?

A. Yes.

Q. And will you give us the name of that company?

A. I am afraid I can't do that, because they were builders down east, where the building was being done for a huge real estate development, and then our salesmen would report, "I couldn't get this order on account of the competition with the low priced pot type burner."

Q. And do those reports come from the salesmen in your company?

1682 A. Oh, yes.

Q. And those are reports that are usually used by your company as to what is going on in the field?

A. Yes.

Q. And they were received by you in the regular course of business?

A. Yes, sir.

Q. Those pot type burners, were they for domestic house heating?

A. Yes, sir.

Q. Small homes?

A. Small homes.

Q. And do you sell your oil burner in connection with small homes?

A. Yes, if we can.

Q. That is, you sell them if you can?

A. We do our darnedest, yes.

Q. And on that occasion you just didn't?

A. Yes.

Q. Now, Mr. Hirsch, you have signed agreements or annual contracts with the respondent here, Minneapolis-Honeywell in years gone by, is that right?

A. Yes.

Q. And in signing any of those agreements, were you informed by any of the Minneapolis-Honeywell repre-

1683 sentatives that you had to buy from Minneapolis-Honeywell?

A. That would be the best way I know of for them to lose the business.

Q. So that the record is clear, in other words, had they so insisted, they wouldn't have gotten any business?

A. They certainly would not.

Q. Now, as a matter of fact, did you, at the same time that you were under contract with Minneapolis-Honeywell, in accordance with these annual contracts enter into contracts with competitors of the respondent here?

A. Oh, yes, every year.

Q. I have asked you to bring with you some of the Mercoid agreements, and I now hand you an agreement dated April 5, 1939, together with a letter which is attached thereto, dated April 10, 1939, from the Mercoid Corporation, addressed to Automatic Burner Corporation, attention J. H. Hirsch, and I will ask you to identify those and tell me whether or not you received this from the Mercoid Corporation.

A. Yes.

Q. Do you recall with whom you conferred, if there was any oral conversation in connection with this agreement?

A. Mr. Owens.

Q. Is that J. W.?

A. J. W. Owens.

1684 Q. Of the Mercoid Corporation?

A. Yes.

Q. Do you know him personally?

A. Yes.

Q. And has he called on you in connection with your sale of controls from time to time?

A. Over a period of years.

Q. And, Mr. Hirsch, I note on the fourth page of the agreement which was referred to as dated April 5, 1939, a signature thereon, and I will ask you whose signature that is.

A. Well, mine is on one side and Owens' is on the other.

Q. That is, you signed on behalf of the—

A. (Interposing) Company.

Q. The Automatic Burner Corporation.

A. Yes.

Mr. Freeman: We will offer in evidence Respondent's Exhibits 118-A, 118-B, 118-C, 118-D and 118-E.

Trial Examiner Sheppard: All right.

Mr. Haycraft: Let me see it.

(Counsel hands document to Mr. Haycraft.)

Mr. Haycraft: Objected to as irrelevant and immaterial. No objection to its competency.

Trial Examiner Sheppard: It will be accepted.

(The document referred to was marked RESPONDENT'S EXHIBIT 118-A, 118-B, 118-C, 118-D and 118-E and received in evidence.)

1685 By Mr. Freeman:

Q. Now, these prices appearing on Respondent's Exhibit 118-C and D, inclusive, are the prices that were extended to you by Mercoid Corporation in connection with any oil burners that you purchased from them, is that correct?

A. Yes.

Trial Examiner Sheppard: What date is that contract?

The Witness: April 5, 1939.

Trial Examiner Sheppard: 1939. It is good for 1940 then, isn't it?

Mr. Haycraft: It is good for 1939.

The Witness: No, it ran from April, 1939, to April, 1940. There was nothing very hard and fast in these contracts as to dates or anything else.

By Mr. Freeman:

Q. Now, I notice in that blank space on Exhibit, Respondent's Exhibit 118-B, that there is filled in, in typewriting, the figures 15,000, so that the paragraph now reads, and I quote:

"Subject to the terms and provisions hereinafter contained, the company agrees to sell and the purchaser agrees to purchase, during the term of this agreement their requirements of the company's automatic controls. The
1686 special net prices extended herewith by the company are based on the purchaser's 1939 control requirements, estimated to be 15,000 units."

That is right, isn't it?

A. That is right, yes.

Q. Now, did your company purchase any 15,000 units from the Mercoid Corporation?

A. No.

Mr. Haycraft: Mr. Examiner, I move to strike the question and answer, because that paragraph doesn't indicate that they ever agreed to do it.

Mr. Freeman: Didn't indicate what?

Mr. Haycraft: That he ever agreed to. It simply says the company's requirements, the total requirements. There is no probative value to that question or answer. If you

want to, you can ask him if he purchased that many that year.

Trial Examiner Sheppard: Just to relieve the situation, Mr. Hirsch, can you give us some idea, from your recollection, of what the performance was under that contract?

The Witness: Maybe two per cent.

By Mr. Freeman:

Q. Well, you bought whatever Mercoid controls you needed from Mercoid Corporation, is that correct?

1687 A. Yes, yes. We bought all the Mercoid controls that we required.

Trial Examiner Sheppard: All right, I will let the testimony stand just exactly like it is for what it is worth.

By Mr. Freeman:

Q. Now, I hand you a manufacturer's purchase contract dated January 23, 1940, of the Mercoid Corporation, and I will ask you if that is an agreement that you produced here this afternoon.

A. Yes.

Q. And that is an agreement executed by—

A. Mr. Owens and myself, the same as the other one.

Q. And does it likewise contain a price schedule for your requirements of Mercoid controls for the year 1940?

A. Yes.

Mr. Freeman: I will offer in evidence as Respondent's Exhibit 119-A, 119-B, 119-C and 119-D, the agreement just referred to by the witness Hirsch, between this company and the Mercoid Corporation.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: Let me see it.

Trial Examiner Sheppard: Let it be accepted.

Mr. Haycraft: No, I said, "Let me see it."

Trial Examiner Sheppard: Oh, pardon me.

1688 Mr. Haycraft: Same objection.

Trial Examiner Sheppard: All right, the exhibit is accepted for whatever value I think it is worth.

(The document referred to was marked RESPONDENT'S EXHIBIT 119-A, 119-B, 119-C and 119-D and received in evidence.)

By Mr. Freeman:

Q. Now, Mr. Hirsch, I notice in the printed price list on Respondent's Exhibit 119-B that after the figure $2.70, for

Type H Sensatherm, there is a typewritten figure of $2.50. What does that mean?

A. That means there is a modification in their price to us.

Q. Does that mean that when you bought Type H. Sensatherm room thermostats you paid $2.50 instead of the printed price of $2.70?

A. That is right.

Q. And is that likewise true with respect to JM Pyrotherm or KMW—that is, you paid the typewritten price?

A. The typewritten price.

Q. Instead of the printed price, the typewritten price. And the typewritten price on each one was lower?

A. Yes, whenever there was a change in the price, we paid the corrected price.

Q. So that you were able to buy the primary controls from Mercoid Corporation, either of the constant ignition type or intermittent ignition type; or intermittent ignition of the re-cycling type?

1689

A. Yes.

Q. So the price was less than the scheduled prices printed in the agreement, is that correct?

A. Yes.

Q. Now, Mr. Hirsch, I notice in the agreement on Respondent's Exhibit 119-B and C, a notation, M-H CO and, thereunder, the abbreviation for the word "No." with a number of figures and characters therein. Will you tell me what they represented at the time you put them in?

A. Well, we were entirely familiar with the Minneapolis-Honeywell names or numbers, stock numbers, and we were not familiar with Mercoid, so we asked Mercoid to put down the comparable unit opposite theirs.

Q. So that opposite the M-H or JM Pyrotherm appears the notation R-116-A.

A. Well, we knew that the R-116-A of Minneapolis would perform the same function as the JM Pyrotherm of Mercoid.

Q. And the lines were put in there at your request?

A. Yes.

Q. And they show a comparable control for accomplishing similar results, is that correct?

A. Correct.

Q. And that is true of all these notations?

1690

A. Yes.

Q. Appearing on both pages?
A. Yes.
Q. Did you have any discussion with J. W. Owens about that?
A. Yes, I requested him to do that.
Q. And he did it in accordance with your request?
A. Yes.
Q. That is, he set forth those controls of his kind which were comparable to Minneapolis-Honeywell controls?
A. Right.
Trial Examiner Sheppard: Does that show on the other contract, too?
Mr. Freeman: No, it does not.
The Witness: Only on this one.

By Mr. Freeman:

Q. I think you have already answered, but even at the sake of repetition, I want to be sure your price for controls, for Mercoid, was less than you paid?
A. Well, our cost price—
Q. (Interposing) Your cost price was less than that?
A. Yes.
Q. What you paid Minneapolis-Honeywell?
A. Yes.
Q. For comparable controls?
1691 A. Yes.
Q. Now, do you have any price list of the Perfex Corporation?
A. Yes.
Q. I notice you testified that Mr. Ben Boalt of that company solicited your business. Did you produce any price list that was submitted to you by the Perfex Corporation?
A. This is it.
Q. And is that the one you produced this afternoon?
A. Yes.
Q. Taken from your files?
A. I got that from our files this morning.
Q. And was it given to you by the Perfex Corporation?
A. Yes.
Mr. Freeman: Now, we offer in evidence Respondent's Exhibit 120-A and 120-B, the price list of the Perfex Corporation addressed "Automatic Burner Corporation, Chicago, Illinois," and dated November 25, 1941.
Mr. Haycraft: Same objection.

Trial Examiner Sheppard: Let the exhibit be accepted for its probative value.

(The document referred to was marked RESPONDENT'S EXHIBIT 120-A and 120-B and received in evidence.)

By Mr. Freeman:

Q. Mr. Hirsch, in Respondent's Exhibit 120-A and
1692 B I note some pencil notations opposite the typewritten price list and I will ask you to explain what those pencil notations are directed to.

A. Well, they are the prices we actually paid for these items.

Q. So that for a low voltage thermostat of the non-heater type, the price was $3.10 for less than 12, but it was actually $2.85?

A. Correct.

Q. And, likewise, the price for more than 12 was $2.60 instead of $2.85?

A. Correct.

Q. The controls that were furnished you by the Perfex Corporation were invoiced to you at the penciled figures, is that correct?

A. Yes, yes, that is right, they are penciled.

Q. So that for No. 150-A Perfex thermostat, you actually paid $2.45 in quantities of more than 12?

A. Correct.

Trial Examiner Sheppard: I forgot to ask the year of that contract.

Mr. Freeman: It is dated November 25, 1941, your Honor.

The Witness: That isn't necessarily the date we received
that, however. It was in printed form. It was not in
1693 effect at that time, but I wouldn't remember the exact date that it was brought to us.

Trial Examiner Sheppard: That is when I wanted to know, when it was in effect.

The Witness: November 25, 1941.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. And whatever Perfex controls you actually bought, you bought at the penciled price?

A. Right.

Q. Now, did you ever have any conversation with Mr.

J. W. Owens of the Mercoid Corporation with respect to your buying controls from them and such controls costing you money?

A. The question isn't quite clear, Mr. Freeman.

Q. I will withdraw the question and ask it again. Did you ever tell Mr. Owens that if you bought controls from him, it would cost your company money to do so?

A. Yes.

Q. Just what did you mean? What was the purpose of such conversation?

A. Minneapolis-Honeywell had a policy of reducing their price as you increased your purchases, going from one bracket into the next higher bracket, which amounted to a reduction in price. Quite naturally, the more controls we bought from the Minneapolis-Honeywell Company,
1694 the lower we paid for the controls. If we failed to get from one bracket to the next, we naturally didn't get the rebate that would accrue to us in the event we did reach that market.

Q. That is, you were looking forward to the so-called retroactive credit?

A. Exactly. And it was very much worth while, as it turned out.

Q. And you had such a conversation with Mr. Owens?

A. Yes.

Q. Did you explain to him then that you were working for the retroactive credit?

A. I don't know that I did. I wouldn't say that I did, but I told him it would cost us money if we divided our business the way he wanted us to.

Trial Examiner Sheppard: The other manufacturers of controls didn't have that system?

The Witness: I don't know, sir. We never got up high enough to find out.

Trial Examiner Sheppard: You did business with two of them here?

The Witness: We did business with three concerns.

Trial Examiner Sheppard: Three concerns. They didn't have that retroactive clause?

The Witness: No, no, our conversations with them were based on the line "if you can't give us a price that is
1695 at least as good as, and possibly lower than, Minneapolis-Honeywell, we won't be interested in your product."

Trial Examiner Sheppard: I see.

By Mr. Freeman:

Q. And whatever controls you bought from competition, you bought at a lower price?

A. Yes.

Q. Now, Mr. Hirsch, I call your particular attention to Commission's Exhibit 2, and particularly to the insert in typewritten form in the agreement, wherein the phrase "7500 estimated" is used.

A. Yes.

Q. Do you recall why that was put in there? What brought it about?

A. Well, that was one of your bracket breaks, one of your bracket—let's put it another way. That was the quantity required for us to purchase in order to get the price set forth in the contract.

Q. Now, did that phrase "estimated 7500" restrict you in your purchase in any way, of controls from other companies?

A. No, sir.

Q. I notice you said that rather emphatically. Just what do you mean?

A. I wouldn't sew myself up, obligate myself, to buy that quantity of material from anybody. That would involve too much from a financial point of view, in case we couldn't sell them.

Q. Did the Minneapolis-Honeywell annual agreement serve as a basis of your conduct or your relationship with Minneapolis-Honeywell for the period of the agreements?

A. Yes, I would say yes. It set forth, did it not—

Mr. Haycraft: (Interposing) I object to the leading questions, Mr. Examiner.

Trial Examiner Sheppard: A little bit too much.

By Mr. Freeman:

Q. Well, what did you use the annual agreements with Minneapolis-Honeywell for?

A. As a basis for our cost, so that we could arrive at our selling price.

Trial Examiner Sheppard: Read that to me.

(The record was read by the reporter.)

Trial Examiner Sheppard: Well, you said a little while ago, to get the benefit of the retroactive.

The Witness: Yes. Well, that isn't entirely true, Major. We knew that this would be the highest price that we could possibly pay during the life of this agreement.

By Mr. Freeman:

Q. And by "the highest possible price" is that referring to the price scheduled in the agreement?

1697 A. Yes, the price set forth here. And we knew that would be the highest price that we would be called upon to pay during the twelve months.

Trial Examiner Sheppard: I see.

The Witness: And we knew that if we exceeded the quota here and got it into the next bracket, we would get a rebate.

Trial Examiner Sheppard: Rebate, all right.

Mr. Freeman: That is all. You may cross-examine.

Cross-Examination by Mr. Haycraft.

Q. As a matter of fact, what was your experience as to the prices that you paid for Minneapolis-Honeywell controls during the years 1937, 1938, 1939, 1940 and 1941?

A. I don't quite get the drift of the question.

Trial Examiner Sheppard: Read it.

(The question above referred to was read by the reporter.)

The Witness: You mean what did we finally pay?

By Mr. Haycraft:

Q. Yes.

A. Oh, we got quite a nice—there was one year, I forget which year it was—either 1939 or 1940, we got a nice retroactive credit pretty close to $7,000.00.

Q. What was the unit price or set price that you

1698 paid and how much did you buy from Minneapolis-Honeywell during those years?

A. Well, if the contract is there, it would be according to the contract.

Mr. Freeman: May we have Mr. Lockrae, who has the record, supply the figures of actual sales, the bracke number and so on?

Trial Examiner Sheppard: Yes, Mr. Lockrae, if you will, please, just give the witness the benefit of your figures on that.

Mr. Lockrae: What years was that, Mr. Haycraft?

Mr. Haycraft: 1937 to 1941.

Mr. Lockrae: Automatic Burner Corporation in 1937 purchased 17,656 units.

Trial Examiner Sheppard: In what year?

Mr. Lockrae: 1937.

Trial Examiner Sheppard: All right.

Mr. Lockrae: In 1938—

Mr. Haycraft: You didn't give us the price in 1937. What were your set prices?

Mr. Lockrae: I better do that as I go along.

Trial Examiner Sheppard: Yes, give us the prices.

Mr. Lockrae: In 1937—and these prices are all for the intermittent ignition controls—were $19.85 a set.

Mr. Haycraft: What bracket was that in, 2 or 3?

1699 Mr. Lockrae: No, that was in bracket 4, in that year.

Mr. Haycraft: 4.

Mr. Lockrae: And then in 1938, I gave you the units didn't I?

Mr. Haycraft: No, I haven't got the units.

Mr. Lockrae: 1938, their purchases were 6,569 units, and the price was $17.25.

Mr. Haycraft: Still in the fourth bracket?

Mr. Lockrae: Yes, that was in the fourth bracket.

Now, in 1939, their purchases were 11,529 units and the price was $15.95 a set.

In 1940, their purchases were 15,739 units, and the price was $14.65 a set.

In 1941, they purchased 19,851 units, and the price was $13.75 a set.

Mr. Haycraft: What was that figure?

Mr. Lockrae: $13.75.

Mr. Haycraft: No, their number.

Mr. Lockrae: The units, 19,851.

Mr. Haycraft: Now, what bracket?

Mr. Lockrae: They changed brackets. I think they had the 5 bracket in the years 1940 and 1941.

Trial Examiner Sheppard: That is when you got that credit?

The Witness: Yes.

1700 Mr. Haycraft: And during that period of time—if I am correct about the brackets, during the years 1937 to 1941, it shows 8,000 sets.

Mr. Lockrae: '37, Mr. Haycraft?

Mr. Haycraft: Yes.

Mr. Lockrae: Well, I have this down here in units. Divide it by 3. 22,500 to 44,999. That would be 7500.

Mr. Haycraft: That is bracket 4, and what year?

Mr. Lockrae: '37.

Mr. Freeman: Well, Mr. Lockrae, are you taking into consideration the burners sold by ABC, the controls that you sold to the Holland Furnace Company?

Mr. Lockrae: They are not included in the figures. These are just our sales to Automatic Burner Corporation.

The Witness: They should be. There was a sale of controls to Holland Furnace for use with Automatic burners.

Mr. Haycraft: When was that?

Mr. Lockrae: That was carried through the years.

The Witness: Yes, all the way.

Trial Examiner Sheppard: You may bring that out.

By Mr. Freeman:

Q. I might ask you, in addition to the purchases of controls—the figures which Mr. Lockrae just gave us—
1701 did your company manufacture oil burners for other companies where the furnace companies picked up the controls direct from Minneapolis-Honeywell?

A. Yes.

Q. And what company?

A. Several of them.

Q. And how did your volume run with such companies?

A. Oh, very large with Holland, in the case of Holland Furnace Company.

Q. How did it compare with the burners that you made and sold under your own trade name, ABC?

A. Oh, I guess we manufactured from 80 per cent—this is an estimate—about 80 per cent of what we sold altogether.

Mr. Haycraft: I am going to hold you to actual figures on that, if they can be obtained. Have you got them, Mr. Lockrae?

Mr. Lockrae: I can obtain them for you, Mr. Haycraft.

Trial Examiner Sheppard: Will you make a note of that?

Mr. Freeman: Mr. Lockrae will furnish the combined figures of controls actually shipped to ABC.

Mr. Haycraft: Or for ABC's account.

Mr. Freeman: Or for ABC burners, to the Holland Furnace, and to all the furnace companies.

1702 Mr. Haycraft: That is right.

By Mr. Haycraft:

Q. I will ask the witness whether he had the arrangement during all those years that he would get credit for sales to those burner manufacturers.

A. Yes.

Q. When you sold?

A. Yes.

Q. That is during 1937 on through 1941?

A. Well, I can't be entirely specific, whether it was 1937, but that is about right.

Mr. Haycraft: It is my understanding that Mr. Lockrae will only include those figures that were given credit for over a certain period of time. That wasn't done in all instances.

The Witness: What year was it, Mr. Lockrae that they started to get direct from you?

Mr. Lockrae: Well, I can't reconcile that from the reports I have here, Mr. Hirsch.

The Witness: During the first few years of our dealings with Holland Furnace, we furnished burners and in some period in there, we changed and they bought them direct, because there wasn't any use in swapping dollars.

Mr. Freeman: When you say "burners" you mean with controls?

1703 The Witness: Yes.

Mr. Freeman: When you say "swapping dollars", you mean you did not charge them any more than what you paid for them?

The Witness: No.

Trial Examiner Sheppard: It was just a bookkeeping matter?

The Witness: That is all. It was tying up our money in handling the stuff, and the bookkeeping involved, without profit.

Mr. Freeman: And it was perfectly agreeable for you if Minneapolis-Honeywell got the controls direct, and relieved you of the billing?

The Witness: We preferred it, since we couldn't make any profit on the controls.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. Now, I understand that you gave both Mr. Owens and Mr. Boalt to understand that they couldn't expect to

sell you any controls unless they made a better price than Minneapolis-Honeywell, is that right?

A. Yes.

Q. And you have already related the reason you didn't divide the business with Mercoid, you gave it to Mr. Owens at that time?

1704 A. Yes, same thing.

Q. Now, you testified that you had certain competition from manufacturers of the pot type burner. I will ask whether or not you had any experience in competition with Quiet Heet Oil Burner Company?

A. Oh, yes.

Q. And what has been your experience in competing with that firm?

A. Quiet Heet?

Q. Yes.

A. They were always lower in price than we were.

Q. Did you lose much business to them?

A. Many a sale.

Q. And that was because of the—did you ever discuss that matter with Minneapolis-Honeywell representatives or officials, the price that this Quiet Heet was quoted?

A. Yes.

Q. For the Minneapolis controls?

A. Yes, I think so.

Q. What did you say to them and what did they say to you?

A. We said that they appeared to be buying controls at a lower price than we were and they investigated, I think, and Mr. Lockrae came back and assured me that that was not true.

1705 Q. When was it that you had a conversation with Mr. Lockrae?

A. Oh, I couldn't pin it down to a date. Mr. Lockrae has come to see us over many years, and I couldn't tell you the occasion of that visit.

Q. Could you tell whether it was 1938 or 1939?

A. No, I couldn't say.

Q. Did he give you figures at which they were selling to Quiet Heet at that time?

A. No, except to say they were paying the same prices now.

Q. And they didn't change your bracket on account of that, did they?

A. I don't think so.

Q. And give you a lower price on account of Quiet Heet?

A. I don't think so.

Q. As a matter of fact, you don't know what bracket Quiet Heet was in except—

A. (Interposing) No, except for what they said.

Q. —except what they told you?

A. Yes.

Q. And you couldn't remember the exact date of the conversation?

A. No, I think we had a dozen conversations along that line.

Q. This was quite a period from this, wasn't it?

A. Yes.

Q. Have you any idea as to the number of accounts
1706 that you lost to Quiet Heet?

A. No.

Q. But you know it was substantial?

A. You couldn't put it on the basis of the number of accounts we lost. We may have sold some burners even to those people who bought from Quiet Heet.

Q. But you do know that you suffered loss of business?

A. Yes.

Q. Was that the firm that you had in mind when you said that some of the firms competing with you featured the M-H controls in their advertising matter?

A. One of them, yes.

Q. And how did the prices at which they featured their controls compare with the prices that you were paying for Minneapolis-Honeywell controls?

A. You couldn't arrive at that, because the controls were sold in connection with a burner and we don't know how they split that up.

Q. Didn't they say something about that?

A. No, no, they operated the same way we did, burner with controls.

Q. Do you remember the prices at which they advertised their burners?

A. Yes, I think they got down, one year, to around $45.00.

Q. And what were you getting at that time?
1707 A. Around 60, I think.

Mr. Haycraft: That is all.

Redirect Examination by Mr. Freeman.

Q. Mr. Hirsch, there were other companies besides Quiet Heet that were selling at prices lower than yours?

A. Oh, yes, we were rather high priced.

Q. So that, as far as competition was concerned, you had competition from other oil burner manufacturers, aside from Quiet Heet?

A. We had competition from every oil burner manufacturer in the United States, operating in the territory we operated.

Q. And your territory was rather extensive, was it?

A. East of the Mississippi and north of the Ohio rivers.

Q. And I understood you to say yours is a rather high priced burner?

A. Yes.

Q. Just what do you mean by that?

A. Well, we were always up in the upper brackets in the dealers' prices.

Q. And has that been true throughout all your business career?

A. Yes.

Q. And that was true long before Quiet Heet ever entered the picture?

1708 A. Yes, yes.

Q. And even in the years back in 1923 and 1924, you were still in the high priced bracket?

A. Yes.

Q. And that has been carried on all through these years?

A. Oh, yes, our prices to dealers have always been above the average in the market.

Q. And there were always, all during these years, many oil burner manufacturers selling at prices lower than yours?

A. Yes.

Q. And some of those were equipped with Minneapolis-Honeywell controls and some with other controls?

A. Not all of them were equipped with Minneapolis-Honeywell, but I would say that all of the oil burner manufacturers got in on some of that business.

Mr. Freeman: That is all.

Recross Examination by Mr. Haycraft.

Q. Do you recall what other firm, besides Quiet Heet, featured Minneapolis-Honeywell controls in their advertising and sold at lower prices than you did?

A. Without attempting to name them by name, I would say all of them.

Q. All of your competitors sold below you?

A. No, you asked me if they featured Minneapolis-Honeywell.

1709 Q. I asked you if any competitors besides Quiet Heet featured Minneapolis-Honeywell controls and advertised their burners at lower prices than yours.

A. No, very few advertised prices at all, but they sold, a great many of them sold them under us.

Q. But Quiet Heet was the firm that made the national, this nationwide advertising campaign?

A. On a price basis.

Q. On a price basis and featured Minneapolis-Honeywell controls?

A. Yes.

Mr. Haycraft: That is all.

Redirect Examination by Mr. Freeman.

Q. There were other firms that featured Minneapolis-Honeywell controls?

A. Yes, but not prices. They did not advertise their prices like Quiet Heet did.

Mr. Freeman: That is all.

Trial Examiner Sheppard: Thank you very much.

(Witness excused.)

J. C. WESTMONT was thereupon called as a witness for the Respondent and having been first duly sworn, testified as follows:

1710 Trial Examiner Sheppard: Give us your initials, Mr. Westmont.

The Witness: J. C. Westmont.

Trial Examiner Sheppard: And your address?

The Witness: 1134 Regent, Madison, Wisconsin.

Mr. Haycraft: Where?

The Witness: Madison, Wisconsin.
Trial Examiner Sheppard: All right.

Direct Examination by Mr. Gilpatric.

Q. Mr. Westmont, with what company are you connected?

A. Wisconsin Oil Burner Company, Madison, Wisconsin.

Q. Are you one of the owners or proprietors of that company?

A. I am secretary and treasurer and one of the proprietors.

Q. What type of oil burner does your company manufacture?

A. Spinning flame pressure burner.

Mr. Haycraft: What, I didn't get that.

Mr. Gilpatric: Spinning flame.

The Witness: Spinning flame pressure burner.

By Mr. Gilpatric:

Q. How long have you manufactured oil burners?

A. Since 1928, I believe.

Q. Your trade name is what?

A. Wisconsin.

1711 Q. Where do you market your burners, Mr. Westmont?

A. Principally in Wisconsin, ourselves, and then we have a distributor in Portland and in Fort Worth; the Morley-Murphy Hardware at Green Bay is a distributor; and the other burners are nationally distributed—it is really of our manufacture but sold under the L. J. Mueller Manufacturing Company name. They handle the national distribution, so we stay out of the field.

Q. Mueller doesn't market the furnace under your name, "Wisconsin" do they?

A. No, they market it under their own name.

Q. Mr. Westmont, what has been your experience in purchasing controls beginning with the time you started in business? Tell us the names of controls which you have used.

A. We used a Tim-O-Stat, Penn control sold by General Electric; Penn Switch; Perfex; White-Rogers.

Q. Any Mercoid controls?

A. And Mercoid. We used them, yes.

Mr. Gilpatric: Will you mark this for identification as Respondent's Exhibit 121-A, 121-B and 121-C.

(The document referred to was marked Respondent's Exhibit 121-A, 121-B and 121-C for identification.)

By Mr. Gilpatric:

Q. Will you identify that for us, Mr. Westmont, Respondent's Exhibit for identification 121-A, B and C?

1712 A. Yes, sir, that is one of our oil burner circulars.

Q. Does that have any reference to controls?

A. Yes, sir, any standard make.

Mr. Gilpatric: We offer in evidence the circular referred to as Respondent's Exhibit 121-A to C.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: It will be accepted.

(The document referred to, heretofore marked RESPONDENT'S EXHIBIT 121-A, 121-B, and 121-C for identification, was received in evidence.)

By Mr. Gilpatric:

Q. Referring to the period in the subpoena, from 1937 to 1941, which make of controls did you purchase the most of for your burners?

A. Minneapolis-Honeywell.

Q. Even though you offered your dealers and customers any standard make?

A. That is right.

Q. Will you explain the reason for that fact?

A. The dealers all demanded Minneapolis-Honeywell, because up in our territory, on account of the advertising and the service, that is the only control that they really know; even though it costs more money, it would be easier for us to furnish that on account of the lessening in

1713 sales resistance.

Q. You said it cost you more money. Do you mean that the other makes of controls cost you less?

A. Yes, all of them.

Q. Did you charge any more for your burners when equipped with Minneapolis-Honeywell controls?

A. Even though they cost us more, we found, with each sale, we saved money, on account of less service.

Trial Examiner Sheppard: Less what?

The Witness: Less service that we would have to render.

Trial Examiner Sheppard: I see. Service. I see. Well, they asked the same question of somebody else this morning—who was it?

Mr. Gilpatric: Mr. Jeffrey.

Trial Examiner Sheppard: That is right. Go ahead.

By Mr. Gilpatric:

Q. Did you have a contract with Minneapolis-Honeywell during this period from 1937 to 1941?

A. We did.

Q. Did you have a contract with other control manufacturers?

A. We did.

Q. Did you feel that your contract with Minneapolis prevented you from purchasing from other manufacturers?

A. No, sir.

1714 Trial Examiner Sheppard: In fact, did you?

The Witness: What?

Trial Examiner Sheppard: In fact, did you purchase from others?

The Witness: Sure, from all of them.

Mr. Gilpatric: Yes.

By Mr. Gilpatric:

Q. You mentioned White-Rogers. What type—

Trial Examiner Sheppard: I want to know, before you do that, if you had a contract with others.

The Witness: We had a contract with most of them, yearly contract, and then we purchased without any contract.

Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. Well, I asked you about White-Rogers. What type of control did you purchase from that company?

A. Combination fan and limit control.

Q. Did you also purchase that unit from Minneapolis-Honeywell?

A. Few, very few.

Q. Most of your purchases of that control were from White-Rogers?

A. White-Rogers.

Q. When you ship your Wisconsin burners, Mr. Westmont, are they equipped with a set of three controls

1715 of the same make, or do you use different makes of controls on the same burner?

A. In most all the cases, all the same make, except when that burner calls for a combined fan, burner furnace unit, but it has a matched control set with combination White-Rogers fan and limit.

Q. But the primary and thermostat are of the same make?

A. The same make.

Q. What was your best price to distributors, of your burner, say in the year 1941?

A. $70.00.

Q. And to dealers?

A. $86.00. We are the highest priced burner to the dealer.

Q. How are you able to sell your burner at that price in competition with the other lower priced burners we have heard about?

A. Well, that is quite a story. That is a precision made job and, in that price, is the service that we render and we enjoy at the city of Madison, about 75 per cent of the business because we do render that service and, even though we have competition with most all of the other burners, the majority of the good dealers will pay us a higher price for our burner, because the public demands that type of service. We render that and there is nobody there that can render it, except ourselves.

Trial Examiner Sheppard: What percentage of 1716 business do you do in Wisconsin?

The Witness: Most all of it.

Trial Examiner Sheppard: Ninety per cent?

The Witness: Well, we have this Mueller furnace that we call a national account, and we just confine ourselves to the state of Wisconsin.

Trial Examiner Sheppard: I see.

By Mr. Gilpatric:

Q. Does Quiet Heet Manufacturing Company of Newark solicit your dealers in Madison?

A. Yes, sir.

Q. What effect, if any, has that competition had on your sales?

A. Not any.

Q. Do you know that Quiet Heet has gotten a better price for Minneapolis-Honeywell controls than you have?

A. Yes, sir.

Q. How do you know that?

A. Because the Minneapolis representatives lay their bracket prices right down before me and ask me which bracket we are going to go in for the coming year, based on our experience in the past year, and I know my cost.

Q. This takes place when you sign your annual contract?

A. That is right.

Q. And the fact—

1717 Mr. Haycraft: I move to strike the question and the answer. The answer is not responsive to the question.

Trial Examiner Sheppard: Well, let's go back and see.

Mr. Freeman: That kind of objection lies only in the mouth of the examining attorney and opposing counsel cannot make that kind of objection.

Mr. Haycraft: I suggest you study your evidence, your rules.

Trial Examiner Sheppard: We will go back and ask the reporter to read that.

(The record was read by the reporter.)

Mr. Haycraft: You say that was what his cost is and bracket prices, but it doesn't indicate that he knows what price Quiet Heet pays.

The Witness: Yes, I do. I know all the Minneapolis lowest prices and I know by the quantity that Quiet Heet produces that they are in that bracket.

Mr. Gilpatric: All right. I think that makes it pretty clear for everybody.

Mr. Haycraft: How does he know what Quiet Heet produces?

Mr. Gilpatric: You will have a right to cross-examine.

Mr. Haycraft: And I move to strike that. There

1718 is no foundation laid that the witness is familiar or knows anything about the volume of sales to Quiet Heet.

1719 Trial Examiner Sheppard: Well, I will let it stay there and give it what value I think it deserves.

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: All right, Mr. Gilpatric, we will proceed.

By Mr. Gilpatric:

Q. Now, speaking generally of your competition, Mr. Westmont, has the fact that other oil burner corporations receive better prices because of their volume hurt the sale of your burners, to your knowledge?

A. Not a bit.

Q. You mentioned earlier the fact that you sold your burner to the Mueller or "Miller" Furnace Company. Do you sell that without controls or with controls?

A. Without controls because we just trade dollars on those controls and there is no use tying the money up.

Q. Do you remember when you first attempted to get this business, this Mueller business?

A. I think 1936.

Q. And did you encounter any competition in getting this business?

A. We took that business away from Timken.

Q. Was there any other company, to your knowl-
1720 edge, other oil burner company, endeavoring to get that business at the same time?

A. Yes, all of them, Quiet Heet, principally, and Reif-Rex Oil.

Q. Do you do any advertising to speak of, Mr. Westmont?

A. Just once in a while in the trade papers.

Q. Could you give us some idea of the volume of your sales during the year 1941, dividing them per year between controls, and sales, your other sales?

A. I think our sales were around 400 and Mueller's sales were about 900 or 1,000, in there.

Q. So you manufactured about 14 or 15 hundred burners that year?

A. Practically.

Q. What price did you pay in that year, for example, for your motors?

A. For our motors?

Mr. Haycraft: I am objecting to this whole line, Mr. Examiner, the same as I did before as to other items than controls.

Trial Examiner Sheppard: Yes, allow that Mr. Haycraft has a general objection on this line. Proceed.

By Mr. Gilpatric:

Q. Did you answer that question, Mr. Westmont, what price you pay for the motors that go into your burn-

1721 ers, along with controls and the other component parts?

A. The present price on a motor is $8.07. You mean control prices, to date?

Q. No, I mean the accessory price for motors and the other component parts, pumps—

A. (Interposing) $8.07 for the motor and $5.10 for the transformer and $7.15 for the pump.

Q. Is that a single stage or double stage?

A. Single stage; and the fan, $1.11.

Trial Examiner Sheppard: Those are all integral parts?

The Witness: Yes, those are the principal parts.

By Mr. Gilpatric:

Q. When you add the controls, you have got the—

A. You have got the housing and the labor of assembling the machine work, but those are the principal parts.

Mr. Gilpatric: That is all.

Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Haycraft.

Q. What do you pay for controls?

A. Controls, I don't remember offhand. I think our control set price in 1937 was $17.25. Mr. Lockrae could look that up and give that to you exact. Some have been dropping in the last three or four years.

1722 Mr. Gilpatric: Mr. Lockrae, would you give us the set prices on sales to Wisconsin Burner Corporation for 1937 to 1941?

Mr. Lockrae: In 1937 it was $22.60 a set for intermittent ignition controls; in 1938 it was $19.35; in 1939 it was $17.25; in 1940 it was $17.25; and in 1941 it was $15.90.

Trial Examiner Sheppard: All right.

The Witness: That is right.

By Mr. Haycraft:

Q. Now, what bracket was he in during those years, that is, his actual sales, for actual purchases, what did he buy?

A. In 1937 he bought 636 instruments, exclusive of Mueller's purchases. In 1938 he bought 1,135 instruments; in 1939, 1,189; and in 1940, 1,495; in 1941, 1,486. All of those are exclusive of the Mueller.

Q. You don't have the Mueller figures?

A. No.

Q. Now, you stated on direct examination that you knew how many burners Quiet Heet sold. Where did you get that information?

A. From Sam La Pidus himself, right in New York City.

Q. When did he tell you that?

A. What year was the Heating and Ventilating Convention in New York?

1723 Mr. Lockrae: I think the last one was in 1938 or 1939, one or the other.

The Witness: I went to Sam and I asked him how in the world he could put on those standard parts and sell at that price, and he showed me where he could make an easy $10,000 a year making a dollar a burner, and he said, "You could do the same thing."

By Mr. Haycraft:

Q. How many burners did he tell you he was manufacturing?

A. 10,000.

Q. What year was that?

A. I think it was 1938 or 1939.

Q. Did he tell you what price he was paying?

A. Yes, sir, he offered to sell me burners. He could sell them to me cheaper than I could make them.

Q. But he didn't—he couldn't sell them cheaper than you could sell them in Madison?

A. No.

Q. Because it was too far away or because of that peculiar service you had?

A. That is right.

Q. Does he sell any burners in Madison at all?

A. I think he sold two.

Trial Examiner Sheppard: That is a sort of strange circumstance, Mr. Westmont.

1724 The Witness: It is.

By Mr. Haycraft:

Q. La Pidus doesn't give any service?

A. You buy their burner and it is shipped to the transportation company and it is yours, whether it runs or not it is your baby. You have just paid a price. You ain't paying anything for service. You just paid a price for what he called a burner and it is made of standard parts.

He capitalized on the General Electric name, the General Electric transformer, Webster pump, all good units.

Q. But he didn't sell but two out of that in Madison?

A. He didn't sell but two in Madison.

Q. And that is the only place you were competing with him?

A. That is all I would know exactly.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. Now, how did you come to buy your fan and limit controls from White-Rogers?

A. Well, all the peddlers will tell you that I am kind of an ornery buyer. They don't sell me. I buy just what I want to, and I just like it, that is all.

Q. Did it cost you less than the one you got from Minneapolis-Honeywell?

A. Yes, it cost me less, had a better price. Price 1725 don't mean anything to me, though.

Q. Do you remember what the difference in price was?

A. I think the price was about 15 cents. It would have been less—it would have been more than that, but I used the Standard control; I had a special knob put on the fan side. They built it just the way I wanted it.

Q. Has that price been more all the time or was there a time when the price was the same?

A. No, all the control manufacturers are higher than Minneapolis.

Mr. Gilpatric: Are higher?

The Witness: Yes, all of them are higher.

By Mr. Haycraft:

Q. You don't mean that.

A. I mean Minneapolis is higher than the other controls.

Q. This particular question I am asking you now is with reference to the fan and limit control which the White-Rogers Company, according to the record in this case, manufactured under a license from the Minneapolis-Honeywell Company, and I am asking you whether or not the price during all these years has been less than the Minneapolis-Honeywell price, or was there a time when it was the same?

A. No, White-Rogers' price has been lower.

Q. How long have you bought from White-Rogers?

A. Ever since they started manufacturing controls.

1726 Q. Do you remember when that was?
A. I think that was in 1937, 1936 or 1937.
Q. Do you remember what the price was that you paid White-Rogers?
A. I don't know right offhand what that was.
Q. Was it $4.75 or $5.25?
A. No, it was $4.75. We never got over the $5. It seems to me it was $4.65.
Q. $4.65?
A. I think it was $4.50, and 15 cents extra for the knob on the fan and limit.
Mr. Haycraft: That is all.
Trial Examiner Sheppard: Anything else?

Redirect Examination by Mr. Gilpatric.

Q. I just want to make sure that the record is clear that the price at which Quiet Heet burners were offered at Madison, even though they didn't sell, as you said, was lower than your burner.
A. Well, they offered that for $45.50 and sent post cards to all the dealers in the State of Wisconsin. As I would go around to my dealers, I would see that card. When they wanted to know how I was going to meet it—they said, "$86, think of that", and I said, "Go ahead and buy." I just told them, "Well, you are getting a burner in a
1727 box. If you don't appreciate my service that I rendered to you all these years, just buy it."
We have increased, you will notice, all along we have increased our business every year on that policy of giving the customer and the dealer the benefit of the doubt. He is always right with us.
Mr. Haycraft: You don't find many manufacturers doing that, do you, these days?
The Witness: Well, who we do business with have to do that with us, too. I throw it right into Minneapolis' hands if their stuff isn't right. I want that replaced if it isn't right.
Mr. Haycraft: Did Quiet Heet pay the freight to Madison?
The Witness: No, f. o. b.
Mr. Haycraft: There was some freight on it?
The Witness: Yes.

By Mr. Gilpatric:

Q. But that freight wouldn't make up the difference between $45 and $86?

A. No.

Mr. Gilpatric: That is all.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Thank you very much.

(Witness excused.)

1728 Trial Examiner Sheppard: We will have a short recess.

(A short recess was taken.)

Trial Examiner Sheppard: On the record.

Mr. Gilpatric: I will recall Mr. A. H. Lockrae.

Trial Examiner Sheppard: Miss Reporter, let the record show that Mr. A. H. Lockrae's testimony continues on behalf of the respondent.

A. H. LOCKRAE, was thereupon recalled as a witness for the respondent and, having been previously duly sworn, testified further as follows:

Direct Examination (Continued) by Mr. Gilpatric.

Q. Mr. Lockrae, will you explain your competition in doing business with Cleveland Steel Products during the period from the time you started selling them in 1938 through 1941?

A. Cleveland Steel Products Corporation has been in the oil burner business for at least 20 years, that I know of, and we have always sold them some controls.

In the early days they standardized on our equipment and because they were building burners for Timken at one time their combined volume enabled us to give both Timken and Cleveland Steel our lowest prices.

Q. That was an example of that dual transaction 1729 type that you referred to yesterday?

A. That is right. But when Timken started to build their own burners, we did not think that Cleveland Steel's sales would justify the continuance of our low prices, and, as a result, Cleveland Steel started to use a lot of competitive controls and standardized on them for their gun type or pressure burner. They built both the rotary and the gun type.

Q. What was the competitive name for that?

A. The first competitive make that got in with Cleveland Steel was the Mercoid Corporation.

Q. What did you do to meet that situation?

A. Well, in 1939, to come closer to competitive prices, we lowered our prices to Cleveland Steel, and in that year they purchased over three times as many units from us as they did in 1938.

Trial Examiner Sheppard: 1939?

The Witness: Yes, sir.

By Mr. Gilpatric:

Q. What about 1940?

A. In 1940 we gave Cleveland Steel our lowest prices and we sold them 14,977 instruments. We continued this practice in 1941 and we sold them 19,143 instruments, and, to our knowledge, our control prices were—we never met the competitive price, we lowered our price, but we 1730 did not meet it.

Q. Besides Mercoid, what was the other competition you had for a while?

A. For a while we had some Perfex competition at Cleveland Steel Products.

Q. Those were the companies that continued to solicit Cleveland during the ensuing years, to your knowledge?

A. For one year, I believe it was, Mercoid and Perfex and ourselves split the business, and then Perfex dropped out of the picture and then it was Mercoid and ourselves.

Q. Mr. Lockrae, refer now to the Century Engineering Company, which has also been referred to in the evidence, and give us briefly the sales of controls to that company during the period from 1936 or 1937 to 1941.

A. Well, Century has always been a highly competitive account and, to my knowledge, they never used a single manufacturer's controls exclusively. They always bought from two or three sources.

As I recall, they first standardized on Mercoid, then on Penn controls, using ours as optional, and that condition exists today.

In 1936 we gave them our 7,500-unit prices and they purchased 8,090 units. In 1937, to come closer to the competitive situation, we gave them our 25,000-unit prices and that purchased 14,619 instruments. In 1938 we gave 1731 them again our 22,500-unit prices, and they purchased 6,672 instruments. In 1939 we gave them our 15,000-

unit prices and they purchased 10,484 instruments. In 1940 we gave them our 15,000-unit prices and they purchased 9,857 instruments. Again in 1941 we gave them our 15,000-unit prices and they purchased 8,423 instruments.

It is interesting to note, too, that from the evidence on record given by Mr. Henning of Penn Electric Switch Company, that in 1938 Century purchased a set of Penn controls for $15.50 and paid us $16.05 a set.

And, incidentally, these figures are all the constant ignition type control because that is all the Century uses; and in 1939 Penn was $14.70 and M.H. was $14.85; and in 1940 Penn was $13.50, which was the price of our No. 661 constant ignition control; that is, the set included that control, and M.H. was $14.75.

Then in 1941, again including the No. 661 control which Century catalogued and used, Penn's price was $12.80 and our price was $14.05 a set.

Q. Did Nu-Way Corporation at any time standardize, as that term has been used here?

Mr. Haycraft: Are you talking about Nu-Way or Century?

Mr. Gilpatric: Nu-Way.

Mr. Haycraft: You have left Century, then?

1732 By Mr. Gilpatric:

Q. Have you anything further to add to Century?

A. That is all. What was your question?

Mr. Gilpatric: Read the question.

(The question above referred to was read by the reporter.)

By Mr. Gilpatric:

Q. Did they standardize on Minneapolis controls?

A. Yes, they did for several years.

Q. Did you ever lose that business to competition?

A. Well, we lost a goodly share of it to competition.

Q. What are the facts there?

A. Well, in 1936 Nu-Way had our 3,000-unit prices and they purchased 4,561 instruments; in 1937 we gave them our 3,000-unit prices and they purchased 2,753 instruments. In 1938 we gave them our 2,250-unit prices as being—

Q. (Interposing.) 2,200 or 22,500?

A. Pardon me. I wonder if that is wrong. I was right. Bracket 2 they had in 1938, which was 2,250 units. But in that year they standardized on the Penn control and only purchased 1,676 instruments from us.

The competitive situation continued in 1939. We gave Nu-Way our 3,000-unit prices and they actually purchased 2,106 in that year. In 1940 they made our controls—we gave them our 7,500-unit prices and they made our con-
1733 trols optional to the dealer with no price differences.

In previous years, when they were using both Penn and M.H., the dealer was charged more for a burner equipped with M. H.

Q. Even at those prices were your controls costing them more than competition?

A. As far as I know, that is the case; at least, I was told. Let's see that was in 1940; that year they purchased 3,641 instruments.

Trial Examiner Sheppard: What class would that be?

By Mr. Gilpatric:

Q. What bracket?

Trial Examiner Sheppard: What bracket, I mean.

A. Well, the 7,500 unit was bracket 3-A.

Mr. Haycraft: They were actually purchased in bracket 2, then, is that right?

The Witness: Not in 1940. I get your point. They actually purchased 3,641 instruments, but we gave them our 7,500-unit prices that came closer to the competitive prices that year; and in 1941 we gave them our 15,000-unit prices, which again did not meet the competitive prices that existed but they did purchase 5,875 instruments from us that year.

By Mr. Gilpatric:

Q. You gave that price to meet the competition?

1734 A. That is it exactly.

Mr. Haycraft: I object to it as leading.

The Witness: I think I already stated that, didn't I, Mr. Haycraft?

Trial Examiner Sheppard: Yes, I will let the record stay the way it is. Sometimes those leading questions help out.

By Mr. Gilpatric:

Q. Mr. Lockrae, in view of the earlier examination of Mr. Hirsch, I wish you would state how the prices which Minneapolis-Honeywell sold controls at to A.B.C. during the years 1937 to 1941 compared with Quiet Heet Manufacturing Company's prices for those same years.

A. In 1937 Quiet Heet was in our 22,500-unit bracket. They purchased 27,584 instruments and the price was $17.85 a set. In that year A.B.C. was in our 12,000 to—well, our

12,000-unit bracket. They purchased 17,656 instruments, and their price was $19.85 a set.

In 1938 Quiet Heet started in our 22,500 bracket. They actually purchased 38,835 instruments, which gave them another retroactive credit, and that made their price $16.25 a set.

Q. Mr. Lockrae, let me interject to ask you whether or not the sales figures of A.B.C. which you are giving include sales to Holland Furnace and these other furnace
1735 manufacturers to which Mr. Hirsch referred as having purchased his burner without controls, the controls being purchased from you.

A. These figures do not include any of the sales that we made direct to Holland Furnace Company, the controls to be used with the A. B. C. burner.

Q. All right, go on to 1939.

Mr. Haycraft: You didn't give the A. B. C. price.

The Witness: I thought I did, didn't I?

Mr. Gilpatric: No.

The Witness: A. B. C. was in our 22,500 bracket and they purchased 6,569 instruments, and their price was $17.25, and that, incidentally, was the price which we gave Quiet Heet at the beginning of the year, but they did get a retroactive credit and got a lower price before the year was over.

And in 1939 we gave Quiet Heet our 30,000-unit price. They bought 53,590 instruments, and our price was $14.90 a set. A. B. C. was in our 15,000-unit bracket. They purchased 11,529 instruments, and the price was $15.95 a set.

And then in 1940 Quiet Heet was in our 30,000-unit bracket and purchased 82,173 units. The price was $14.65 a set. A. B. C. was in our 30,000-unit bracket, purchased 15,739 units, and our price was $14.65 a set.
1736 In 1941 Quiet Heet purchased 91,638 units. Our price was $13.75 a set; and A. B. C. was in our 30,000 bracket, purchased 19,851 units, and the price was also $13.75 a set.

By Mr. Gilpatric:

Q. Mr. Lockrae, does your company sell thermostats and limit controls to manufacturers of pot type burners?

A. We do.

Q. Those burners use the primary control, do they not, of the oil float valve type?

A. Constant level float valve, yes.

Q. Are those burners, to your knowledge, sold in competition with and for the same purposes as pressure and rotary type burners?

A. They are.

Mr. Gilpatric: Will you mark this as Respondent's Exhibit 122 for identification?

(The document referred to was marked Respondent's Exhibit 122 for identification.)

The Witness: You want me to explain that?

By Mr. Gilpatric:

Q. Yes, will you identify it for us and explain it?

A. This circular covers a vaporizing oil burning furnace manufactured by the Perfection Stove Company of Cleveland, Ohio.

Q. Is that a pot type burner?

1737 A. That is a pot type burner and it is advertised up to 70,000 BTU capacity.

Q. What size home will that heat?

A. Well, that would be an average small home.

Trial Examiner Sheppard: Five or six rooms?

The Witness: Five or six rooms.

By Mr. Gilpatric:

Q. Will it refresh your recollection if I show you the booklet put out by the Perfection Stove Company, which I will ask be marked for identification as Respondent's Exhibit 123-A and B?

(The document referred to was marked Respondent's Exhibit 123-A and 123-B for identification.)

A. This is a catalogue or home owner piece of advertising put out by Perfection Stove Company.

By Mr. Gilpatric:

Q. Are the types of heaters referred to in Respondent's Exhibit for identification 123-A and B the same type as that shown in the circular, Respondent's Exhibit 122 for identification?

A. The same general type, yes.

Q. Is the Perfection Stove Company one of the larger manufacturers of pot type burners?

A. They are.

Mr. Gilpatric: Respondent offers in evidence Re-
1738 spondent's Exhibits 122 and 123-A and B.

Mr. Haycraft: May I ask the witness a question about it?

Mr. Gilpatric: Yes.

Mr. Haycraft: Which one of the exhibits which has been identified here as a primary control 116 or 117 was used on this pot type burner?

The Witness: Neither the R-116 or 117 primary controls are used with that type of burner. The room thermostats and limit controls of standard makes are used.

Mr. Haycraft: Which one of these primary controls that you have here is used on this that you identified, I mean limit controls?

The Witness: The limit controls?

Mr. Haycraft: Yes.

The Witness: That would be today's type No. LA-419, if just a limit control was involved. If the furnace was equipped with a fan, as most of them are, it would probably be the type 404 combination control, which includes the fan switch and the limit control.

Mr. Haycraft: I object to the exhibits, Mr. Examiner, as being irrelevant and immaterial. As the witness has stated, they use a different primary control than was involved in this proceeding up to this time.

Mr. Gilpatric: On the other hand, Mr. Examiner, 1739 I think it has been made evident now by testimony of other witnesses, Mr. Crawford of Timken, Mr. Hodges of Detroit Lubricator, and this witness, and Mr. Hirsch of A. B. C. that these pot type burners are sold in competition with the pressure type and rotary type burners and carry controls made by this company, the respondent here, and we think it is material, in view of the stipulation, that you include all types; but this company only sells 25 percent of the annual volume of sales of the whole country, and I don't want to burden the record with all this other data.

Trial Examiner Sheppard: You just want to put that in as an illustration?

Mr. Gilpatric: Yes, as an illustration.

Mr. Haycraft: On that point, Mr. Examiner, we seriously urge that this is irrelevant and immaterial and going into a field entirely foreign to the Commission's case in chief and foreign to the allegations of the complaint. The testimony we have taken, the stipulation we have, the first exhibit in this case was confined to the type of products that have been in evidence up to this time, in which the field is in domestic pressure and gun type burners.

It is true that these witnesses on previous occasions have testified, have referred to the pot type burner as being competitive, but that doesn't qualify or make
1740 that testimony, or at least the evidence here, relevant and material to the issues in this case.

Respondent is not engaged in the manufacture of burners. He is engaged in the manufacture of temperature controls that are used on burners.

As I say, as far as the Commission's case in chief and all its proof is concerned and the stipulation, it is all referring to the pressure and gun type burners, rotary and gun type.

Now, we are going to be led into this field, another field, in this type of testimony, and you are going to have a much longer record than needed and you are going to have a number of exhibits that are not relevant and are immaterial to the instant case, because if this is going to be allowed in there will have to be more testimony taken on rebuttal.

They are going beyond the Commission's case in chief.

Trial Examiner Sheppard: Does that Exhibit No. 1 have anything to say about pot type burners?

Mr. Freeman: Exhibit 1 has to say about pot type burners and as to what constitutes the primary control and, if I might here, I would just ask Mr. Lockrae whether or not the pot type burners of the kind he referred to, as made by the Perfection Stove Company, where there
1741 is included a limit control and a thermostat, likewise include a primary control.

The Witness: They do include a primary control.

By Mr. Freeman:

Q. And what is the purpose of that primary control?

A. It is to provide for the safe operation of the burner.

Mr. Haycraft: Yes, but that primary control, Mr. Examiner,—

Mr. Freeman: (Interposing.) Will you please let me get through?

Mr. Haycraft: I am still making the basis of my objection.

Mr. Freeman: Mr. Haycraft, I want to be courteous to you.

Mr. Haycraft: I am beginning to doubt it very much.

Trial Examiner Sheppard: Go ahead, gentlemen. I will hear you both.

Mr. Freeman: Mr. Haycraft, I just call your attention to the fact that I said if I could ask one or two questions of the witness I would then show the pertinency of the pot type burner primary with the Commission's exhibit, the stipulation, Commission's Exhibit 1, in response to your question.

Trial Examiner Sheppard: Proceed.

By Mr. Freeman:

1742 Q. So that I get it clear, there is a primary control used in connection with the pot type burner for safe operation?

A. Yes, sir.

Mr. Freeman: Now, Mr. Examiner, I would like to read the definition of a primary control as found in Commission's Exhibit 1, and thereafter I would like to ask this witness, who is familiar, as your Honor well knows, whether or not this definition covers the primary of the kind referred to in that exhibit, where there is illustrated a pot type control, and I now read from Commission's Exhibit 1:

"A primary control"—

Mr. Haycraft: What page?

Mr. Freeman: Page 6.

"A primary control, which is a control device controlling the cycle of operation of the oil burner so as to start and stop it when heat is needed or no longer needed (as governed by the thermostat) and to prevent a hazardous condition from occurring when there is a failure of combustion, the primary controls manufactured by the respondent being called a protectorelay"—

that is merely a notation of what is manufactured by the respondent. However, I will now ask the witness.

By Mr. Freeman:

Q. I am asking you whether or not the definition given to a primary control as found in this stipulation
1743 covers the structure shown in the pot type burner or used with the pot type burner about which we are talking now.

Mr. Haycraft: I object to that question, unless it uses the word "protectorelay", which we have been talking about here, and which has been a matter of proof in the

Commission's case. If he will tell us whether that takes a protectorelay, I will withdraw my objection, but the protectorelay is the respondent's product we are talking about now.

Trial Examiner Sheppard: I will leave that to you, Mr. Lockrae.

The Witness: It is a primary control, that is, the constant level float valve is a primary control, and it safeguards against the failure of combustion or the abnormal discharge of oil.

Mr. Haycraft: But it is not a protectorelay.

Trial Examiner Sheppard: Does it have a different function from the protectorelay or do they act the same?

The Witness: They both perform the same results but they are not designed the same.

Mr. Haycraft: Mr. Examiner, I think it is only fair to say further for the record that at the time this stipulation, Commission's Exhibit 1, was prepared and entered into, we stayed away from pot type burners deliberately, I did, and there was discussion of it at the time, and
1744 we kept it out of the stipulation because I didn't want to get dragged into it, and I don't think it is fair to drag it into this case under those conditions.

Trial Examiner Sheppard: Do you gentlemen think it is important in your case to go into the pot type when we haven't up to this time? I tend to agree with Mr. Haycraft that it will make the record longer

Mr. Freeman: Mr. Examiner, Mr. Haycraft said he wanted to keep that out. He is now talking about some of our preliminary conferences before this stipulation was entered into. But let us look at the stipulation as entered into.

Mr. Haycraft: We just read the difinition of a primary control and it was limited to protectorelay.

Mr. Freeman: I am going to read from the stipulation, page 4:

"The total volume of respondent's sales of said products annually during the years 1939, '40, and '41 constitute approximately 25 percent of the total number of temperature controlling devices (including, but not limited to automatic temperature controls as hereinbefore defined) sold annually in the United States to manufacturers of all types of burners of oil for domestic heating plants, including vaporizing, pot, and distillate types, and to contrac-

1745 tors, dealers, and wholesalers in such burners and controls."

Now, I have read from the stipulation. Pot type burners are specifically referred to.

Mr. Haycraft: That is the only reference there is in it, and you will find in the balance of the stipulation every paragraph refers to the various items with respect to the other types of burners and specifically defines what an automatic temperature control should be and goes on and defines it as the type I am talking about and does not include the pot type burner.

I think, in all fairness to the Commission, they should follow the line we took in the stipulation.

Mr. Freeman: Mr. Examiner, in all fairness, if you followed Mr. Haycraft's argument through to a logical conclusion, protectorelay is the trade name of a primary control as used by this company. Mercoid calls it its K. M. I. Pyratherm. The Penn Company calls it its Safetrol. If you followed Mr. Haycraft's argument to a logical conclusion, all of the testimony where they mentioned a primary, and it was known as a Pyratherm or a Safetrol, it would be contrary to his theory.

Mr. Haycraft: I deny that, but I do insist it would be a comparable type of control to the Protectorelay, and that is what we referred to in the case in chief.

Mr. Freeman: Mr. Examiner, the principal issue 1746 here is one of competition.

Mr. Haycraft: No, it isn't, not between burners; between manufacturers of controls.

Mr. Freeman: Will you please extend me the courtesy of letting me finish my statement before you interrupt?

Mr. Haycraft: You have consistently denied that courtesy to me.

Mr. Freeman: Let me make this statement.

Competition is one of the issues, as I understand this case. Now, we have in the stipulation reference to a pot type burner. Does that mean we can't put in any evidence to show what pot type burners are? Does that mean that after witnesses, such as Mr. Schafer of Timken, Mr. Hirsch here, and Detroit Lubricator Company's Mr. Charley Hodges, testified that they were actively engaged in competition with such type of burners, that we can't put in any evidence to show what they are?

Mr. Haycraft can argue when he argues his case before

the Commission that it is immaterial, but we certainly are entitled to show the pot type burner is in competition with burners upon which we put our controls.

After all, competition is one thing that determines price, and I think we are entitled to put it in, in view of the stipulation.

1747 Mr. Haycraft: The answer to that is: I wish to point out that the competition between manufacturers of burners is not involved in this case. It is competition between manufacturers of controls, and that is competition between manufacturers of comparable controls.

Mr. Freeman: And also I would like to call the Major's attention to Paragraph 4 of count 3 of the complaint, and I am going to read it in its entirety, because it is important on this point:

"The effect of the said discriminations in price mentioned in Paragraph 2 and 3 hereof has been, or may be substantially to lessen competition in the line of commerce in which respondent is engaged, and to injure, destroy, and prevent competition between the respondent and its competitors, and to injure, destroy, and prevent competition between the customers of the said respondent in the sale and distribution of automatic temperature controls for heating plants, and has been and may be to tend to create a monopoly in said line of commerce in the various localities or trade areas in the United States in which said respondent and its competitors are engaged in the sale and distribution of said products."

Now, in the light of that sort of an allegation, I think we are entitled to show that the price of oil burners,

1748 including controls—Mr. Haycraft has referred a good many times to Quiet Heet and some of these other companies, that those prices extended by such companies are made on the basis of meeting this kind of competition, and the complaint here alleges competition as between customers of the respondent with other people engaged in selling automatic temperature devices mounted upon oil burners, and I think it is pertinent.

Mr. Haycraft: In answer to that, Mr. Examiner, I desire to point out that throughout the Commission's case in chief, including this stipulation, we have confined our proof to automatic temperature controls that are found on the domestic type burners or described as and defined in the trade as the pressure and the gun type burners.

Now, then, when the Commission interprets its complaint in the taking of testimony and the making of stipulations in that manner as outlined, then it seems to me that going beyond that is irrelevant and immaterial and going into a field not involved in this case.

Mr. Gilpatric: Is the Commission abandoning the allegation in the complaint that refers to competition between customers of the respondent?

Mr. Haycraft: No, because the complaint is specific in its language and I followed it in my proof. It is customers of the respondent engaged in the sale of auto-
1749 matic temperature controls for use on pressure and gun type burners.

Mr. Gilpatric: I just repeat that we are not bound by your interpretation of the complaint. That is for the Commission.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

While the Examiner agrees with Mr. Haycraft that this line of testimony is not important and not necessary to the determining of the issues in this case, the respondents have indicated that they think it is an important matter in their defense and to that extent the Examiner is going to allow them to put in these exhibits and allow Mr. Haycraft the opportunity to go to the Commission to strike, if he finds it necessary, and we will take the testimony so we won't have to return on another trip here.

I will accept Exhibits 122 and 123-A and B in evidence in reference to that particular matter.

(The documents referred to, heretofore marked for identification RESPONDENT'S EXHIBITS 122, 123-A, and 123-B, were received in evidence.)

Mr. Gilpatric: We respectfully differ with your Honor's views on this point.

Trial Examiner Sheppard: All right.

1750 Miss Reporter, let the record show an adjournment to 10:00 o'clock in the morning.

(Whereupon, at 4:30 p. m., December 2, 1943, the hearing in the above-entitled matter was adjourned.)

1751

Room 1123,
New Post Office Building,
Chicago, Illinois.
December 3, 1943.

Met, pursuant to adjournment, at 10 a. m.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission.

Messrs. Cravath, de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and Paul J. Chase, Esq., 15 Broad Street, New York, New York, and Bair & Freeman, by Will Freeman, Esq., 135 South La Salle Street, Chicago, Illinois, Attorneys for respondent.

1752

Proceedings.

Trial Examiner Sheppard: Miss Reporter, show the hearing is convened in the matter of Minneapolis-Honeywell Regulator Company, Docket 4920.

Show a continuation of the examination of Mr. Lockrae by the respondent.

A. H. LOCKRAE, resumed the stand and testified further as follows:

Mr. Gilpatric: Mr. Lockrae is now available for cross-examination, if the Examiner please.

Trial Examiner Sheppard: All right.

Cross-Examination by Mr. Haycraft.

Q. On this matter of bracket prices, how long has your firm been following that bracket system of classifying their customers in the varying discounts and varying volumes?

A. Well, I came to work with the Honeywell Company in 1924 and that plan was in practice with that company at

that time, and when we consolidated with Minneapolis Heat Regulator Company in 1927 we continued to follow that plan, and Minneapolis had followed a similar plan of selling various quantities at varying prices for varying quantities, so my experience in the control business, in all my experience in that business that plan has always been practiced.

1753 Q. Well, has there been any change in the method of arriving at bracket prices and the margins between the various brackets or the arrangement of those brackets during the time that you have been holding your position?

A. Well, the scene in both respects has fluctuated. As conditions change, why, we had to change. We changed the bracket quantities from time to time and we changed the bracket prices from time to time.

Q. Well, when you first came with the firm, did they have more than six brackets at that time?

A. I don't remember. It seems to me that they had five.

Q. Well, now, at the beginning of the period defined in Commission's Exhibit 1 for the year 1937, when was that arrangement put into effect?

A. You mean the number of brackets?

Q. The number of brackets and the range in each bracket.

A. Well, it was put into effect either early in the year or late in the previous year.

Q. Do you know whether it had been used during 1935 or 1936, or were there different arrangements during those years?

Mr. Gilpatric: I have no desire to be captious, but of course this line goes back further than the direct examination did. I didn't question him with regard to bracket prices prior to 1936 and 1937.

1754 Trial Examiner Sheppard: I think he wants to get some idea when it started.

A. Well, I have a record here, Mr. Haycraft, that shows we had six brackets in 1937 and we also had six brackets in 1936.

By Mr. Haycraft:

Q. When did that six brackets start? That is the question.

A. I can't tell you whether it started in 1936. We might have had six brackets in 1935. I don't remember.

Q. Well, now, how did you arrive at this range in your brackets that you had in 1936 and 1937, Mr. Lockrae?

Mr. Gilpatric: Speaking of dollar range or quantity range?

By Mr. Haycraft:

Q. Quantity range first.

A. Well, it was undoubtedly the same theory that was used there and the same practice that was used in later years, in that we had to have our prices and our brackets somewhat commensurate with the competition and I imagine we used the same logic then as we would today if we were establishing prices for 1944.

Q. What competition did you have in mind in your arrangement of quantity brackets?

A. Well, our competitors, the control people with
1755 whom we were competing.

Q. Who were they?

A. Well, at that time we had Penn Switch and Mercoid and we had Perfex.

Q. What were their brackets that you had to meet?

A. I don't recall what they were at the moment.

Q. Well, do you have any records to show what you were shooting at?

A. In 1936?

Q. Yes.

A. I couldn't answer that.

Q. As a matter of fact, now, Mr. Lockrae, Minneapolis-Honeywell is the leader of the industry and it isn't a case of your following your competitors so much as your competitors following you?

A. That is not true, Mr. Haycraft.

Q. You deny that?

A. I deny that.

Q. You deny that you are the leader of the industry?

A. No, sir.

Q. But you deny that your competitors follow you?

A. I made the statement that we had to take the competitive situations into consideration and we had to have our bracket quantities and our prices somewhat commensurate with that situation in order to exist.

1756 Q. Well, did your competitors have six brackets arranged just as you had these arranged in 1936 and 1937?

A. I can't answer that. I don't know. I don't know that I have any records now, this late date, showing that.

Q. Well, you know, don't you, from your recollection, that they did not?

A. Well, I can't say that I do.

Q. You know that some of your competitors didn't even have bracket prices?

A. I couldn't say that today. I know that they sold on quantity. That was the consideration in the establishment of their prices, the same as it was in ours, and my recollection is that they did have brackets but what they were and what quantities I can't recall.

Q. You heard Mr. Hirsch testify yesterday as to what he told one competitor; at least, that the price had to be lower than Minneapolis-Honeywell if he expected to get any business.

A. I am not surprised at that remark.

Q. Isn't that true of all the oil burner manufacturers?

Mr. Gilpatric: Isn't what true?

By Mr. Haycraft:

Q. In other words, don't they all tell any of your competitors that if they hope to get any business, that they must quote lower than Minneapolis-Honeywell?

1757 A. I think a shrewd buyer would make that statement to anyone.

Q. Did they ever tell you that you had to get lower than your competitors in order for you to get any business?

A. They certainly told us we would have to get lower or we wouldn't get the business.

Q. But they never told you you would have to get lower than your competitors?

A. Not that I recall.

Q. As a matter of fact, to your knowledge, have you ever seen a bracket set-up which was similar, insofar as the arrangement of the quantity is concerned, to yours at any time?

A. Yes, I have seen bracket set-ups, that is, where it would show the prices in the various brackets. That was in evidence here from Mr.—

Q. (Interposing.) Yes, but were those quantities or the prices comparable to the prices or the quantities that you observed in your brackets?

A. I don't recall just exactly what they were, but I know that they were similar.

Q. Hasn't it been your experience that your competitors would wait and see what you were going to do in the way of brackets and prices before they get out their brackets and prices?

1758 A. Oftentimes that would happen.

Q. Well, didn't that usually happen?

A. I couldn't say as to that. I know that we always endeavored to have our prices set up very early in the year or late the previous year because the manufacturers were all getting out their price sheets and their literature and it was quite a convenience for them if we could have our price data in their hands early, and when our prices were figured and our quantities were set, we issued our prices.

Now, competition may have followed or they may have been in ahead of us, I don't know.

Q. Did you have any fixed policy as to the margin that you would observe between your prices and your competitors' prices?

A. We would take the history of our competitors' prices for the previous year and their bracket structure, and after we had established our first bracket manufacturers' price, as I explained a day or so ago, then we would arrange our bracket structure and our prices as we thought best to meet the conditions that existed.

Now, if the competitor came along and changed them, that was their prerogative; that is, changed their structure.

Q. Well, you say that you took these competitive brackets of prices into account in arranging your own.

1759 What I am trying to get at is, just what use did you make, or how much of a factor were these competitive brackets or prices in arranging your own?

A. They were a very vital factor.

Q. If they were a very vital factor, can you recall just what you made of them? What was your policy?

A. Why, certainly. Let me explain a little in detail. Perhaps it will give you a better idea.

When our salesmen were calling on manufacturers throughout the year, their sales reports were constantly containing information on competitive prices and quantities. Now, we would watch those reports very carefully. We would get a report from one part of the country on a particular manufacturer; we would get another report from some place else on another manufacturer.

Well, in our experience and knowing just about the potential of those various manufacturers, we could get a

very good idea of whether the prices mentioned were right. Oftentimes they were very misleading; but when we would get the same figures from two or three different accounts of comparable price, we took that as fact.

And we garnered that information and we picked it up throughout the months of the year and that guided us in bringing up our new bracket structure and our prices for the succeeding year.

1760 Q. Well, what prices did you observe from your price reports, from your reports from your investigators in 1936, that were the basis of your price structure in 1937?

A. Well, you are talking back six or seven years, Mr. Haycraft, and I can't make any statements in answer to that question unless I could dig up more records than I have with me.

Q. Well, do you keep your records of your reports that far back?

A. No. I could probably dig some out of the files, or something of that sort.

Q. Do you keep work sheets or notes for the preparation of your brackets for 1937?

A. Ordinarily not. When the year was over, it was past history as far as we were concerned.

Q. Don't you make a comparison year by year as to the factors that are taken into consideration?

A. Certainly.

Q. Which is the most important factor in 1937, your cost of production of your controls or your competitive situation?

A. Well, the competitive situation is the guiding factor. Costs, of course, are given considerable consideration. We know the mark-up that we must have in order to make a profit. Naturally, we give that consideration.

1761 Q. Well, now, you figured a price of $23.85, that is, your net price on 50 to 99 sets, or 150 units, as a basis. Now, what factor did you take into consideration to determine that price?

A. Well, I think, Mr. Haycraft, we followed the same practice as I explained yesterday or the day before.

Competitive list prices are published; they are available anywhere, also their discounts to the dealer and to the wholesaler, and when we sell a bracket 1 manufacturer who is going to do business through the wholesaler we have to allow him a margin of profit and that is taken into consideration in the setting of our bracket 1 prices.

Q. What margin of profit do you figure on them?

A. Oh, it would vary.

Q. Well, your bracket 2 price in 1937 was $1.25 less than your bracket 1 price. How do you arrive at that margin, that difference?

A. Undoubtedly just as I explained, with the knowledge we had of the competitive situation with manufacturers who would be classed by us in that bracket; we established that price with that knowledge.

Q. What competitors had a bracket the same as yours?

A. I don't know. I didn't go by the competitors' brackets. We went by this information we accumulated.

Q. Your bracket 3 was $1.30 less than your bracket
1762 2. How did you arrive at that differential?

A. I would say exactly the same as explained.

Q. Your bracket 4 was again $1.65 less than your bracket 3.

A. They were all arrived at on the same basis, as far as I know, Mr. Haycraft.

Q. Now, you can't recall any competitor that sold any product at anywhere near those prices at the time you made up that bracket, can you?

A. Well, I know this, that our competitors' prices were always lower than ours and some one of those prices might be less than another, but I couldn't answer that question intelligently.

Q. As a matter of fact, didn't you work these brackets out on a basis of your varying costs of production and your distribution and all that on these various quantities?

A. Not in 1936 and 1937. You see, Mr. Haycraft, we know these manufacturers, we know what volume they have. We have a general idea and sometimes very authentic information as to the competitive price situation that exists with those manufacturers.

Now, we may have four or five accounts that might be in bracket 2 one year and their quantity might have been, say, 300 sets of controls. Well, competition, the situation
1763 that existed there and the prices that they were given, this group of manufacturers, we might change our bracket structure or our prices to meet that particular situation.

Trial Examiner Sheppard: Have you had cases like that?

The Witness: Well, the conditions are fluctuating like that all the time.

Now, we always were very careful about that because you could see the situation that we were in, because if we lowered our prices too, that is, lowered our bracket prices, then at the start of the year everyone that was in that bracket was going to have the benefit of those lower prices, so this wasn't just a hit and miss proposition with us. We had to weigh the overall picture and then decide on our brackets and there were long lengthy discussions and hours and hours of time spent in arriving at those brackets.

By Mr. Haycraft:

Q. Who actually figured these differentials on these brackets?

A. Well, usually I did the base work. We would all get together and consult, as I say, and spent hours and hours together in suggesting these brackets, in determining where the various accounts would fall in proportion to their purchases, and so forth.

Trial Examiner Sheppard: When were these new prices gotten out on these brackets, as a rule?

1764 The Witness: We always tried, Major, to have them ready by the first of December of the previous year. That is what we strive to do. Sometimes conditions are such that we can't do it.

Trial Examiner Sheppard: That is, prices for the succeeding year?

The Witness: The succeeding year.

Trial Examiner Sheppard: That is what I want to get.

By Mr. Haycraft:

Q. Now, in 1938 you made a change in your bracket structure by increasing your quantity for bracket 1, increasing the quantity for brackets 2, 3, 4, and 5, and then put certain customers in a sixth bracket which was the same so far as the quantity was concerned but they got a lower price, at the time you attempted that 10,000 set price, to September 1, 1938.

What was the reason for your quantity set-up in those brackets in that year? Was there a change in your cost of distribution or production?

A. Now, your question again, Mr. Haycraft, if I remember correctly, you said in 1938 we increased the quantities in the first bracket?

Q. That is right, 50 to 749 rather than 50 to 99 sets.

A. Wait a minute. In 1937 it was 100 to 349.

1765 Q. That is your bracket 2.

A. No, our bracket 1 in 1937 was 100 to 349 sets.

Q. According to this exhibit, I am talking about.

A. There is an error there somewhere.

Q. Your testimony yesterday was 150 units, or 50 sets was your bracket 1.

A. 150 units or 50 sets.

Q. Bracket 1.

A. In 1937 this record I have shows it was 100—

Q. (Interposing.) Your testimony yesterday was 50 to 150.

A. I wonder if I made an error.

Trial Examiner Sheppard: Off the record while they straighten it out.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: I would certainly want to check again before I could be positive, in view of that.

By Mr. Haycraft:

Q. What was the situation in 1938? According to Exhibit 1, the bracket 1 is 50 to 749; bracket 2, 750 to 2,999; bracket 3, 3,000 to 7,499; bracket 4 is 7,500 to 14,999; bracket 5 is 15,000 and up; and bracket 6 is 15,000 and up.

A. Mr. Haycraft, you remember in previous testimony that business in 1937 sloughed off in the last quarter of the year. To start the year it looked very promising:

1766 everyone was enthusiastic and, as Mr. Sweatt pointed out, there was a lot of optimistic buying; and in 1938 we again had to take the customers' 1937 purchases into consideration, and we regrouped those manufacturers to come under the new bracket structure, as is outlined.

Q. Well, that year did you make those changes in accordance with the different varying costs of production and distribution, as the result of the reduced volume?

A. We also took into consideration the fact that our prices were lower in 1938 than they were in 1937.

Q. I am talking about the quantities now. I haven't talked about the price.

A. All I can say about these quantities is just as I have explained, Mr. Haycraft, two or three times here this

morning, that we did take into consideration the actual year's experience in establishing those quantities.

Q. The previous year?

A. That is right.

Q. Well, now, what factor or what experience in the previous year would cause you to change your quantity bracket, the quantities of the various brackets, increase them as you did in 1938 over 1937?

A. Well, oftentimes it was more logical.

Q. Let us try and recall what happened in 1937 to make that change in 1938.

1767 A. I won't be pinned down specifically to something that happened that long ago. My memory is not that good.

Q. Well, do you have any reports or recommendations, written recommendations by anyone or yourself or others that would help?

A. I wouldn't have any of those. As I said before, once this job was done we were thankful it was out of the way and we didn't maintain any of those records.

Q. You do recall the matter of the four customers and the special prices being made to them of $14.90 if they would buy 10,000 sets, prior to September 1, 1938?

A. Yes, I do remember that.

Q. Now, you will notice that your bracket price structure in 1938 not only reduced in dollars and cents for each bracket but that the relationship between the brackets was changed.

A. That is correct.

Q. In other words, your bracket 2 was 8 percent lower than the bracket 1 in 1938 and it was over 5 percent lower in 1937. Your bracket 3 was almost 13 percent lower in 1938, whereas it was not quite 11 percent in 1937. The bracket 4 was 18 percent lower, as compared to 16 percent, almost 17 percent, in 1938 as compared with 1937; but your bracket 5 price, neither one, neither the special price for the 4 or the other was as great or as much lower per-

1768 centagewise in 1938 as in 1937.

Now, what factors prompted those particular changes?

A. There was no attempt to make any percentage differentiation between brackets. As I have testified previously, we felt we had to establish these brackets and the prices commensurate with competitive conditions that

existed during the year previous to the establishment of these prices.

Q. Well, what competitive conditions prompted you to increase the quantity on the lower prices to make those prices lower to the middle brackets in proportion to your first bracket but not 5 and 6?

Mr. Gilpatric: Are you still speaking of 1938, Mr. Haycraft?

Mr. Haycraft: Yes, comparing 1938 and 1937.

A. I couldn't state the specific instance, Mr. Haycraft.

By Mr. Haycraft:

Q. Did you have less competition in your large volume customers in 1937 than you had previously so that you didn't need to give as low a net price to your volume customers in 1938 as you did in 1937?

I am comparing their $16.25 bracket 5 price in 1938 with $21.08, which is your bracket 1 price, with the relationship between your $17.85 bracket 5 prices and the $23.85 bracket 1 price in 1937.

1769 A. Well, your overall differential between those brackets fell where the good Lord willed, after we had reviewed this competitive situation, and established these various bracket prices, and that condition existed until we made the preliminary cost study in 1938.

Q. Well, these, of course, were made up before that study?

A. That is right.

Q. Well, is it your recollection that competitive conditions eased up in your volume accounts in 1937 as compared to 1936 so that you could increase the ante a little bit in 1938?

A. Well, if there was any easing up in competition it was beyond my knowledge at any time that I have been in this business.

Q. Well, you didn't make as much of a price reduction in 1938 for your large customers as you did for your smaller ones, did you?

A. From the figures, no.

Q. And why?

A. Because we didn't have to, apparently, from our cost study.

Q. That is what I am trying to get at. Was it the cost study or the conditions?

A. I beg your pardon. I meant our competitive condition study for that year.

1770 Q. You didn't make any comparison of costs that year?

A. Not at that time. The first comparison, to my knowledge, that was ever made was that one based on 1937 figures.

Q. Now, then, in 1939 you made another shake-up in your quantity differentials. You reduced your quantity in volume in these respective brackets in all of them this time. What prompted you to do that?

A. Exactly the same explanation that I have given before, Mr. Haycraft.

Q. Well, by that you mean that there was a less competitive situation that required your large volume discounts?

A. I can only tell you this, that they were based on the competitive situations as we found them when these prices were established.

Q. But not upon your varying costs of production and distribution?

A. The varying costs of production and distribution in 1939, to be as consistent as we possibly could, to follow the only example which we had, we set up the overall differential and we took it very rigidly into consideration at that time, and that was the allowable selling prices that we had figured through the medium of our cost study.

Mr. Gilpatric: You mean difference in prices between the top bracket and bottom bracket?

The Witness: The difference between bracket 1

1771 and bracket 5, the difference between the top and bottom prices, and then as we set up these other prices we tried to be as consistent as we possibly could with that cost study.

In some places competition wouldn't permit it; in others it would, and we set it up, and we were more consistent that year, I believe, than in any previous year.

By Mr. Haycraft:

Q. Well, had there been any change in your competitive situation that would prompt the change in your bracket differentials there, either in the quantity or the price?

A. There could very well have been.

Q. I am trying to get your recollection.

A. No.

Q. This isn't so long ago; this is 1939.

A. There are a lot of things happen in a year in this business. I wouldn't answer any differently than I have heretofore.

Q. Again you have reduced the percentage differential between your bracket and your other prices so that your quantity of 10,000 and up, which was formerly 15,000 and up, is less. In other words, you give less reduction in price for that quantity than you did in previous years.

Was it your experience and recollection that the competitive situation had eased up so that you didn't need to allow your volume customers as much of a discount
1772 as you had been allowing them?

A. The discount hadn't a thing to do with it. We had to establish our low prices to meet the red hot competition that always existed amongst those major manufacturers who were entitled to it and to whom we gave those prices.

Q. Had your red hot competition lessened so you didn't need to lower your prices as much?

A. We based those prices on the competitive situation as we found it at that time.

Q. Well, was the competitive situation easier in 1939 than it was in previous years?

A. I couldn't answer. If it was easier it would be awfully surprising. But there is always a vanishing point, you know, even with a competitor that wants the business. He can go down just so low and then he goes into the red; and then it would cease. It might have ceased in 1939, I don't know.

Q. You admit, don't you, that you didn't allow as much of a volume inducement in 1939 as you had in previous years?

A. Those figures were checked pretty carefully.

Mr. Gilpatric: Same price.

The Witness: The answer is obvious.

By Mr. Haycraft:

Q. In other words, you charged $18.10 to a man that bought 50 sets in 1939; a man that bought 10,000 and
1773 up paid $14.90, or a difference of about 18 percent; whereas, in 1938 you charged $21.05 for a man that bought 50 sets and you gave as low as $16.25 to the usual customer who bought 15,000, and $14.90 to a customer, these particular four customers that you testified to?

A. Well, that is exactly what we did.

Q. But you haven't any recollection of the change in competitive conditions that brought about the change in your prices?

A. No, I haven't other than the fact that those competitive conditions always existed and we were always up against lower prices from competition.

Q. Now, in 1940 you inserted a couple of new brackets there, 3-A and 4-A. 3-A changed your bracket 3 from—splitting it, rather; that would be 1,000 to 4,999 and now 3-A is 2,500 to 4,999.

A. That is right.

Trial Examiner Sheppard: You mean seven brackets instead of six?

Mr. Haycraft: Yes, there really were seven brackets. They put in these new brackets, which really made seven.

By Mr. Haycraft:

Q. Now, what was the situation that caused that?

A. There is only one word to answer that, and that is "competition." We were losing business to some accounts that we could not hold in bracket 3 and it was to the best interests of our company to set up those two intermediate brackets, come closer to competition, and try to recapture or hold those accounts.

Q. You maintained those new brackets through 1941, did you not?

A. Yes, sir, we did.

Q. To what extent in both 1940 and 1941 did you take into account the varying or changing costs of production and distribution?

A. Undoubtedly the same as we had in previous years.

Q. Prior to 1938 you didn't take that into consideration, as I understand it? You didn't make any study?

A. I am speaking now of the competitive situations that existed in the year in which these figures are made up.

Q. I am not talking about competitive situations. I am asking you the extent to which you took into account, took that into account, in the years 1940 and 1941, in establishing any of the brackets for those years, either of the volume or the price, whether you took into account your costs of distribution and manufacture.

A. The costs of distribution and manufacture were not given as much consideration as we gave to the competitive

situation that existed in the various brackets, and
1775 also the consideration that we gave to this preliminary cost study to maintain our overall differential as close as we possibly could and yet be consistent with competition, and those were the factors that were considered there in the establishment of 1939 prices and thereafter.

Q. Well, you noticed that in 1940 and 1941 you increased that overall differential quite substantially, didn't you?

A. I just don't recall what the—let's see.

Q. Well, 1941, your low bracket price, that is, your low price of $13.75, was 23 percent below your top or bracket No. 1 price of $17.35, whereas your overall differential in 1939, the year that you say you took this 1938 study into account, your overall differential was 17 percent plus.

In other words, you found it necessary to increase your overall?

A. We did.

Q. Now, what change in your accounting procedure or results of studies of varying costs of production or distribution accounted for that?

A. Well, Mr. Haycraft, let me get that record just a minute, please.

Well, this cost study that we made revealed that you could have an overall price differential of $3.32, and in
1939 we actually carry that year with a $3.20 overall
1776 differential.

Now, in 1940 we had a differential of $3.45 and in 1941 we had a differential of $4.

Q. $3.60, wasn't it?

A. That is right, $3.60. Now, when this cost study was made up, Mr. Haycraft, we didn't take into any consideration the varying production costs in making controls for these smaller manufacturers. We didn't segregate out our difference in invoicing prices where you might invoice the manufacturer for 10 sets of controls and another one for 10,000.

We didn't take into consideration the added costs of shipping these controls in small lots versus large lots, and so forth, and if we went over what we termed our allowable overall differential, we still felt that an actual cost study would reveal that we were well within bounds.

Q. You didn't make that actual cost study, though?

A. We did not.

Q. The only study, then, that you made during this period of time was the one you made in 1938?

A. That is right.

Q. Do you have that cost study?

A. Yes, it is here. Do you have that study, the green book, Mr. Gilpatric?

Mr. Gilpatric: Yes.

1777 (Document handed to the witness.)

By Mr. Haycraft:

Q. Do you have that now?

A. Yes, I have it.

Mr. Haycraft: Will you mark this for identification?

Trial Examiner Sheppard: Just a minute. We haven't got that in now?

The Witness: No.

Trial Examiner Sheppard: I am going to take it as the respondent's exhibit.

Mr. Gilpatric: He can put in his own copy. We gave the Commission a copy.

Mr. Haycraft: It should be with 115, it should go along with that.

Trial Examiner Sheppard: 115?

Mr. Haycraft: Yes.

Mr. Gilpatric: We are not going to put our copy in.

Mr. Freeman: He has a copy.

Trial Examiner Sheppard: Have you got a copy, Mr. Haycraft?

Mr. Haycraft: If you will give me a recess, if the Examiner please?

Trial Examiner Sheppard: We will take a recess.

(A short recess was taken.)

1778 Mr. Haycraft: I would like to have the witness produce the letter of September 25, 1939, which is supplemental to that.

Trial Examiner Sheppard: Will you mark these Respondent's Exhibits 124-A through M and 125-A through D.

(The documents referred to were marked RESPONDENT'S EXHIBITS 124-A, 124-B, 124-C, 124-D, 124-E, 124-F, 124-G, 124-H, 124-I, 124-J, 124-K, 124-L and 124-M; and 125-A, 125-B, 125-C and 125-D and received in evidence.)

Mr. Gilpatric: I want to have the record show that even though these exhibits are designated as respondent's

Exhibits 124 and 125, they are being offered by Mr. Haycraft.

Trial Examiner Sheppard: That is right, and the Examiner takes them as Respondent's Exhibit, for convenience to himself, the Commission and attorneys.

Mr. Gilpatric: Now, Mr. Lockrae, I am going to ask you to step aside for a while so that we can accommodate these gentlemen that are from out of town. I don't know which one we will take first.

(Witness excused.)

C. C. KINSTLER was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

1779 Trial Examiner Sheppard: Give us your name.

The Witness: C. C. Kinstler.

Trial Examiner Sheppard: And your address, Mr. Kinstler?

The Witness: Bloomington, Illinois.

Trial Examiner Sheppard: All right, Mr. Freeman.

Direct Examination by Mr. Freeman.

Q. Your residence is Bloomington, Illinois?

A. Bloomington, Illinois, yes.

Q. And you are in the employ of Williams Oil-O-Matic Corporation?

A. Williams Oil-O-Matic Corporation, yes.

Q. How long have you been an employ of that company?

A. Just a little better than thirteen years.

Q. And in what capacity are you employed?

A. Sales capacity.

Q. What are the items that you actually sell? That is, what items do you direct your attention to?

A. Well, automatic heating products.

Q. And are those heating products for domestic or household use?

A. For domestic and household use, yes.

Q. For heating houses of six, seven, eight, nine, ten rooms?

1780 A. And for buildings.

Q. Commercial as well?

A. Yes.

Q. Let's go back to about 1936 and I would like to have you tell us what make of controls Williams Oil-O-Matic used in connection with the sale of its domestic oil burners.

A. There were three types of controls used; the Minneapolis-Honeywell, the Mercoid and the Penn Electric Switch controls.

Q. You used the term "types". Do you mean controls made by—

A. (Interposing.) Three different manufacturers, yes.

Q. So far as the controls themselves, am I correct in my understanding that a set of Minneapolis-Honeywell controls is substantially comparable to a set of Penn controls or Mercoid controls?

A. That is right.

Q. Have you made a check-up with your records for the years 1936 to 1942, and can you give us, percentage-wise, the controls manufactured by Minneapolis-Honeywell, Penn Electric Switch, and Mercoid, used by your company since 1936?

A. Yes, these figures here are from our records and disclose the figures for each of the years.

Q. Yes, I would like to have it so that the Major can get the benefit of it, as we go along.

A. In 1936 this figure shows 88.81 per cent of the 1781 controls that year were of the manufacture of Penn Electric Switch; 2.71 were of the Mercoid Corporation; 8.48 of the Minneapolis Control Regulator Company.

In 1937, the percentages are: 78.75 of Penn Electric Switch Company; 10.03, the Mercoid Corporation; 11.22, Minneapolis-Honeywell Regulator Company.

1938, 77.28 per cent Penn Electric Switch Company; 9.56 the Mercoid Corporation; 13.16 per cent, the Minneapolis-Honeywell Regulator Company.

1939, 55.21 per cent, Penn Electric Switch Company; 9.17 Mercoid Corporation; 35.62, Minneapolis-Honeywell Regulator Company.

1940, 67.32 Penn Electric Switch Company; 8.42 Mercoid Corporation; 24.26 per cent, the Minneapolis-Honeywell Regulator Company.

For the year 1941, 42.58 per cent, Penn Electric Switch Company; 14.18 per cent, the Mercoid Corporation; 43.24, Minneapolis-Honeywell Regulator Company.

For the year 1942, 64.84 per cent, Penn Electric Switch Company; 9.65, the Mercoid Corporation; and 25.51, Minneapolis-Honeywell Regulator Company.

Mr. Haycraft: I move to strike the 1942 figures, because they are outside of the issues.

Trial Examiner Sheppard: Yes, I think you can strike that. I am not interested in 1942 figures.

1782 Mr. Freeman: We offer in evidence Respondent's Exhibits 126-A through 126-P, the tabulation just referred to by the witness Kinstler.

By Mr. Freeman:

Q. Will you now refer to Respondent's Exhibits B through P, inclusive, for identification, and tell me whether or not there were any differential charges for Williams Oil-O-Matic burners, including a set of Minneapolis-Honeywell controls.

A. Yes. On the price effective May 1, 1936, there is an additional charge of $2.50 a set for Minneapolis-Honeywell controls.

Q. And will you tell us if these controls were put on the oil burner as standard during the year 1936?

A. The Penn Electric Switch controls were standard and Mercoid, likewise, were available at basic prices.

Q. That is, Mercoid controls were optional?

A. That is right, they were optional.

Q. And when you say they were at the "basic prices", that is at no additional charge? In other words, anyone could have gotten Mercoid controls without any additional charge?

A. That's right.

Trial Examiner Sheppard: But there was an additional charge for—

Mr. Freeman: (Interposing.) For Minneapolis-Honeywell, there was an additional charge of $2.50. Is
1783 that correct?

The Witness: That is correct.

Trial Examiner Sheppard: That is all right.

By Mr. Freeman:

Q. Now, will you tell us what the prices were in 1937 with respect to controls of the three different companies which were used in Williams burners?

A. On burners that were equipped with Penn Electric Switch Company controls, as well as Mercoid controls,

there was no additional charge—that is, they were optional or standard—and on burners equipped with Minneapolis-Honeywell controls, there was a charge, or additional charge of $7.50 net.

Q. That is in 1937, you raised that differential sum from $2.50 to $7.50, is that correct?

A. That is correct.

Q. And was Penn standard in the year 1937?

A. That is correct.

Q. And Mercoid was, likewise, optional?

A. That is correct.

Q. Now, will you give the prices effective March 2, 1938, and tell us what the facts were with respect to differentials in the year 1938 as to oil burner controls?

A. The Oil-O-Matic burners equipped with Penn Electric controls or Mercoid controls carried no additional
1784 charge or were optional. Those that were equipped with Minneapolis-Honeywell controls carried an additional charge of $2.50 net.

Q. So that in 1938, the differential was dropped from the 1937 amount of $7.50 to $2.50, is that correct?

A. That is correct.

Q. Was Penn still standard?

A. Penn was still standard.

Q. And I take it Mercoid was optional?

A. Optional.

Q. Now, will you give the prices effective on February 8, 1939 and tell us what controls were standard, and what controls were optional, and if there were any differentials, will you give us the amount?

A. Penn Electric Switch Company controls were standard. Mercoid controls and Minneapolis-Honeywell controls were optional. No additional charge.

Q. So that the differential in the year 1939 for Minneapolis-Honeywell controls was done away with?

A. That is correct.

Q. Now, will you turn to the next prices effective November 1, 1940, and tell us whether or not there were any differentials in connection with the oil burners equipped with different controls?

A. There was no differential on one of the models.
1785 On the second model burner, there was a differential for Minneapolis-Honeywell controls of $2.50. However, Mercoid controls were optional on all models. The Penn Electric Switch Company controls were standard.

Q. And the $2.50 extra for Minneapolis-Honeywell controls was connected to which one of your model oil burners?

A. It was the model that is called our high pressure model, the Williams high pressure burner.

Q. Now, will you turn to the next price list, effective January 6, 1941, which states "Supersedes November 1, 1940 data and price list", and tell us what the facts were in connection with the controls used on oil burners thereafter.

A. On that price sheet, in respect to Williams Oil-O-Matic low pressure burner, Penn Electric Switch Company controls, and Mercoid or Minneapolis-Honeywell were optional. However, on the Williams high pressure model there was an additional charge of $2.50 for Minneapolis-Honeywell controls.

Q. In connection with the low pressure burner, when you say "optional", that option was at no extra cost?

A. No extra cost, that is correct.

Q. Now, will you turn to the price list of the Williams Company effective August 1, 1941, and tell us what make of controls were standard on Williams Oil-O-Matic burners, what was optional and, if there were any differentials, with respect to the optional controls.

1786 A. The Penn Electric Switch Company controls, the Mercoid controls, and the Minneapolis-Honeywell Regulator controls were optional, at no extra charge, on all models on our, shall we say, both models, both low pressure and high pressure models.

Q. And tell us what make of controls was considered standard by Williams Oil-O-Matic, in accordance with your prices August 1, 1941, and which were considered optional.

A. The Penn Electric Switch Company controls were standard. The Mercoid and Minneapolis-Honeywell controls were optional.

Q. Now, with respect to the quantity of sales, do you sell more high pressure burners than you do low pressure burners? What are the facts?

A. The volume of sales of the high pressure and low pressure burners are substantially about the same.

Trial Examiner Sheppard: Are you talking about all these years, 1937 to 1941?

The Witness: Yes. Perhaps in 1937 we had a larger volume of business on the low pressure burner, because our high pressure burner was relatively new at that time.

Trial Examiner Sheppard: But outside of that it was the same?

The Witness: Substantially the same volume, comparable volume.

1787 Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Do you know, with respect to these prices that your company paid for controls covering this period of our inquiry, from 1936 and 7 up to and including 1941, how the Minneapolis-Honeywell prices compared with Penn, and likewise with Mercoid?

A. It is my understanding, from our purchasing agent, that we always paid a higher price for Minneapolis-Honeywell controls than we have for the other two, Mercoid and Penn.

Trial Examiner Sheppard: Mr. Freeman, before you go any further, let's take care of that exhibit.

Mr. Freeman: All right, we now offer in evidence Respondent's Exhibit 126-A through 126-P, inclusive.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The document referred to was marked RESPONDENT'S EXHIBIT 126-A, 126-B, 126-C, 126-D, 126-E, 126-F, 126-G, 126-H, 126-I, 126-J, 126-K, 126-L, 126-M, 126-N, 126-O and 126-P and received in evidence.)

Trial Examiner Sheppard: Now, go ahead with the examination.

By Mr. Freeman:

Q. I now ask you, do you know which of the con-

1788 trols your company paid the lowest prices for?

A. Penn Electric Switch Company controls. It is my impression that we purchased those at a little lower price.

Mr. Haycraft: I move to strike the answer. What his impression is isn't enough. If we can't have figures here, we don't know.

Trial Examiner Sheppard: I didn't hear that.

Mr. Haycraft: It was his impression. If he has an exhibit or some definite proof or evidence, all right.

Trial Examiner Sheppard: Well, yes, can you give us something definite on that?

Mr. Freeman: I am going to give you something, something definite. I have some Mercoid invoices.

Mr. Haycraft: All right, I move to strike the last answer.

Trial Examiner Sheppard: That can go out. He can make it more definite, yes.

By Mr. Freeman:

Q. I hand you a photostatic copy of Mercoid's invoice dated August 12, 1938, and will you give me the prices of Mercoid KMI primary controls?

Mr. Haycraft: Why don't you put it in evidence?

Mr. Freeman: I don't have to put it in evidence yet.

Mr. Haycraft: All right, I object to reading from 1789 an exhibit marked for identification.

Trial Examiner Sheppard: Well, I want the witness to identify it first, and then we can come back.

Mr. Haycraft: He can identify it without having to tell us what is in it.

Trial Examiner Sheppard: Well, tell us what that is.

The Witness: That is an invoice from the Mercoid Corporation.

Trial Examiner Sheppard: What year?

The Witness: Dated August 12, 1938.

Trial Examiner Sheppard: All right, make your offer.

The Witness: The prices shown for the—

Mr. Haycraft: (Interposing.) No, I object to what the prices shown there are. If the exhibit is going in evidence, let it be offered in evidence and received in evidence.

Trial Examiner Sheppard: You don't have to talk about it. Just make the offer.

Mr. Freeman: We offer in evidence Respondent's Exhibit 127, Mercoid invoice of August 12, 1938, just referred to by the witness Kinstler.

Mr. Haycraft: Let me see it. Where did you get this, Mr. Kinstler?

1790 The Witness: That is from our files. That is a photostatic copy of the invoice from our files.

Mr. Haycraft: Who gave it to you?

The Witness: Well—

Trial Examiner Sheppard: (Interposing.) Let it be accepted.

Mr. Haycraft: I said, "Who gave it to you?"

The Witness: I took it from our files, myself.

Mr. Haycraft: Yourself?

The Witness: That is right.

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The document referred to was marked RESPONDENT'S EXHIBIT 127 and received in evidence.)

By Mr. Freeman:

Q. The KMI is the intermittent control?

A. That is right.

Q. And is there a constant ignition control referred to in the invoice? And if so, will you give the prices?

A. There is a type KMW Pyrotherm, which is priced at $8.70.

Q. I now hand you an invoice of the Mercoid Corporation dated July 27, 1939, which we will ask to have marked as Respondent's Exhibit 128, and I will ask you to state what it is and where you got it.

1791 (The document referred to was marked Respondent's Exhibit 128 for identification.)

The Witness: This invoice is from the Mercoid Corporation, dated July 27, 1939, and it was taken from our files, from the files of Williams Oil-O-Matic Heating Corporation, by myself.

Trial Examiner Sheppard: All right, pass it over.

(Exhibit handed to Mr. Haycraft.)

By Mr. Freeman:

Q. And just what control is referred to therein and the prices thereof?

Mr. Haycraft: Just a moment.

Mr. Freeman: I am not offering it yet.

Mr. Haycraft: I am going to object to any reference to it until you do offer it.

Mr. Freeman: I will offer in evidence Respondent's Exhibit 128.

Mr. Haycraft: No objection.

Trial Examiner Sheppard: All right, Respondent's Exhibit 128 is accepted.

(The document referred to, heretofore marked RESPONDENT'S EXHIBIT 128 for identification was received in evidence.)

The Witness: The control billed here is a Type KMW Pyrotherm at a price of $7.75.

1792 By Mr. Freeman:

Q. And is that a constant ignition control?

A. That is a constant ignition control.

Q. Used for domestic oil burners sold by Williams Oil-O-Matic Company?

A. That is correct.

Q. I now hand you a Mercoid invoice of October 11, 1940, addressed to Williams Oil-O-Matic Heating Corporation, Bloomington, Illinois, marked for identification as Respondent's Exhibit 129, and I will ask you sto state what it is and where you got it.

A. This is an invoice from the Mercoid Corporation, dated October 11, 1940, secured from the files of the Williams Oil-O-Matic Corporation, by myself.

Mr. Freeman: We offer in evidence Respondent's Exhibit 129 for identification.

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The document referred to was marked RESPONDENT'S EXHIBIT 129 and received in evidence.)

By Mr. Freeman:

Q. And do you find thereon any reference to primary controls and, if so, will you tell us the kind and the prices.

A. There are some primary controls of the Model 1793 JM Pyrotherm billed at $7.75 net.

Q. And that is a constant ignition control?

A. That is a constant ignition control.

Q. I now hand you an invoice of the Mercoid Corporation, addressed to Williams Oil-O-Matic Heating Corporation, dated November 5, 1940, and I will ask you to state what it is and where you got it from.

A. This is an invoice of the Mercoid Corporation, dated November 5, 1940, and it was secured from the files of the Williams Oil-O-Matic Heating Corporation, by myself.

Q. Do you find thereon any primary controls and, if so, will you tell us the type and price thereof?

Mr. Haycraft: Is it received in evidence?

Trial Examiner Sheppard: Yes, you better offer it.

Mr. Freeman: I will offer in evidence Respondent's Exhibit 130, marked for identification.

Trial Examiner Sheppard: Accepted.

(The document referred to, heretofore marked RESPONDENT'S EXHIBIT 130 for identification, was received in evidence.)

The Witness: Yes, there is billed on here some JM Pyrotherms, which are constant ignition controls, at a price of $6.75.

By Mr. Freeman:

1794 Q. And do you find thereon any room thermostats, and, if so, will you give us the type and price thereof.

A. Yes, there are some room thermostats. Type H, Sensatherm, at the price of $2.50 net, each.

Q. I now hand you an invoice of the Mercoid Corporation, addressed to Williams Oil-O-Matic Heating Corporation, dated February 21, 1941, and I will ask you to state what it is before you start.

A. This is an invoice of the Mercoid Corporation, dated February, 1941. It was secured from the files of the Williams Oil-O-Matic Heating Corporation, by myself.

Mr. Freeman: We will offer in evidence as Respondent's Exhibit 131, the invoice just referred to by Mr. Kinstler.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be received.

(The document referred to was marked RESPONDENT'S EXHIBIT 131 and received in evidence.)

By Mr. Freeman:

Q. Do you find on the invoice reference to a primary control of the intermittent ignition type?

A. Yes.

Q. And the price thereof?

A. The price thereof was $8.25.

1795 Q. I now hand you an invoice of the Mercoid Corporation, dated 9-16-41, addressed to Williams Oil-O-Matic Heating Corporation, and I will ask you to state what it is and where you got it. Said invoices being referred to as Respondent's Exhibit 132, for identification.

A. This is an invoice of the Mercoid Corporation, dated September 16, 1941. It was secured from the files of the Williams Oil-O-Matic Heating Corporation by myself.

Mr. Freeman: We offer in evidence Respondent's Exhibit 132 for identification.

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The document referred to was marked RESPONDENT'S EXHIBIT 132 and received in evidence.)

By Mr. Freeman:

Q. Do you find thereon any reference to room thermostats?

A. Yes.

Q. What type and price?

A. Type H Sensatherm, $2.50 net, each.

Q. And how about primary controls, will you tell us the kinds thereon appearing.

A. There are some JM Pyrotherms which are the constant ignition primary control as $7.50 each; also the model JMI Pyrotherms, which are the intermittent type control, at $8.25 each.

1796 Q. And do the thermostats referred to in the invoice, Respondent's Exhibit 132, and the primary controls make up comparable sets or complete sets of primary and thermostats?

A. Yes, they make up complete sets of thermostats and primary controls.

Q. That is, one of the thermostats goes with one of the primary controls?

A. That is correct.

Q. And is that the way you used them at Williams Oil-O-Matic?

A. As sets, yes.

Q. And that is, likewise, true with Minneapolis-Honeywell controls and also of Penn controls?

A. Yes.

Q. They are used as sets on the same burner?

A. Used as sets.

Q. Now, will you tell us over what area Williams Oil-O-Matic does business?

A. Domestically, throughout the United States.

Q. What type of coverage does it have? Does it use salesmen, distributors, dealers, jobbers? What are its trade channels?

A. Our products are sold through dealers.

Q. And about how large sales organization does it have—and I am talking about the period prior to Pearl Harbor.

1797 A. An organization of from eight hundred to one thousand dealers. They would vary from time to time during the different periods.

Trial Examiner Sheppard: Scattered all over the country?

The Witness: Throughout the country, yes.

By Mr. Freeman:

Q. Do you know about what your dealer prices are? How does that run, say, to the oil burner manufacturers sold—to the oil burners sold in the United States.

A. We generally have rates that run beyond that of other manufacturers. We have been recognized as the highest priced oil burner.

Q. That is, you sell at relatively high prices?

A. That is right.

Q. And how do you account for building up such an organization, of from between eight hundred dealers to one thousand, selling oil burners at a relatively high price?

A. Well, first of all, we have an excellent product, which has an acceptance. It has been on the market for a number of years, and we merchandise that product. By that I mean to say—

Trial Examiner Sheppard: (Interposing.) How long have you been working for Williams Oil-O-Matic? Did you say 1936?

The Witness: How long have I been with Williams 1798 Oil-O-Matic?

Trial Examiner Sheppard: Yes.

The Witness: Thirteen years.

Mr. Freeman: And the company goes back to 1920.

The Witness: Yes.

By Mr. Freeman:

Q. Will you name some of the companies you are actually in competition with?

A. There is Electrol; Petrol Nokol; Timkin; Aldrich; ABC—many others.

Q. You compete with Quiet Heet?

A. Quiet Heet, yes.

Q. You understand that Quiet Heet sells at a relatively low price. Now, from your actual experience in meeting that kind of competition, what has Williams Oil-O-Matic done to meet that competition?

A. We meet that kind of competition by stressing better design and construction of the Oil-O-Matic burner, the features of the Oil-O-Matic burner to the organization that is behind it, both dealer as well as factory organization. Briefly, we offer a better product and better service, and, for that kind of service, we do require a better price.

Q. Service is an important factor in connection with the sale of oil burners?

1799 A. Yes, it is.

Trial Examiner Sheppard: What does that word mean with reference to an oil burner? Does that mean maintenance service?

The Witness: Broadly speaking, it means service offered by our local dealers on maintenance and, in addition to that, we have a well organized factory service department for training those dealers in service and for assisting them.

Trial Examiner Sheppard: I see. And do you do any business with Madison, Wisconsin?

The Witness: Madison, Wisconsin, yes.

Trial Examiner Sheppard: Do you compete with Mr. Westmont?

Mr. Freeman: The Wisconsin oil burner.

The Witness: The Wisconsin oil burner, yes, we do.

Trial Examiner Sheppard: And they sell at a very substantial price too, don't they?

The Witness: I would say that is an average priced burner, rather than an expensive burner.

Trial Examiner Sheppard: I thought he said it was the highest priced.

Mr. Freeman: Major, when he said "one of the highest", he meant above the average.

Trial Examiner Sheppard: I see. Go ahead.

1800 By Mr. Freeman:

Q. Would you say that the Williams price of oil burners with controls is above the average all over the country?

A. Yes, I would say the Williams control is sold at above the average.

Q. And has that been true at least since you have been with the company, some thirteen years?

A. Yes.

Q. And still is?

A. And still is.

Q. You have stated that Minneapolis-Honeywell controls cost you more than comparable competitive controls. And will you tell me how it is that at least in 1941 that Minneapolis-Honeywell exceeded the sale of controls to your company over and above Penn Company by about three-quarters of one percent?

A. We find a preference among many of the dealers for Minneapolis-Honeywell controls and it is our best knowledge that is because of the wide public acceptance among the prospective purchasers of oil burners, they show a preference to those types of controls.

Q. And the service that may be rendered by Minneapolis-Honeywell likewise, has a bearing?

A. Oh, certainly.

Mr. Haycraft: Objected to as leading.

1801 Trial Examiner Sheppard: Yes, that is leading, Mr. Freeman.

By Mr. Freeman:

Q. What are some of the factors which you definitely know have an effect on the preference by the purchasing public?

A. Performance, of course, and the service back of the set of controls or of the instrument.

Q. What was the situation when your company was charging $7.50 more for a burner equipped with Minneapolis-Honeywell controls than one equipped with Penn or Mercoid controls?

A. There was a tendency on the part of many of the dealers, in spite of their preference for the Minneapolis-Honeywell controls, to save some money on their purchase, and they would select other types of controls in many cases.

Trial Examiner Sheppard: I don't understand that answer, Mr. Kinstler.

Mr. Freeman: What is that?

Mr. Gilpatric: He doesn't understand the answer.

Trial Examiner Sheppard: Read it to me again.

(The record was read by the reporter.)

Trial Examiner Sheppard: I don't understand how you are going to save money by paying more for the controls.

The Witness: Well, perhaps I didn't make my answer clear. The point was this; during the period that we were charging $7.50 additional for the Minneapolis-Honey-
1802 well controls, the dealers would select Mercoid or the Penn controls, on which there was no additional charge.

Trial Examiner Sheppard: To get it cheaper?

The Witness: In order to get a lower price, yes. To save money on the purchase.

Trial Examiner Sheppard: Oh, you referred to the other two?

The Witness: I didn't specify the controls. I said The "other two".

Trial Examiner Sheppard: All right, go ahead.

By Mr. Freeman:

Q. And what happened when that was again lowered to $2.50, so that the differential in Minneapolis-Honeywell was only $2.50?

A. There were a greater number of dealers selected the Minneapolis-Honeywell controls.

Q. And what happened when the differential was wiped out?

A. Again, there was an increase in the selection of Minneapolis-Honeywell controls on the burners.

Q. And I take it that Williams Oil-O-Matic had absorbed any difference in price?

A. Yes, it did.

Mr. Freeman: You may cross-examine.

1803 *Cross-Examination by Mr. Haycraft.*

Q. What was the difference in cost?

A. I don't have that information. I am not in the purchasing department and I don't have that information at hand. I am in the sales department.

Q. And do you know why the $7.50 extra was paid?

A. It was because of the additional cost. I don't know the amount of the additional cost.

Q. You don't know whether it amounted to that much?

A. No, I really couldn't say.

Q. So you don't have anything to do with the purchase of the controls?

A. No, I don't have anything to do with the purchase.

Q. And you don't know what the differential was in the cost?

A. I couldn't tell you the amount of it, no.

Q. Do you know anything about the difference in the service rendered by Minneapolis-Honeywell and the service rendered by Mercoid and Penn Switch to the dealers in the United States?

A. I am afraid that I—anything that I might say on that would be my own personal opinion. I do know this—well, let me state this, that no analysis was made by us relative to that, but we do know, through our con-

1804 tact with the dealers that those dealers who liked the Minneapolis-Honeywell controls did feel that they had less service. They felt that they didn't have service problems with that control.

Q. How about the dealers that preferred the Penn Switch and the Mercoid? What did they feel about it?

A. They probably were quite satisfied with the service they had on those controls. Of course, there was a time when they were influenced by the differential in the cost of Minneapolis-Honeywell controls, when furnished with the burner.

Mr. Freeman: Will you read that?

(The answer above referred to was read by the reporter.)

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Freeman: Just remember, Mr. Haycraft, when we examine a witness, we don't want you to open your mouth with respect to any cross-examination until the witness is through, from here on out.

Mr. Haycraft: I was attempting to do that.

By Mr. Haycraft:

Q. What service was rendered by the respective manufacturers to the dealers, to your knowledge—that is control manufacturers?

1805 A. You are referring to the respective control manufacturers?

Q. Yes.

A. They do maintain a service to dealers, selling oil burners.

Q. And just what do you mean when you say "service rendered"? What service do they render to dealers?

A. Engineering service, maintenance service, training of the dealers in the proper installation and maintenance of those controls.

Q. Do you have any information with which you are familiar, so that you can testify as to whether or not Minneapolis-Honeywell service thus rendered was better or superior to the service rendered by Mercoid or Penn Switch?

A. I wouldn't have any authoritative knowledge regarding that.

Q. When you stated that Penn Switch was standard in your organization, do you mean that on orders received, where no controls were indicated, you put Penn switch controls on your burners?

A. That would be the purpose in specifying a standard set of controls.

Q. However, they do not have their name plate on those controls, do they? They are sold under the Williams name?

A. Some are sold under the Williams name and
1806 others are sold under the Penn Electric Switch Company name.

Q. When was it one way and when was it the other?

A. I couldn't specify the years now. There had been some changing back and forth.

Q. With respect to this Exhibit 126, I notice that the standard controls were the Williams controls and, the optional controls are listed as Mercoid and Minneapolis-Honeywell.

A. If they are referred to in that price sheet as standard, some of those controls, they would have carried the Williams name plate. They are controls manufactured by the Penn Electric Switch Company.

Mr. Freeman: Will you point out what switch you are referring to?

Mr. Haycraft: The one I was looking at, I don't have this exhibit lettered or numbered. It is dated—

Mr. Freeman: You must be talking about Respondent's Exhibit 126-G.

Mr. Haycraft: November, 1940 price sheet, following that, and the one following January 6, 1941. And those are the ones I had noticed. In fact, I haven't seen Penn Switch mentioned anywhere.

Mr. Gilpatric: Look at Respondent's Exhibit 126-K.

Mr. Haycraft: Well, I haven't got them lettered—I will have to see.

1807 Mr. Freeman: Oh, I want this one back.

Mr. Haycraft: You want this one back?

Mr. Freeman: Yes.

Mr. Haycraft: I thought you gave it to me.

Mr. Freeman: It was just a courtesy, to use it.

Trial Examiner Sheppard: That is marked, isn't it?

Mr. Freeman: That is the one we marked.

Trial Examiner Sheppard: All right.

Mr. Freeman: And that will help you to refer to the pages. (Handing exhibit to counsel.)

Trial Examiner Sheppard: Okay.

By Mr. Haycraft:

Q. I notice on Exhibit 126-E, reference is made to "Penn controls standard, unless otherwise specified".

Mr. Freeman: What is that?

Mr. Haycraft: I notice on 126-E, also, that it says there that the burners are equipped with Penn controls, as standard, unless otherwise specified.

Mr. Freeman: Mr. Haycraft, perhaps I can help you along to save time.

Mr. Haycraft: Also on some of the others. I think it is clear from the testimony now, though, both ways. The exhibit will show on careful inspection.

Trial Examiner Sheppard: All right.

1808 By Mr. Haycraft:

Q. Now, what were your volume of sales of burners beginning in 1937 on down through 1941?

A. I don't have anything, any record of our sales volume during that period, during those years. I am not prepared to supply that information, and I can't recall it from memory.

Q. Do you recall whether or not you sold more in 1937 than you did in 1936?

A. As near as I can recall now—and this is just recollection—our sales were, as near as I recall now, a little larger in 1937 than 1936. However, I could be wrong, as I said, I am going entirely by recollection now—some years ago.

Q. How about 1938 as compared with 1937?

A. 1938 was considerably less.

Q. How about 1939 as compared with 1937?

A. '39 with '37? As near as I can recall now, I don't think there was a great deal of difference in sales volume. I think it ran pretty much the same.

Q. In other words, 1939 was higher than 1938?

A. '39 higher than '38?

Q. Yes.

A. Yes, it would have been a little higher than 1938.

Q. It wasn't quite as high as 1937?

1809 A. No, no.

Q. How about 1940?

A. We showed some increase in 1940.
Q. Over 1939 or over 1938?
A. Over 1939.
Q. How about 1941?
A. Quite a decided decrease.
Q. Decrease.
A. I might suggest that was due to war conditions.
Q. Now, your biggest year was 1937?
A. That is my recollection now. As I say, I could be wrong about that.
Q. Mr. Henning was on the stand here and testified—he is of the Penn Electric Switch Company—and you know him, don't you?
A. Yes.
Q. He testified that the volume of sales to your firm in 19—

Mr. Freeman: I wish you would read from the record, so that the witness would have it complete, rather than from your notes, Mr. Haycraft.

Mr. Haycraft: Well, I will let you read from the record. I haven't got the record, so that I can read from it. I think my notes are as accurate as the record.

By Mr. Haycraft:

1810 Q. In 1937 $194,810.00; 1938 the sales were $73,154.00; which at that time was apparently 78 per cent of your controls; and in 1939, $61,939.00; 1940, $70,445.00.

A. Is that his testimony on sales to us?
Q. That is his testimony.
A. Dollar volume of their control sales to us?
Q. Dollar volume. That would indicate, if the percentage of business was anything like that indicated in your exhibit No. 126, Respondent's Exhibit 126, that your sales dropped quite substantially in 1938, as compared to 1937, and 1940 didn't even come up to 1938.

Mr. Freeman: Oh, I object to that, Mr. Examiner. Mr. Haycraft is leaving out one important factor. Dollar volume doesn't necessarily determine the number of oil burners sold or oil burner controls, because the prices in 1941 were much less than they were back in 1937 and 1936. I think Mr. Haycraft can include that as one of his statements or—

Mr. Haycraft: The witness can include that.

Mr. Freeman: We object to your form of question. It is assuming something that isn't a fact.

Mr. Haycraft: I am not assuming something that isn't a fact. It may be that all the facts are not included in the questions, but—

Mr. Freeman: Well, then, we object to that type 1811 of examination because it goes beyond the scope of the direct examination and it is improper cross-examination.

Mr. Haycraft: I am using that to refresh the witness' recollection.

Mr. Freeman: You didn't say anything about refreshing.

Trial Examiner Sheppard: I think the witness may answer.

The Witness: You recall I stated earlier, when you asked about volume of sales, I was not able to submit any figures on sales—I was not prepared to.

By Mr. Haycraft:

Q. To refresh your recollection as to the volume of sales of burners subsequent to 1937, or 1937 and subsequent years, I am giving you the figures of Mr. Henning.

A. Yes.

Q. To give you some idea as to the volume of controls that were sold by your firm during those years, to see whether or not they will assist you in your testimony.

A. Well, frankly—

Mr. Freeman: (Interposing) Just a minute. We object to that question, Mr. Haycraft, because you are not presenting all the facts which Mr. Henning testified to with respect to the sales.

Mr. Henning, if you will recall, Major, said in 1937 1812 that they oversold everybody, because they were going to move to Goshen, and they would be shut down, and I think if he is going to refer to his testimony, it is only fair to the witness to give him full and complete information.

Mr. Haycraft: I am giving it as full as I can, if counsel for the Respondent wants to add anything on redirect examination, that is his privilege, but I don't think he should dictate the form of the question to me.

Mr. Freeman: It is absolutely beyond the scope of our direct examination and we move—well, that is all.

Mr. Haycraft: Beyond the scope of the direct examination? You asked him about sales.

Mr. Freeman: We certainly didn't.

Mr. Gilpatric: We certainly did not.

Mr. Haycraft: You did that on your direct examination.

Mr. Freeman: We did not.

Mr. Gilpatric: We certainly didn't.

Mr. Haycraft: I will let the record speak for itself on that.

Mr. Freeman: Well, we want the record re-read.

Mr. Gilpatric: We couldn't cross-examine on Timkin and the Examiner so ruled.

Mr. Freeman: I suggest that the record be re-read as to whether we asked anything about sales.

1813 Trial Examiner Sheppard: It would take a whole lot of time.

Mr. Freeman: I don't care.

Mr. Gilpatric: We will take the time.

Mr. Haycraft: Do you want the whole direct examination read?

Mr. Freeman: Do you recall, so that we can avoid reading the whole direct examination?

Trial Examiner Sheppard: I don't recall anything about it. It would take a whole lot of time. We kept him on the stand longer than we expected.

Mr. Freeman: I have kept within my half hour.

Trial Examiner Sheppard: Just what do you want? Let us go off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Gilpatric: It is beyond the scope of the direct examination.

Mr. Haycraft: I say it isn't.

Trial Examiner Sheppard: I am not going to take the witness' time or anybody else's time. Turn to the last question. Go on from there. This question of opinion does not matter.

Mr. Gilpatric: I wish you would apply those rules to us.

1814 Trial Examiner Sheppard: They apply to both of you.

(The record was read by the reporter.)

Mr. Haycraft: That is right. I had read to him some figures of sales of the Penn Electric Switch Company to see

whether or not that would refresh his recollection as to volume of sales of burners in those years, subsequent years.

I will ask this question. I will withdraw that one.

By Mr. Haycraft:

Q. Do you recall now, after I have refreshed your recollection with the figures from Penn Electric Switch, whether or not your volume of sales of burners subsequent to 1937 ever was as much as 1937?

Mr. Gilpatric: How is that relevant? I object to it on the ground that it is immaterial. Suppose it was more or less, so what.

Trial Examiner Sheppard: You may answer if you know, Mr. Kinstler.

The Witness: I haven't any record here of sales. I don't definitely recall the volume of sales or the trend from year to year and I can't answer that definitely.

By Mr. Haycraft:

Q. Can you tell from Respondent's Exhibit 126 whether or not these percentage figures indicate a decline or
1815 increase in the volume of sales, actual volume of sales of these respective companies?

Mr. Freeman: Which figures are you referring to?

The Witness: Will you repeat that, please?

Mr. Haycraft: 126-A. For instance, you show here that in 1941, Minneapolis-Honeywell percentage was 43.24; and the Mercoid was 14.18; and the Penn Electric Switch 42.58. Now, in 1940, the Penn Electric Switch was 67; Mercoid, 8, Minneapolis-Honeywell 24.26.

Can you tell whether or not those relative percentage figures are indicating an increase or decrease in the actual volume, number of controls sold?

The Witness: You mean to say of their volume?

By Mr. Haycraft:

Q. Yes.

A. I couldn't tell you.

Q. In other words, you don't know whether you bought more or less in 1941 than you did in 1940?

A. I don't have the purchasing department records, beyond this that we compiled, and I don't have those figures before me. All I have here is the percentage figures.

Q. And you have no figures and no evidence as to the actual prices paid?

A. No.

Q. By your firm for the Penn Electric Switch or
1816 the Minneapolis-Honeywell controls at the same time that the invoices that you identified as coming from Mercoid?

A. I don't have those invoices here.

Q. Do you know whether or not there was any difference in price that the Williams Oil-O-Matic was paying for Minneapolis-Honeywell controls in those years when dealers would charge $7.50 extra and those years where they were only charging $2.50 extra for Minneapolis-Honeywell?

A. In conversation with our purchasing agent repeatedly and over a period of time, I had always been given the information that we did pay more for Minneapolis-Honeywell controls than we did for Mercoid and Penn.

Q. He never told you how much?

A. He never mentioned the differential, but we did pay more.

Q. What I am trying to get at; why did you cut or reduce your $7.50 price, optional price, extra price on Minneapolis-Honeywell to $2.50?

A. I understand there was an adjustment of price. That is, I got information.

Q. And you don't have the—

A. (Interposing.) I couldn't give you the differential, no, sir.

Q. Was there more than one year that you paid the $7.50 extra for the Minneapolis-Honeywell?

Mr. Freeman: Would you read that last question?
1817 (The record was read by the reporter.)

A. Just that one year. That is 1937.

By Mr. Haycraft:

Q. And that was the year that you sold most oil burners?

A. I wouldn't make that statement without having some actual figures before me. I don't clearly recall.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Anything else?

Mr. Freeman: No, but I do want to call attention to the fact that on pages 1428 to 1432 of the record there is contained the prices at which Minneapolis-Honeywell sold Williams Oil-O-Matic controls during the years about which Mr. Haycraft has just been examining this witness. And if he just refers to that testimony, he will then have in the record the prices paid by Williams Oil-O-Matic for its con-

trols—that is, the controls purchased from Minneapolis-Honeywell.

Mr. Haycraft: Well, I move to strike all the testimony of this witness as irrelevant and immaterial to the issues in this case.

Trial Examiner Sheppard: That is denied. I will take the testimony and give it the probative value I think it is worth.

Anything else?

Mr. Freeman: That is all.

1818 Trial Examiner Sheppard: Thank you.

Mr. Freeman: It is twelve-fifteen. Why don't we adjourn and come back at two o'clock.

Mr. Haycraft: Are we going on with Mr. Lockrae?

Mr. Freeman: Yes.

Mr. Haycraft: That would suit me fine.

Mr. Freeman: We have got two other out of town witnesses coming in at twelve-thirty and we will have two short witnesses—especially if Mr. Haycraft will stick to our direct—and we will be through in a little while.

Trial Examiner Sheppard: Okay. Miss Reporter, take an adjournment to one-thirty.

(Whereupon, at 12:15 p. m., a recess was taken until 1:30 p. m. this day.)

1819 Afternoon Session.

1:30 p. m.

Trial Examiner Sheppard: All right, on the record. We will take your witness that you said was a short one, Mr. Freeman.

Mr. Freeman: Mr. Aldrich, will you please take the stand?

L. I. ALDRICH was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Sheppard: Will you give your name to the reporter?

The Witness: L. I. Aldrich, A-l-d-r-i-c-h.

Trial Examiner Sheppard: Your address?

The Witness: Wyoming, Illinois.

Trial Examiner Sheppard: All right, Mr. Freeman.

By Mr. Freeman:

Q. You are L. I. Aldrich of the Aldrich Company, Wyoming, Illinois, is that correct?

A. I am.

Q. And what is the business of the Aldrich Company?

A. We manufacture domestic oil burners and boilers.

Q. Mr. Aldrich, how long has that company, that is,
1820 the Aldrich Company, been in existence?

A. Since 1935.

Q. And have you been connected with it all that time?

A. I have.

Q. Will you just give us briefly the growth of your business, that is, how you started in 1935 and where you were then located, right up to the present time?

A. I was located in Peoria, Illinois, and operated alone in 1935, took in a partner in 1936 and moved to Wyoming, Illinois, in 1940.

Q. And did you continue in the same location in Peoria from the time you started in 1935 until 1940?

A. No, we had five different locations of the plant. The office remained in the same place.

Q. And what was the reason for having these five different factories?

A. We outgrew each one of them.

Trial Examiner Sheppard: You had five factories?

Mr. Freeman: Five different factories.

Trial Examiner Sheppard: Five different factories?

By Mr. Freeman:

Q. That is, you didn't have all five at any one time?

A. No, we moved from one to the other.

Q. And each move was to a larger place?

A. Yes.

1821 Q. I was right in my understanding that you outgrew your old place and moved?

A. That is right.

Q. And then you moved from Peoria, Illinois, to Wyoming, Illinois, in 1940?

A. Spring of 1940.

Q. And that is where you are located now?

A. Yes, sir.

Q. Mr. Aldrich, when did you personally become acquainted with the oil burner business?

A. Well, I devoted my time exclusively to the oil burner business in 1921.

Q. In 1921?
A. 1921.
Q. And what company were you located with then?
A. I started to work for Williams Oilomatic.
Q. Of Bloomington, Illinois?
A. Yes.
Q. And between 1921 and 1935, when you organized the Aldrich Company or formed the Aldrich Company, what was your connection with the oil burner business, if any?
A. I was chief engineer with the Hart Oil Burner Corporation, or its predecessor.
Q. And when did you commence or begin with Hart Company?
A. 1922.
1822 Mr. Haycraft: 1922, did you say, or '32?
The Witness: 1922.

By Mr. Freeman:

Q. And you continued with Hart until when?
A. 1935.
Q. And as chief engineer?
A. Yes, sir.
Q. And the Hart Company is located in Peoria, Illinois?
A. Yes, sir.
Trial Examiner Sheppard: Then you had good experience in that before you started in on your own?
The Witness: Yes, sir.

By Mr. Freeman:

Q. Now, Mr. Aldrich, when you started in the oil burner business in 1935 you, of course, bought oil burner controls from control manufacturers, is that correct?
A. Yes, sir.
Q. And who enjoyed your business?
A. Mercoid exclusively, in 1935.
Q. And how about 1936?
A. I began to buy from both Minneapolis and Mercoid.
Q. And then how about 1937 and 1938?
A. I continued that, and ultimately added Perfex and Penn controls.
Q. So now you sell or use controls manufactured
1823 by Penn Electric, Mercoid Corporation, Perfex, and respondent here, Minneapolis-Honeywell?

A. Yes, sir.

Q. Can you tell me about how many oil burners you made in the year 1937, and I hand you a slip which you may use for the purpose of refreshing your memory?

(Handing document to the witness.)

Mr. Freeman: I might say on the record we are not introducing this. This is the figures that Mr. Aldrich gave us personally some time ago.

The Witness: Are you talking about controls or burners?

By Mr. Freeman:

Q. I am talking about the number of burners made by your company in 1936; and, while you are at it, you might give us 1937, 1938, 1939, and 1940.

A. I made 250 in 1935.

Mr. Haycraft: How many?

The Witness: 250.

Mr. Haycraft: What year?

The Witness: 1935.

By Mr. Freeman:

Q. All right, 1936?

A. 1,250. 7,200 in 1937; 12,500 in 1938; 17,500 in 1939; and in 1940 I made 20,037 exactly; and in 1941 1824 I made 20,227.

Q. Now, did you sell all of these burners equipped complete with controls or do you sell burners without controls sometimes?

A. From 1937 until date there was between 4,000 and 4,500 burners furnished Sears Roebuck & Company without controls.

Q. And are they the only burners that you sell without controls?

A. Yes, sir.

Q. And whose controls are used on those burners that you sell to Sears Roebuck?

A. All Mercoid.

Q. You know that as a fact?

A. Yes, sir.

Q. And you have actually seen the burners crated and equipped?

A. I have seen—no, we don't crate the controls, but I know.

Q. Of your own knowledge, now?

A. That is right.

Q. Now, with respect to those burners that you sell with controls, whose controls do you use?

A. All makes.

Q. That is, some of those go out with Mercoid controls?

A. Yes, sir.

1825 Q. And likewise with Penn controls?

A. Yes, sir.

Q. Perfex controls?

A. Yes, sir.

Q. And the respondent's controls, Minneapolis-Honeywell?

A. Yes, sir.

Trial Examiner Sheppard: You let your customers indicate what they want?

The Witness: Yes, sir.

By Mr. Freeman:

Q. Now, Mr. Aldrich, I asked you sometime ago to give me your purchases of controls from Mercoid, Minneapolis, Penn, and Perfex for the years 1936 to 1943, inclusive.

A. I sent you that by letter.

Q. And you have just stated you sent that by letter, and I ask you now to refer to Respondent's Exhibit 133, which I will ask to have marked by the reporter for identification.

(The document referred to was marked Respondent's Exhibit 133-A for identification.)

By Mr. Freeman:

Q. (Continuing) And I ask you if that is the letter that you referred to, the first page of that exhibit, 133-A?

A. Yes, sir.

Q. And did you make up that list, or have it made 1826 up from the records of your company for the years 1936 to 1941, inclusive?

A. Yes, it was made by our bookkeeping department.

Mr. Haycraft: What is the number of this exhibit?

Mr. Freeman: 133-A.

By Mr. Freeman:

Q. And while we are at it, I wish you would look at Respondent's Exhibits 133-B, C, D, E, F, and G and tell me whether or not they are circulars put out by your company from time to time.

A. They are. These contain both price lists and net prices.

(The documents referred to were marked Respondent's Exhibits 133-B, 133-C, 133-D, 133-E, 133-F, and 133-G for identification.)

Mr. Freeman: We offer in evidence as Respondent's Exhibits 133-A to G, inclusive, the documents identified by the witness.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: I would like to inquire as to whether or not this witness is under contract with the Minneapolis-Honeywell.

Mr. Freeman: I think that is immaterial. That is certainly immaterial with respect to the particular exhibits.

I merely have had the exhibits identified and I now
1827 want to offer them before I examine him further.

That is what I understood to be the Commission's rulings.

I will examine him further on it, and we will also examine him with respect to contracts, and you will have an opportunity to cross-examine.

Mr. Haycraft: All right. At the time, then, there will be no objection, but I may move to strike later.

Trial Examiner Sheppard: All right, let them be received.

(The documents referred to, heretofore marked for identification RESPONDENT'S EXHIBITS 133-A, 133-B, 133-C, 133-D, 133-E, 133-F, and 133-G, were received in evidence.)

By Mr. Freeman:

Q. Mr. Aldrich, I noticed you purchased $129,376.61 worth of controls from the Mercoid Corporation between the years 1936 and 1941, and I now ask you whether or not that figure includes the Mercoid controls for the 4,000 or 4,500 burners purchased annually from you by Sears Roebuck, using Mercoid controls.

A. It does not. Sears Roebuck purchase their own controls.

Q. From the Mercoid Corporation?

A. Yes, sir.

Q. The remaining three numbers, however, that is
1828 the amount of purchases from Minneapolis, Penn Electric, and Perfex, are those used on your own burners sold with controls?

A. Yes. Mercoid's also.

Q. Now, Mr. Aldrich, will you refer to Respondent's Exhibit 133-B and tell me whether or not you had any different price for a Mercoid primary of the constant ignition type than you had for a Perfex control or a Minneapolis control?

A. Yes, sir, there is a difference.

Q. And, just for convenience and ready reference, will you tell us what your price was for a Mercoid constant ignition primary?

A. $12.60.

Q. And what did you get for a like control or comparable control of the Perfex type?

A. $15.

Q. And a like or comparable control of the Minneapolis-Honeywell?

A. $16.60.

Q. Now, do you likewise have upon your price list the price that you charged for an intermittent ignition primary control?

A. Yes, sir.

Q. And was the price for Mercoid, Perfex, and 1829 Honeywell the same?

A. No.

Q. What was the Mercoid price?

A. The Mercoid was $13.40; Perfex, $17.20; and Minneapolis was $18.70.

Q. Why was it that you priced the Mercoid primary of the constant ignition type for $4 less than what you sold a Minneapolis-Honeywell primary of the constant ignition type?

A. Well, that represented the exact difference in cost to me.

Trial Examiner Sheppard: What was that answer?

(The answer was read by the reporter.)

By Mr. Freeman:

Q. That is, you paid less for a Mercoid control than you did for a Minneapolis-Honeywell control?

A. Yes, sir.

Q. And likewise you paid less for a Perfex control than for a Minneapolis-Honeywell control?

A. Yes, sir.

Q. And how about the room thermostats? What was your charge for a Mercoid type H Sensatherm thermostat?

A. Excuse me. I wish to, in replying to the former answers and to the balance of the answers, on this page, to say that these prices were subject to a discount, that these are not the net prices but that they are all
1830 subject to the same discount.

Q. So your answer still holds, that you paid less for Mercoid than you did for Perfex and less for Mercoid and Perfex than what you did for Minneapolis-Honeywell?

A. Yes, sir.

Q. These are your prices subject to a discount?

A. Subject to a discount.

Q. And the discount was the same?

A. On all controls, yes.

Q. Now, what was your list price, subject to a discount, for the Mercoid Sensatherm?

A. $5.10.

Q. And what did you get, list price subject to the same percentage of discount, for a Minneapolis-Honeywell thermostat?

A. $5.80.

Q. And how about a Perfex thermostat of their No. 150-A type?

A. $5.

Q. And how about the Perfex thermostat of the 100-A type?

A. $4.30.

Q. So that in each case the Minneapolis-Honeywell's prices as charged by you were always higher than what you got for like products put out either by Perfex or Mercoid in the year 1938?

1831 A. That is true.

Q. Now will you turn to Respondent's Exhibit 133-C, which is entitled "List prices for Aldrich Heat-Pak standard line of oil burners", and tell me whether or not you allowed any differential or made any price adjustment where Mercoid controls were used with the oil burner, as distinguished from oil burners equipped with Minneapolis-Honeywell controls?

A. I did.

Q. And what was that difference?

A. $2.50 net.

Q. And is that the notation which appears upon Respondent's Exhibit 133-C, reading as follows:

"Deduct if with three Mercoid controls in place of Minneapolis, $2.50"?

A. That is right.

Q. And I notice in your 1939 price list that your burner is equipped with a; and I now quote:

"Three standard Minneapolis-Honeywell controls (stack relay, T-11 Acratherm, and a limit control without adjustable differential)."

Is that correct?

A. That is right.

Q. In 1939 you were still featuring Minneapolis-Honeywell and Mercoid controls, is that correct?

A. Yes, sir.

1832 Q. Now will you turn to Respondent's Exhibit 133-D, entitled "Aldrich Compact X oil burner, 1940 list prices, f.o.b. factory, and specifications", and tell me whether or not there was any differential in the sale of oil burners equipped with Mercoid controls and those equipped with Minneapolis-Honeywell controls?

A. There was.

Q. And can you look at your price list and tell me what the difference was for an oil burner equipped with, let's say, the constant ignition primary?

A. $3, list.

Q. That is, Mercoid sold for $3 less?

A. List.

Q. And what was the difference in list between Minneapolis-Honeywell and Mercoid in connection with the primary of the intermittent type?

A. $3.

Q. That is $4, is it not?

A. On intermittent?

Q. Yes, intermittent.

A. $4, even. Both of those were subject to the same discount.

Q. And by "subject to the same discount", you mean percentage discount, so that in all cases a burner equipped with Minneapolis-Honeywell controls sold for more money?

1833 A. That is right.

Q. Now will you turn to the 1941 price list effective March 15, 1941, entitled "Aldrich 'Standard' Oil Burner", and give me the controls that were there considered standard? That is Respondent's Exhibit 133-E.

A. Minneapolis constant ignition control, RA-116, T-11, and standard limit control.

Q. Now, those three controls were standard with the oil burner, is that correct?

A. If they ordered them that way. They also get an option as to any control they wanted.

Q. Now, if they bought an oil burner and asked that it be equipped with three controls of the Mercoid Corporation's make, that is, constant ignition, how much did you allow net?

A. $1.

Q. That is, a burner equipped with Mercoid controls was sold by you for $1 less.

A. That is right.

Q. Did you at the same time offer other makes of controls besides those manufactured by Minneapolis-Honeywell or the Mercoid Corporation?

A. Either Penn or Perfex.

Q. And did you make any charge extra or allow any deduction in connection with either Perfex or Penn?

1834 A. Well, they were the same price as Minneapolis.

Q. So that Mercoid's price on controls with oil burners was always less than the other three companies?

A. Yes, sir.

Q. Now, will you turn to the price list entitled "Controls and Accessories", dated as of August 1, 1941, and tell me of those there disclosed with respect to prices for controls?

A. Well, in this sheet we started out showing the amount to deduct if a control was taken with a burner, and that was at the top of the page.

Then below that we listed the charges or deduction that would be made in case they substituted one make of control for another make.

Q. And by "your own make of control for another make," you mean of the same manufacturer but a different kind of control?

A. No, if they substituted a control of one manufacturer for another that was comparable.

Q. Well, just tell me what is meant under the heading "Minneapolis R-117 relay (intermittent) in place of constant spark relay".

A. Well, it also applies to the controls that could be used for the same purpose of any one make.

Q. In other words, you allowed a differential where they bought a constant ignition primary of Minneapolis-
1835 Honeywell and did not take a primary of the intermittent ignition type, is that correct?

A. Well, we listed it with the constant ignition and then we would charge them more for the intermittent relay, or if we listed it with the intermittent ignition relay, we would charge less than with the constant ignition relay.

We were not in the control business; we were only concerned with selling burners, and we added our cost of controls according to what the dealer took. If he took a cheap control we charged him less than if he took a high priced control.

Q. I notice on the sheet you are just referring to, Respondent's Exhibit 133-F, you have there listed quite a number of controls under Minneapolis-Honeywell, a like quantity under Mercoid, and a substantial quantity under Perfex and likewise under Penn.

A. That is correct.

Q. And are those substantially comparable controls?

A. They are. Sometimes we even mix those controls on a job. A dealer will want a Minneapolis relay or maybe a Perfex relay and he will want a Penn or Mercoid thermostat and limit control.

Trial Examiner Sheppard: I was going to ask you, Mr. Aldrich, if you had that experience in your business.

The Witness: Oh, yes, many times.

1836 By Mr. Freeman:

Q. But you don't ordinarily mix a series 10 T-11 Aeratherm of Minneapolis-Honeywell with somebody else's primary, do you?

A. You can't.

Q. When it comes to Minneapolis-Honeywell's primaries and thermostats, they go out on the same job?

A. The series 10 controls must go together because you can't use the series 10 room thermostat or a series 10 limit control with a—

Q. (Interposing.) You mean primary?

A. With a primary control of any other make, because those controls are three-wire controls and they have a lock-in circuit which the other people are not using.

But we can sell other thermostats and limit controls with the Minneapolis series 10 relays and we do it.

Q. But so far as selling thermostats and primaries of the Minneapolis-Honeywell kind, that is, the series 10, they usually go on the same burner?

A. In the majority of cases, yes, but not always.

Q. Well, you don't follow the general practice of mixing Minneapolis—

Mr. Haycraft: (Interposing.) I object to the leading question.

Trial Examiner Sheppard: Turn it the other way.

1837 Mr. Haycraft: Ask him what he does.

By Mr. Freeman:

Q. Well, do you make it a practice, then, of sending out Minneapolis-Honeywell primaries with thermostats of the two-wire type?

A. Yes, certainly.

Q. And how are they connected up, then?

A. Bridged to posts on your relay.

Q. And when you do that, you eliminate this lock-in circuit?

A. Yes.

Q. And you eliminate one of the functions of the Minneapolis primary.

A. No.

Q. Well, would you say it is just as good?

A. Just as good, yes, sir.

Q. Do you know why Minneapolis-Honeywell has the series 10?

A. Well, it is easier to get sensitivity than it is with the others.

Q. A little better performance?

A. That is right. Easier to get it.

Q. Now, following along in Respondent's Exhibit 133, 133-G, I call your attention to the November 15th, 1941, price list, and I will ask you if there is disclosed

1838 thereon the prices at which you sell Minneapolis, Perfex, Mercoid, and Penn controls.

A. Yes, this is the price of controls, but separately from burners.

Q. And I notice under the general heading of "Control", you have a series of items, and I now ask you whether or not the items under Minneapolis, Perfex, Mercoid, and Penn, that extend in the same horizontal column, are comparable items.

A. They are. They perform the same function.

Q. Did you have annual contracts for your purchases of oil burner controls from Minneapolis-Honeywell during the years, say, 1936 to 1941, inclusive?

A. I am not sure about 1936. I think I did, but in the rest of the years I know that we have had.

Q. And have you likewise during that period of time entered into annual contracts with the Mercoid Corporation?

A. Yes, with all makers.

Q. Likewise with Penn?

A. Yes.

Q. Or Perfex?

A. Not all of the years with Penn, but the last few years we have had contracts with Penn.

Q. That is, you signed annual contracts with all of the companies?

1839 A. Yes, sir.

Q. And have you ever felt, in signing up with any one of the companies, that that contract kept you from buying controls from any one of the other companies?

A. No, sir.

Mr. Haycraft: I object to that unless there is some showing of what those contracts were. There might have been some provision in there—this Aldrich Company is not one of the 88 that have been a matter of discussion heretofore in this case, and I don't know what kind of a contract they have.

Mr. Freeman: Just read the stipulation, Mr. Haycraft. It will state.

Trial Examiner Sheppard: What is that?

Mr. Freeman: The stipulation states there are more companies with contracts than merely those 88 you refer to.

Mr. Haycraft: Well, it may be in a unit contract, I don't know.

Trial Examiner Sheppard: Well, this gentleman knows whether he has the contracts or not. I will let you make your statement, whatever it is.

The Witness: We had contracts with all makers. None of them were exclusive and none of them specified that we had to buy controls from no one else.

1840 Trial Examiner Sheppard: What I am interested in, Mr. Aldrich, is, and I want you to tell me—

The Witness: (Interposing.) All right.

Trial Examiner Sheppard: I don't care whether you

had contracts with all of them or not, but if you should have a contract with them, all of them, I want to know if you felt free and easy to buy wherever you wanted to, outside of any contract?

The Witness: Certainly.

Trial Examiner Sheppard: That is all I want to know on that point.

Mr. Freeman: That is all I want to know.

The Witness: I wouldn't have contracted unless I felt that way.

Trial Examiner Sheppard: In other words, you want more than one avenue of supply?

The Witness: I want what the customer wants.

Trial Examiner Sheppard: What is your position with that concern; are you president?

The Witness: Well, it is a co-partnership and Mrs. Aldrich and I own a half interest.

Trial Examiner Sheppard: It is a co-partnership?

The Witness: Yes, sir.

Trial Examiner Sheppard: You are not incorporated?

1841 The Witness: No.

Trial Examiner Sheppard: Just you and your wife?

The Witness: Well, there are four of us.

Trial Examiner Sheppard: What?

The Witness: There are four, Mr. Hill and his wife and myself and my wife.

Trial Examiner Sheppard: Oh, yes. All right, go ahead.

By Mr. Freeman:

Q. When you started in the oil burner business and bought controls from Minneapolis-Honeywell, do you recall what your price set-up was at that time? Did you get Minneapolis-Honeywell's low price?

A. No, I don't think I did, not at first, when I first started, because I didn't have very much credit established yet. I had to buy wherever I could get them.

Q. How about your volume, have you established yourself with respect to volume, or had you at that time?

A. They come around all right.

Q. That is, as your volume increased you got better prices?

A. That is right.

Mr. Freeman: I am wondering if Mr. Lockrae would merely state in the record the particular brackets that the Aldrich Company was in for the years 1936 to 1941.

1842 Trial Examiner Sheppard: Maybe you could tell us yourself?

The Witness: No, I couldn't.

Trial Examiner Sheppard: Do you know the first bracket you were put into?

The Witness: No, I don't know the first bracket.

Trial Examiner Sheppard: All right, in view of the fact that he can't tell us, Mr. Lockrae, you can prompt him and then you can testify to it.

The Witness: Your Honor, I don't think we had the same brackets every year. Now, I don't know for sure, but I think they probably had those classifications set up differently different years, Minneapolis-Honeywell did.

Trial Examiner Sheppard: Mr. Lockrae will fix it up for you.

Mr. Lockrae: In 1936 he bought in our bracket 1; in 1937 in our bracket 3; in 1938 in our bracket 4; in 1939, our bracket 3; 1940, bracket 4-A; and 1941, bracket 5.

By Mr. Freeman:

Q. Is that correct, Mr. Aldrich?

A. Yes.

Trial Examiner Sheppard: That showed a steady rise for you, except in one year you duplicated?

The Witness: In 1938, you see, we had a drop in the industry, but I increased the number of burners that I

1843 sold but I was unable to increase the profits.

Mr. Haycraft: And the price?

The Witness: In 1936 we paid $28.90 for a set of controls of the intermittent ignition type.

Trial Examiner Sheppard: That was when you were in bracket 1?

The Witness: Bracket 1. In 1937 it was $21.30.

Trial Examiner Sheppard: That was in bracket 3?

The Witness: Right. In 1938, bracket 4, $17.25; in 1939, bracket 3, $15.95; in 1940 I was in bracket 4-A, $15.15; and in 1941, in bracket 5, $13.75.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Mr. Aldrich, when you came on the market in 1935 and 1936 with your Aldrich burner, how did your net price

to dealers compare with the average price for oil burners at that time then on the market?

A. I think it was probably a little below the average in price. However, there were burners selling as much as $10 less.

Q. And there were likewise burners selling for about how many dollars more than your price?

A. Oh, 35.

Q. And what has happened since? Now, let us get that same comparison, bringing it down a little closer to 1941.

1844 A. Yes. We get about $6 net more than my lowest priced competitor.

Q. And that price that you get is still lower, though, than other oil burner manufacturers?

A. Well, when they go out after one of my large dealers they quote lower prices yet than I do.

Trial Examiner Sheppard: Do you do business all over the country or locally?

The Witness: All over the United States and in all foreign countries, that is, when there isn't a war on.

By Mr. Freeman:

Q. So you are in competition with burners selling for less than what your burner sells for and likewise with burners selling for more than what you sell for?

A. Yes.

Q. Well, who sells for less than you do?

A. Well, nearly any of them when they are selling especially to builders, even our highest priced competitors will cut the price.

Q. So that your competition is just everybody, then?

A. That is right.

Mr. Freeman: That is all. You may cross-examine.

Cross-Examination by Mr. Haycraft.

1845 Q. What has been your price range during these years? What were you selling for in 1941, and then go back?

A. Well, in 1941 we were selling burners in whole carload lots for as low as $47.50 and $48, with three controls; that is, where we could get large volume in carload lots and have n service of any kind and the customer took all responsibility.

We started out with an $82.50 price in 1935 on the same item.

Q. What were you selling for in 1937?

A. In 1937, about $55, with the controls.

Q. 1938?

A. We lowered that about $2 a year as we increased our volume. I think you will find that will run down about $47.50.

Q. Did you follow during that entire period this same policy of selling only in carload lots to large buyers?

A. We made a specialty of large outlets, such as furnace companies and boiler companies and appliance people and Sears, Roebuck & Company, where they sold under their own brand.

Q. You usually sold in carload quantities, then?

A. Yes.

Q. Did you have any dealers at all that serviced your—that sold your burner and serviced it?

A. Oh, yes.

1846 Q. About how many throughout the country did that?

A. Well, on an average of probably, through those years, about a thousand.

Q. About a thousand?

A. We have had as high as 2,000 dealers.

Mr. Freeman: 2,000 accounts?

The Witness: Yes.

By Mr. Haycraft:

Q. Now, when you sold these burners in less-than-carload lots, did you get a higher price for them?

A. Yes.

Q. What did you get for them then?

A. Well,—

Q. In 1941, and going back.

A. Well, they would run about an average of about $3 apiece, maybe more, to the small dealer.

Q. About $3 apiece. In other words, about 50, 51 dollars?

A. 51, 51, 52 dollars; that depends on how much assistance the man wanted. If he happened to be a fellow that required a lot of service, a lot of help, we always charged him enough more to cover it.

Q. Now, referring to this Exhibit 133, on the last page, 133-G—does the witness have it before him?

A. Yes.

1847 Q. Will you look at the last page; November 15, 1941, was there any difference in your price, in the price of your constant ignition control whether it was manufactured by Minneapolis, Perfex, Mercoid, or Penn during that time?

A. 1941?

Q. Yes.

A. Constant ignition?

Q. Yes, constant ignition stack relay, R-116A of Minneapolis.

A. Same price.

Q. Same price for all four?

A. Yes.

Q. How about the intermittent ignition relay, was there any difference in your price on those four?

A. No, it was the same price.

Q. Same price.

A. That is where they bought without buying a burner. Please understand, we try to discourage them buying any controls without burners. We are not in the control business. We were never in the control business.

Q. Now, the low voltage thermostat, is there any difference in the four brands there?

Mr. Freeman: Are you asking him about selling price or the cost price?

Mr. Haycraft: Selling price. That is what this 1848 is.

Mr. Freeman: That is the best evidence, then.

Mr. Haycraft: You asked him about it. I want to ask him something about it, too.

By Mr. Haycraft:

Q. Is there any difference between your low voltage thermostats?

A. There was none that year.

Q. The clock thermostat, what differences was there there?

A. Well, the Minneapolis had three kinds and the Mercoid and the Perfex and Penn only had one kind each.

Q. For comparable clock thermostats what was the difference?

A. The Minneapolis cost the dealer $1 more for a comparable outfit.

Q. That T-109A, what is the difference between that and T-111A?

A. The T109A is an elapsed time manually wound thermostat.

Q. And the T105A, that high priced one, what was that?

A. That is a deluxe old model of Minneapolis.

Q. An old model?

A. Yes, sir.

Q. Now, the T111A and the 126D4-D8 and 772, they are comparable in their performance?

A. That is right.

1849 Q. Now, the line voltage thermostat, what difference was there there?

A. Well, the T45, T44-T45, is a comparable one, is comparable to the Perfex 200D. That is wrong.

The Perfex 200D is a heavier instrument; it is comparable to the No. 855 Mercoid. No, correction again. I will start out with the T42. The T42 is comparable to the 200D Perfex and the 855 Mercoid.

Q. What difference in price do you have there?

A. Well, we had a $5.50 price on the Perfex, $6.50 on the 855 Mercoid, and $5.75 on the T42 Minneapolis.

Q. In other words, Minneapolis was cheaper than the Mercoid?

A. Yes, sir.

Q. What is the Penn one? You didn't mention that one. Was that heavier or lighter than the others?

A. Well, that job is comparable to the T44-T45 of the Minneapolis.

Q. The $4.50 Minneapolis line voltage thermostat was comparable to Penn's $6.50, is that right?

A. That is right.

Q. Now, the Strap-On-Aquastat?

A. Those are all comparable.

Q. They are all the same price?

A. They are all the same price.

1850 Q. The Submerged Aquastat?

A. There is a difference. DA-36 and 37 Mercoid are very much superior to any of the others listed in performance. They are a better control.

Q. And cost more?

A. And cost more, yes, sir.

Q. Well, what is there comparable to the Minneapolis L170A?

A. Well, I would say that there isn't much preference between that and the others listed, outside of the DA-36 & 7, they are comparable.

Q. So that it is a little higher in price, however, than the Perfex and Mercoid, but lower than Penn?

A. Yes, sir.

Q. The Steam Pressure Control P404A—

A. (Interposing.) They are all comparable.

Q. And the Minneapolis price is less than the price—the price on the Minneapolis control is less than on the Mercoid and the Penn, is that right?

A. That is right. The same as Perfex.

Q. Now, the combination high and low Aquastats, you just have two there, don't you, Penn and Minneapolis?

A. Yes.

Q. Are they comparable?

A. Well, I never handled any of the Penn so I can't
1851 tell you for sure. They cost us the same.

Q. The warm air limit control, L419, the Minneapolis number, is that comparable?

A. You will find two prices there, and that is because the M51 Mercoid has an adjustable differential. Minneapolis have a control in their line that sells for a dollar more that is comparable.

Q. It is the same price, then?

A. Same price.

Q. How about the Penn item?

A. I think the Penn is always a little bit less. They are adjustable, anyhow.

Q. Now, the fan control, LA412A of the Minneapolis, is that comparable to the others listed?

A. They are all comparable except the same thing applies to the M53, which has an adjustable differential.

Q. Now, the combination fan and furnace control, LA401A, are they all comparable?

A. No, they are not. The M-80 has an adjustable differential on both the fan switch and the burner switch.

Q. How about the Perfex?

A. And the Penn also. Perfex is adjustable. Minneapolis is fixed.

Q. Now, where you have got higher prices for Mercoid and Perfex and Penn than you do have for Minneap-
1852 olis, does that mean that you paid more for them?

A. Yes, wherever they show higher prices, in either

case, either the Minneapolis or the others, we paid more for them.

Q. Now, on this August 1, 1941, that is 133-F, I believe where you have deductions for—you start off by saying, "Deduct the following where a control is not taken."

Now, a standard limit control is mentioned. Now, what do you mean by that?

A. The standard limit control is either a warm air switch or Strap-On-Aquastat or a steam pressure control of 15 pounds or more.

Q. Of any particular make?

A. Of any particular make, without an adjustable differential. If it has an adjustable differential we always add an extra charge.

Q. Then these various items that you have added, where it says, "Add the following where a control listed below is substituted for a control listed in the price of burner", you have there, down a little ways, "Where burner is purchased with an extra standard limit control", is your definition of a standard limit control the same there?

A. Yes, sir, it is in the industry throughout.

Q. Do you remember whether or not the contract that you signed with the Minneapolis-Honeywell Company had this language in it:

1853 "It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the company's costs are figured to cover a complete set of controls, the following break-down prices are purely for invoicing purposes, it is agreed that the purchaser's yearly purchases will consist of at least 90 percent as many room thermostats and 100 percent (but at the company's option not more than 125 percent) as many limit controls as primary controls"?

A. I think that is in all control contracts.

Q. It is in all set control contracts of the Minneapolis-Honeywell. It is not in the unit. The reason I am asking you whether or not your contract had that clause in it is because it is not for the unit.

A. I don't know whether it had it or not, but it wouldn't have made a bit of difference if it had, because I think all makers have tried to get you to buy their controls in sets as much as possible; but, irrespective of that, the entire industry, if they handled more than one make of

controls, sell the customer whatever they want, otherwise they lose the customer.

Q. You don't have your contract with you to know whether or not that is in it?

A. No, I think probably they have a copy of our 1854 contract over there. Haven't you?

Mr. Gilpatric: It had that language in it, Mr. Lockrae will state for the record, I think.

The Witness: I think it had that language in it because it is standard practice.

Trial Examiner Sheppard: All right, I will take it, coming from you.

By Mr. Haycraft:

Q. Do you know of any other contract that has that in it? You say it is a standard practice. It may be a standard practice of Minneapolis-Honeywell. Is there such a clause in other contracts, is it standard practice of any other contract?

A. Well, I am not prepared to state.

Trial Examiner Sheppard: All right, Mr. Aldrich, if you go home look at it and if you find that it differs you can write to me; otherwise, I will take what you said there.

The Witness: You know, we never looked at those contracts after we get them. I don't know whether we burn them up or put them in the fire or not.

By Mr. Haycraft:

Q. Referring now to 133-B, this 1938 prices for controls and accessories, you were asked about the first two items on this page, that is, stack relays and power 1855 relays, and also, I think, as to thermostats.

I will ask you whether or not under your Pressuretrols there there were any comparable items, that is, did either the Mercoid or the Perfex Pressuretrol, were they comparable to the Minneapolis-Honeywell L-404-2?

A. This is the 1938 sheet in front?

Q. Yes, 1938 sheet, that Pressuretrols column there. You have got some Mercoid and some Perfex and one Minneapolis-Honeywell. I was wondering whether or not they were comparable.

A. Well, under DA-31 control, ours cost us 25 cents more than the comparable Minneapolis, and it has been worth a dollar more, at least, by rights.

Q. What do you mean by that?

A. It is a better instrument.

Q. That is, the DA-31 Mercoid compared with the Minneapolis-Honeywell L-404-2, is that correct?

A. That is right. They sell for 25 cents more and we have always paid that much more and we have always considered it worth more than that. It is a better instrument.

Q. Now, the Aquastats, what comparison is there there between the Mercoid and the Perfex and the Minneapolis-Honeywell?

A. I wouldn't consider them any different in quality, and the price has always been substantially the same.

1856 Q. You have got here in the Surface type, the Mercoid and Perfex selling for 20 cents less than Minneapolis-Honeywell's L-409-1?

A. That is right.

Q. On the others, the immersion type, you have the Minneapolis-Honeywell selling for less than the Mercoid. What is the difference between those?

A. The Mercoid costs us more money in that case.

Q. They sold for $7.80, whereas Minneapolis-Honeywell sold for $6.80, is that right?

A. Mercoid at that time was not building a competitive price Immersion type Aquastat.

Q. Now, then, the Airstats, you have the Mercoid, Minneapolis-Honeywell and Perfex items. Which one of those is comparable?

A. Well, the M-51 Mercoid always cost us $1 more than we paid for the Minneapolis.

Q. You sold them for the same, is that it?

A. No.

Q. I see Minneapolis is the 419, for $4.80. Is that the same one?

A. Yes, sir, the Mercoid has an adjustable differential. Minneapolis has an Airstat with an adjustable differential, but they get the same price as the Mercoid do for it.

1857 Q. Now, then, you will notice you have got your Mercoid M-80 combined fan and furnace control, $10.20, and the furnace control, $9—rather the Minneapolis combined fan and furnace control, $9. Are those comparable, that is Minneapolis L-401-3?

A. The Mercoid is a superior differential. It has an adjustable differential on both circuits.

Q. Does it cost more?

A. Yes. Despite the fact that there was a royalty that Mercoid didn't pay.

Q. At that time?

A. Yes.

Your Honor, I venture to suggest that whenever one of these companies would come out to contract, that I would see one of the others within three days, and they had talked the prices over together, and the prices were identical in the same quality merchandise. I think they all had agreed what they were going to do in advance. I could always tell what the trend of prices was going to be by the first one that called on me.

If one firm had an adjustable differential on the switch, he was sure to come up with exactly the same differential that the other company made.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. The next page here, it is C, Respondent's Ex-1858 hibit 133-C. It is the January, 1939, list. Down here, your extras and deductions for optional equipment, it says, "Combination furnace and fan control place of limit control." What combination control did you refer to there, where you charged $6?

A. That would be the warm air control.

Q. Would that be Mercoid or Minneapolis?

A. It would be either way, I think.

Q. Either one?

A. Where is it?

Q. Right down in the middle. "The combination furnace and fan control place of limit control", and you add $6.

A. Yes, we would add that regardless of the man that was buying. If they ordered Mercoid combination, he would pay $6 more. If he ordered the Minneapolis combination in place of the Minneapolis limit control, he would have to pay $6 more.

Q. That applied to either company?

A. That is right. If there was any difference in the price of the make, it would carry right through.

Q. Now, was this the same burner in 1941, this Heat-Pak, as your Compact X in 1940?

A. No, the burners were slightly different, different capacity.

Q. You were getting more money for your burner in 1941?

1859 A. We constantly reduced the prices every year. If we made too much money, we gave it to the customer next year.

Q. You advanced your price in 1941 as compared with 1940, didn't you?

A. No, I don't think so. That is list price.

Q. I know, but your list price—

A. We changed our list prices about twice during the entire period and rearranged our discounts. We had to do it on account of adding to our line.

Q. What were your trade discounts during those years?

A. We started out with around 50 percent and when we got through the last of our civilian business we were selling at 70 percent, with the new list.

Q. I see. 70 percent, that would make your difference in price?

A. Yes.

Q. Would that same discount apply on your parts and accessories?

A. Well, we usually give a dealer 50 percent discount on the parts.

Q. For instance, on page 133-B, where you have 1938 prices, you said these were list prices?

A. Yes.

Q. And they were subject to a trade discount. What was the trade discount?

1860 A. At that time I think the trade discount was 66 2/3 percent. The extras, however, are net. You will notice it is marked net, extras.

Q. Where is that?

A. Net extras for optional equipment; and you notice above the burner it says, "1940 list prices."

Q. What page are you on?

A. 1940.

Q. This is 1938. Are those prices all subject to a discount and, if so, to what discount?

A. I believe we gave 25 percent at that time.

Q. 25 percent on these—

A. (Interposing) On the controls. That is, to the jobber.

Q. To the jobber?

A. Net to the dealer.

Q. How about the dealer?

A. Net to the dealer.

Q. These price lists on the next page, 133-C, 1939 list prices, this is a Heat-Pak standard line number, and different types of burners you had there, they were all subject to what, 66 2/3 percent discount?

A. No, sir, that year on that list we had a 50-percent discount to the jobber.

Q. To the jobber?

1861 A. Yes.

Q. And net to the dealer?

A. No, the dealer is about 33 1/3 percent?

Q. 33 1/3 percent to the dealer and 50 percent to the jobbers?

A. That is right. The extras and deductions, however, have always been net with us.

Q. For optional equipment?

A. Yes.

Mr. Haycraft: That is all.

Redirect Examination by Mr. Freeman.

Q. One question, Mr. Aldrich. On the last page of Respondent's Exhibit 133, which of those items did you send out as standard with your burner when someone wanted a Minneapolis-Honeywell set of controls?

A. If they wanted a Minneapolis-Honeywell set of controls, they got a Minneapolis-Honeywell set.

Q. What three items to make up the set?

A. That would be a standard limit control, a constant ignition relay, and a room thermostat, low voltage room thermostat.

Q. You wouldn't send out a line voltage thermostat, would you?

A. No, never.

1862 Q. Isn't it a fact that a line voltage thermostat is an extra used on something other than your oil burners?

A. No. It is used where you have a summer-winter hook-up.

Q. That is, on a circulator?

A. That is right.

Q. Isn't it true that all the controls except the stack relay and the ordinary limit controls and the ordinary

thermostats are extras used in connection with special applications on oil burners?

A. Your three limit controls, you have to have three types of limit controls.

Q. That is where steam—

A. (Interposing.) —and water.

Q. And water.

A. And in some cases vapor, although recently we use hot water control on vapor jobs.

Q. Those three are comparable in function?

A. Yes.

Q. And then you had to have one thermostat in association with the primary?

A. That is right.

Q. And that was usually a low voltage thermostat?

A. Yes.

Q. These other items appearing here, such as clock thermostat, line voltage thermostat, and the fan con-
1863 trol and the combination fan and furnace control, those are extras over and above the standard controls which function in connection with the operation of an oil burner, is that correct?

A. That is true, with the exception of the combination fan and furnace control. A warm air furnace has a fan and they buy a combination control.

Q. Then that serves an additional function over and above the limit control?

A. That is right.

Mr. Freeman: That is all.

Mr. Haycraft: I move to strike that. I object to that question as leading. Isn't it the limit control, the fan and furnace control?

The Witness: One part of it is a limit control.

Mr. Haycraft: And the control is a part of it, isn't it?

The Witness: Yes.

Mr. Freeman: That is all.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Thank you very much, Mr. Aldrich. You are excused.

(Witness excused.)

Trial Examiner Sheppard: Take a little recess, gentlemen, of five or six minutes.

1864 (A short recess was taken.)

Trial Examiner Sheppard: We will be on the record.

Mr. Gilpatric: We will call Mr. Berghoff.

ROBERT G. BERGHOFF, was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Sheppard: Give us your name, Mr. Witness.

The Witness: Norbert G. Berghoff, B-e-r-g-h-o-f-f.

Trial Examiner Sheppard: Give us your address.

The Witness: Wayne Oil Burner Company.

Trial Examiner Sheppard: Located where?

The Witness: Fort Wayne, Indiana.

By Mr. Gilpatric:

Q. Mr. Berghoff, what position do you hold with Wayne Oil Burner Corporation?

A. Up until July of 1942 we were a corporation. However, we changed over to a company, which is now a partnership.

Prior to that time I was treasurer of the company.

Q. Was that true during the years of, say, 1937 to 1941?

A. That is right.

Q. Did your duties have anything to do with pur-
1865 chasing as well?

A. Yes, I handled the purchasing.

Q. What type of burner did your company manufacture?

A. We started out manufacturing the pressure atomizing type, but back about three years ago or four years ago we introduced a vaporizing type of burner.

Q. Is that latter type of burner sold for the same users that a pressure type burner is?

A. To a certain extent we use it for smaller installations, and it is more of a competitive type burner, but—

Q. (Interposing.) Lower priced?

A. Lower priced, and does the same function, except that they don't normally use the vaporizing type burner for large gallonages.

Q. Will you give us generally the date when your company began to make oil burners?

A. It was before my connection with the company, but I think it was around 1929 or 1930, and I got into it just about that time.

Q. What types of automatic temperature controls has your company sold to burners equipped with—

A. (Interposing.) Well, we used Minneapolis-Honeywell, Perfex, Mercoid, and I think some Penns, and probably one or two others back through the history.

Q. Did you have contracts with Minneapolis-Honeywell?

1866 A. Yes, sir.

Q. How about with the other control manufacturers you have named?

A. We had contracts with three of them, that I know of.

Q. Will you name the other two companies?

A. Perfex and Penn.

Q. What about Mercoid?

A. And Mercoid.

Mr. Gilpatric: Will you mark these, please,—

The Witness: (Interposing.) As a matter of fact, I meant Mercoid instead of Penn.

Mr. Gilpatric: Will you mark these as Respondent's Exhibits 134-A and B, 135-A and B, and 136-A and B?

(The documents referred to were marked Respondent's Exhibits 134-A, 134-B; 135-A, 135-B; 136-A, and 136-B for identification.)

By Mr. Gilpatric:

Q. Mr. Berghoff, I show you Respondent's Exhibits for identification 134-A and B, 135-A and B, and 136-A and B, and ask you whether those are contracts between your corporation and the Mercoid Corporation for the years 1938, 1939, and 1940?

A. Yes, they are.

Mr. Gilpatric: Respondent offers them in evidence with the request that it be permitted to substitute photo-

1867 static copies for the originals.

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let RESPONDENT'S EXHIBITS 134, 135, and 136 be accepted.

(The documents referred to, heretofore marked for identification 134-A, 134-B; 135-A, 135-B; 136-A, and 136-B, were received in evidence.)

By Mr. Gilpatric:

Q. Commission's Exhibit 1 in this case states that your company had a contract with Minneapolis-Honeywell in 1938 in which the quantity of sets was specified as an estimated amount.

Do you recall that?

A. Yes, I do.

Q. Did you consider that that contract prevented you from purchasing controls from other manufacturers?

A. No, I didn't.

Q. Did you, in fact, during that year purchase controls from other sources than Minneapolis-Honeywell?

A. Yes, I did.

Q. Have you with you any figures which would indicate your control purchases during the period that I have referred to?

A. Yes, I have them here.

1868 Q. Will you give us the figures for the years 1938, 1939 and 1940.

A. I am not too sure that these figures are accurate. However, I had the girl take them off of the records of the company before I left, and I have every reason to believe they are somewhere within reasonable accuracy.

1938, purchases from Minneapolis-Honeywell were $15,560.83; from the Perfex Corporation in the same year, $16,687.61; Mercoid in the same year $1,695.81.

1939, Minneapolis-Honeywell, $9,932.30; Perfex Corporation, $17,567.46; Mercoid Corporation, $1,446.99.

1940, Minneapolis-Honeywell, $8,386.66; 1940, Perfex Corporation, $14,254.95; and Mercoid, in the same year, $280.52.

Q. Do you recall whether, during those years, the prices which your company paid for Minneapolis-Honeywell controls ran higher or lower than the other two competitive makes you have mentioned?

A. For the principal controls, the prices of Minneapolis-Honeywell were somewhat higher than the other two.

Q. By "principal controls" you mean primary, room thermostat and—

A. (Interposing.) And limit control, that is right.

Q. Did you charge any more for your burners equipped with Minneapolis-Honeywell controls than those 1869 equipped with other makes?

A. No, we didn't, as a general rule, between Minneapolis-Honeywell and Perfex, but in one or two cases, we had dealers where—I think they were probably furnace manufacturers—that we had a lesser price when we furnished Mercoid controls.

Q. In those instances you passed along the slight differential?

A. That is right.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Gilpatric:

Q. What was your price to dealers, that is, your burner with controls, during 1941?

A. It ran somewhere in the neighborhood of $75.00.

Q. And what, if you know, was the installed price of your burners, including tank and other equipment?

A. When we installed them locally, our regular price was $275.00 complete, installed with tanks and controls; and throughout the territory, the price varied, depending upon competition in the different areas and also whether or not the burners were installed by oil companies who didn't try to make anything out of the installation of the burner, 1870 but rather increased their oil deliveries, and so forth.

Q. Do you recall the particular price brackets of Minneapolis-Honeywell that your contract brought you in the particular years?

A. I don't recall what brackets we were in at all.

Mr. Gilpatric: Mr. Examiner, may I ask Mr. Lockrae to give us that information.

Trial Examiner Sheppard: Yes.

The Witness: I don't think our contract discloses any brackets.

Mr. Gilpatric: If you have that, will you give it, for the record?

Mr. Lockrae: What years?

Mr. Gilpatric: Beginning with 1937, through 1941.

Trial Examiner Sheppard: Show Mr. Lockrae is giving the information for the record.

Mr. Lockrae: They were in bracket 3 in 1937, 3,000 units, the price $21.30 a set for intermittent ignition control. In 1938, they were in bracket 2. Their quantity was 2250 units and their price was $19.35 on the intermittent ignition control. In 1939, bracket 3, 3,000 units. Their price was $16.65 for the intermittent ignition controls. In 1940, they were in our 15,000 unit bracket. The price of the controls for intermittent ignition was $15.85. In 1941, they were in our 15,000 bracket, and the price was for a 1871 set of the intermittent ignition controls, $14.90.

Mr. Haycraft: In what bracket, 4?

Mr. Lockrae: 4 in 1940 and bracket 4 in 1941.

By Mr. Gilpatric:

Q. Mr. Berghoff, are you aware that during some of the years that Mr. Lockrae has referred to, certain of your oil burner manufacturing competitors received better bracket prices than your company from the Minneapolis-Honeywell?

A. Yes, I believe I can say I was aware of it, due to the fact that as time went on, we knew that as we picked up we got into different brackets, and we took it for granted that somebody else would, too.

Q. To your knowledge, did the fact that your competitors, the ones I mentioned, received better control prices hurt your sale of oil burners or affect your competition?

A. I don't believe so much, in our particular field, and there were a great many other things that went into the cost of our burner, such as engineering service, advertising campaigns, dealer helps, salesmen; and, for that reason we were getting around $75.00 for a burner, where our competitors were away under that.

Q. Was your sales territory very broad?

A. Well, we had about 60 percent of the extent of our business in the eastern market and through this particular period, we did about 10 per cent export business, and 1872 we covered the United States coast to coast.

Q. What was the trend of your sales during the period from 1937 to 1941?

A. They were pretty constant. We didn't seem to move much one way or another.

Mr. Gilpatric: That is all.

Cross-Examination by Mr. Haycraft.

Q. Well, according to your purchase of these controls, it would indicate your sales went down, declined, during those years. How about that?

Trial Examiner Sheppard: Declined? I remember Mr. Lockrae's figures. They went into a different bracket and then went up again.

Mr. Lockrae: I am looking at his volume, dollars and cents.

Trial Examiner Sheppard: Oh, I see.

Mr. Gilpatric: Mr. Examiner, again we must bear in mind the control prices went down. You can't tell the units from the dollar figures.

Mr. Haycraft: They didn't go down that much.

Mr. Freeman: Well, why don't you tell him how much they went down.

Mr. Haycraft: Well, good grief, he is the witness. He ought to know. I am asking him to testify.

1873 Mr. Freeman: You can be fair in asking your questions of the witness.

Mr. Haycraft: I don't know myself. Why don't you ask him?

Mr. Freeman: Same old story, we will put in our case our way. I am objecting to your form of question. It is unfair.

Mr. Haycraft: No, it isn't unfair.

Trial Examiner Sheppard: Well, we will let the witness settle it, if he has it.

The Witness: Well, my particular reason for that, our business was pretty constant. Of course, no business stands still. My particular end of the business was purchasing and I am not too familiar with the sales figures, although I do know that we did stay in a pretty close range. That is, there are certain facts in there that might make a differential between the number of actual units sold and the dollar and cents gross, due to the fact that the prices have varied some. We did have a few accounts where we sold direct to furnace manufacturers, where we didn't furnish controls. We would eliminate, perhaps, the limit control. As I recall, it hasn't been up until very long ago when the underwriters would not permit an oil burner manufacturer to sell a burner without the primary, I think, control—being a part of the unit—and I think—I am not

1874 too clear on that—but I think that restriction was lifted and we sold burners to furnace manufacturers that purchased their own controls, because they also sent out furnaces with certain controls on them without burners, and that had some bearing on our control volume.

By Mr. Haycraft:

Q. Well, do you have figures there showing the exact number of controls you bought in 1938?

A. No, I don't. I just have the figures, the dollars and cents.

Mr. Haycraft: Do you have that, Mr. Lockrae?

Mr. Lockrae: Yes, I have.

Mr. Haycraft: He gave the brackets on direct examination, and now I would like to have the exact number of controls.

Mr. Lockrae: 1937, 4,820 units. 1938, 1,872 units, 1939, 1726 units. 1940, 1428 units. 1941, 1271 units.

Mr. Haycraft: Purchases were declining.

By Mr. Haycraft:

Q. Do you know whether or not there was any arrangement there on burners you manufactured for other manufacturers? Did they buy direct from the manufacturer?

A. Yes, sir.

Q. Do you know what furnaces they were, what companies?

Q. What companies?

1875 A. Yes, I do.

Q. What were they?

A. The Bard Manufacturing Company.

Q. Pardon?

A. Bard. And Ruddy Furnace Company. And I think there may have been one or two more, smaller ones.

Q. These two, when did you sell to them?

A. Well, we were selling to them when the prices came up.

Q. For how long?

A. Oh, for the last four or five years.

Q. Can you remember the year you first sold?

A. No, I can't.

Q. Or the quantities?

A. No, I couldn't be sure about that.

Q. You are not familiar with the sales end of it?

A. No, I am not.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Thank you.

Mr. Gilpatric: One question.

Redirect Examination by Mr. Gilpatric.

Q. Do you know whether controls which your company purchased from Perfex Corporation were used with this distillate or vaporizing type of burner?

Mr. Haycraft: He didn't speak of it by that name.

1876 He didn't call it the distillate.

The Witness: The vaporizing type.

Mr. Haycraft: The vaporizing type.

Mr. Freeman: That is the same type.

Mr. Haycraft: I thought it was, but I wasn't sure enough for the ground of my objection.

Mr. Freeman: Why don't you withdraw your objection?
Mr. Haycraft: I object to the question, Mr. Examiner.
Trial Examiner Sheppard: Well, it seems to me it is funny. Off the record.
(Discussion off the record.)
Trial Examiner Sheppard: On the record.
The Witness: Now, will you read the question.
(The question above referred to was read by the reporter.)
A. Yes, they were.
Mr. Freeman: Is a vaporizing type burner ever known as distillate or pot type burner?
The Witness: Yes, it is.
Mr. Freeman: That is all.
Mr. Haycraft: When did you begin to manufacture them?
The Witness: I believe we started development work on that in about 1938 and got a few into the field in that year and manufactured from then on until we were asked to discontinue the manufacture of all burners.
Mr. Haycraft: What proportion of your business was that particular type as compared with the other?
The Witness: Oh, less than ten per cent.
Mr. Haycraft: Do you use Minneapolis-Honeywell primary controls on that type of burner?
The Witness: No, it operates differently. We use a float valve, which is not purchased from any of the companies that we discussed today and, as I recall it, the only other control used in connection with that installation which was manufactured by the companies under discussion is the thermostat.
Mr. Haycraft: And that is the one you bought from Perfex?
The Witness: Yes.
Mr. Haycraft: And that would be about ten per cent, you say, of your business during that time?
The Witness: I think it ran somewhere around there.
Mr. Haycraft: I think that covers it.
Trial Examiner Sheppard: Okay. That will be all sir. Thank you very much.
The Witness: Yes, sir.
(Witness excused.)

A. H. LOCKRAE resumed the stand and having been previously duly sworn, testified as follows:

Cross-Examination (Resumed) by Mr. Haycraft.

Q. I think at the last session we had just identified the exhibits 124 and 125. Do you have copies of those before you, Mr. Lockrae, 124—

Trial Examiner Sheppard: And 125.

By Mr. Haycraft:

Q. First, I will ask you what Exhibit 124 is. What if anything you had to do in the preparation of it.

A. Exhibit 124 is a cost summary that was made in 1938, based on 1937 figures, from company records, and this study was to give to us the varying costs, including business at the various price brackets which we had at that time.

Q. Did you have anything to do with the preparation of it?

A. I did.

Q. What did you have to do with it?

A. Well, I segregated all of our sales reports covering the men whose names appear in the report. I also determined, from our accounting records, the salaries and expenses of those men for 1937. I also took, from our standard company records, our costs per set of controls and 1879 determined from our records the profit or the factory cost for 1937, and then, again from our company records, I determined the indirect and direct selling expenses for the New York office—which is involved in the study—and also our home office; the general overhead and selling and administrative expenses.

Q. Are you an accountant?

A. I am not a C. P. A., no.

Q. When did you begin the study?

A. Well, I couldn't tell you the exact time. I worked on it intermittently, because I also had other things to do.

Q. Do you remember having an interview with Mr. Royal on October 5, 1938?

A. I remember having an interview with Mr. Royal, but I don't recall the date.

Q. At which time you stated that you would like to have an opportunity to assemble some figures showing the differences in cost in selling the customers at various price

brackets, which would tend to justify the point of variation in price; and that he agreed he would include such a study in his report to the Commission.

Mr. Freeman: What are you reading from?

Mr. Haycraft: And that later on in November, November 11, 1938, you did submit such a report to him, which is Commission's Exhibit 124.

1880 The Witness: I recall submitting the report. I may have mentioned to Mr. Royal, prior to that time, that I was working on the figures.

Mr. Gilpatric: You mean to say Respondent's Exhibit 124, instead of Commission's Exhibit.

Mr. Haycraft: Respondent's.

By Mr. Haycraft:

Q. And does that refresh your recollection as to the time that you prepared and submitted that report to Mr. Royal?

A. Well, I can tell you that I gave Mr. Royal the report shortly after, or it might have been shortly prior to my letter of February 25, of 1939.

Q. Well, if he mentioned November, do you have a letter of transmittal, copy of a letter of transmittal in November, 1938, to Mr. Royal, letter of transmittal in connection with the report, Exhibit 124?

A. No, the only report I have here is—the only letter I have here is the letter of February 25, 1939.

Q. Do you recall going to the Commission's office in Chicago, that is to this office here, on the 11th floor?

A. Yes, I do.

Q. And giving to Mr. Royal on that occasion the report which is Respondent's Exhibit 124?

A. I don't remember whether I gave that report to him then or not, Mr. Haycraft.

1881 Q. On November 11, 1938?

A. I remember of meeting with him here.

Q. And along with that, was a price sheet, price list, dated August 15, 1938, is that right?

A. Yes, I recall there were several pieces of data that he wanted me to get for him, and I was coming to Chicago and I brought them down.

Q. Now, in reference to Respondent's Exhibit 115, I notice that, in comparing that item, Respondent's Exhibit 124-B, that there is one column left off, the discount column.

A. That is right.

Q. What was the purpose of not including the first column, the discount column?

A. That column covered miscellaneous small manufacturers whose volume was almost negligible. As a matter of fact, in the report, it shows in the New York area, only $5,600.00 of sales, or 227 sets of controls sold in the entire year of 1937.

As I have explained previously, I think, Mr. Haycraft, that does cover the small accounts that were just getting into business or those that were going out of business, and it was a price structure that we established in order to have some resale price set up for that class of manufacturer or dealer, or whoever was assembling the burner.

1882 Q. Now, Respondent's Exhibit 125, the letter of February 25, 1939, that is your letter, is it not, explaining the method of preparation of Respondent's Exhibit 124?

A. That is correct.

Q. And also, in this letter, there is a comparison similar to the one which has been received in evidence as Respondent's exhibit 115, except that it carries this earlier column, this first column?

A. That is correct.

Q. Now, in the study that was made—going into Exhibit 124, Respondent's Exhibit 124—did you make a study of all of the branches of the Minneapolis-Honeywell Company?

A. No, I did not.

Q. What branches did you use for the purpose of making this study?

A. Well, I took the largest branch which we had, because most of the oil burners—that is the largest percentage of our oil burner business, anyway—was done there and I figured that was a fair criterion to go by, and I also included in this study accounts in some of the other branches or accounts, I should say, that filled in our lower price brackets.

Q. Where is that set forth in the exhibit?

A. Well, it is mentioned, Mr. Haycraft, in several of them. On Schedule F, you will note the break-down
1883 there of Bracket 4, 5 and 6; also the salesmen's calls on analysis No. 3.

Q. That shows the home office and New York.

A. Pardon me?

Q. That shows the home office and the New York branch office, doesn't it?

A. Well, Schedule F that I am looking at—are we looking at the same one? Here we mention the brackets 4, 5, and 6 accounts and, again, on analysis 3, we mention the same, 4, 5 and 6.

Q. Where were those records taken from, the New York office?

A. Well, the manufacturer—for example, Mr. Hoyt is in our Boston office and one or more of the accounts are in that office. In other words, I not only include New York, the New York office, but, in some of the larger accounts, went beyond the New York area. For instance, here is Baltimore (indicating) and so forth, you see.

Q. And for what purpose was that put in?

A. Well, we were trying to establish the difference in the bracket, various bracket accounts.

Q. Those were just the expenses of sales and calls?

A. We were figuring out there the cost per salesman and the salesman's cost per call.

1884 Q. But when you figure overhead and office expense and so forth, you figured that in the New York office, didn't you, and the home office?

A. Well, we figured it in the New York office and also in the home office.

Q. Now, in determining the amount of your selling expense, what was the total volume of sales that you made the study of in those brackets 1, 2, 3 and so forth—such as you have in Schedule D you have got there? You have here "cost of calls on 88 manufacturers". And how much is the total sales to those manufacturers during that period of time, compared with the figures that you have in the exhibit? In other words, how much of a section do they cover?

A. Let me see. Pardon me. Off the record, please.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: Well, I find that all of those manufacturers were located partially in the east and there were some in the west.

By Mr. Haycraft:

Q. Where are you getting that information?

A. Analysis No. 2. That is the last one in the book, Mr. Haycraft.

Q. Now, the figures that you have for volume of 1885 sales there amount to—I mean the amount of expense—amounts to $5,686.20, and the amount of sales was—do you have any idea as to the volume of sales to those companies that—

A. Where are you getting those figures, what page?

Q. That is in Schedule "C", "Cost of calls on 88 manufacturers".

A. Well, in accordance with Schedule D and C, which will have to be looked at together—if you start with your discount or bracket 1—perhaps this will give you the information you want—we sold to discount manufacturers a total of $5,684.00 of materials during 1937; in bracket 3, $73,323.00 and then the sales are enumerated in the other brackets.

Q. What is your total then for all those?

A. The total New York sales were $1,565,771.18.

Q. What is the total of the sales on which you made your allocation?

A. The total—pardon me just a minute. On analysis 1, that is the fifth page from the back, if you want to find it—

Q. (Interposing) I have got it.

A. We outlined there the names of the various manufacturers and classified them by the various brackets, and, in that manner, determined the sales that were made to those various classes of manufacturers.

1886 Q. What percentage was that of your total business done through that office?

A. The companies that you picked?

Q. Was that about one-third, would you say?

A. I was trying to get that more accurate, and I thought I could do it here, Mr. Haycraft. I think I can give you that a little more accurately; the discount, the bracket 1, and the bracket 2 and bracket 3 sales totaled approximately $500,000.00. Our New York branch, total sales, $1,565,771.18. Those three brackets represent approximately one-third of the New York figures.

Q. Didn't you use this discount bracket first, as a basis to work on?

A. That was included in those figures I just gave you.

Q. What was your basis on which you used, you figured the discount? Didn't you use that figure, the discount bracket sale, as your basis on which you figured Bracket 1, Bracket 2 and Bracket 3 sales?

A. Well, you remember that the discount bracket prices were the same as we gave to a jobber under contract.

Q. Yes.

A. And then, from the jobber price, we determined our first bracket prices.

Q. In other words, it was the base for the first bracket price?

1887 A. Well, the discount manufacturer sales is nothing but a drop in the bucket compared to the jobber sales. They just happened to have and were extended the same prices as the jobber.

Q. And in the study that you made, you just used bracket 1, 2 and 3; you didn't use 4, 5 and 6?

A. I figured 4, 5 and 6, but did not confine it to the New York area.

Q. Well, what did you base that on? What sort of comparison did you make of your total sales that were taken into consideration and with those total sales that you—for, instance, was it a home office figure that you compared with the total sales, or what?

A. Schedule F, if you will refer to it, please.

Q. Yes, I have it.

A. You have it?

Q. You used a different comparison, didn't you?

A. Yes, as I recall, we determined the direct selling cost to this class of account the same as we did for the first three brackets. In other words, it was based on the actual salesman's salaries and expenses.

Q. And how many accounts did you take into consideration to make that study?

A. If you will refer to the analysis, analysis 3—if you want me to, I will count them, but they are all listed

1888 there, that is the next page.

Q. About twenty accounts, that is all?

A. That is all the accounts here.

Q. Now, your total sales to those twenty accounts was approximately $2,700,000.00, is that right?

A. That is right.

Q. The total sales were $9,774,000.00.

The Witness: Pardon me. This is off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. What I am trying to get is the cross section or percentage of sales of the total accounts. You referred to your total sales, your home office and branch.

A. Just a second.

Q. Isn't that obtained by comparing that $2,749,000.00 figure with the $9,774,000.00 on Schedule F?

A. Just a minute. (To reporter.) What was that now again.

(The question referred to was read by the reporter.)

A. I would like to answer that question in this way. The twenty accounts involved in the study, which included Brackets 4, 5 and 6, amounted—

1889 Trial Examiner Sheppard: That is Exhibit what?

Mr. Haycraft: 124.

Trial Examiner Sheppard: 124.

The Witness: Amounted to $2,749,008.00. Now, all of our sales from the combined branches and the home office to all classes that we termed wholesale, which would include manufacturers of all descriptions, dealers, jobbers, and the heating trade generally, was $8,250,787.00. Therefore, your percentage would be approximately 34. Just off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: It is thirty-three plus per cent. That is what it amounts to.

By Mr. Haycraft:

Q. Now, then, on your direct selling expense that you took into account, both in your New York office study and in this bracket 4, 5 and 6, what was the total amount of that? I will refer you to the first column of Schedule C, which is $5,686.20.

A. Just a second.

Q. Well, on Schedule F, at the bottom of the schedule, you will notice the direct sales expense item, analysis No.

3, bracket 4, $3,380.96; under bracket 5, it is $1,885.90;
1890 bracket 6, $3,318.95; or a total of $8,543.81; in your home office, brackets 4, 5 and 6. The total of those two figures is $14,230.01, which is the total amount of the direct selling expense, which you took into consideration in the preparation of this exhibit.

Now, what proportion does that bear to the total amount of direct selling expense of all of your business, or wholesale business, as indicated in your page C of Exhibit 124, Respondent's Exhibit 124-C—the total of your home office and branch office selling expense?

A. Well, Mr. Haycraft, we have direct selling expense, according to analysis 3, on those three accounts—

Q. Totalling $8,543.81?

A. That is right.

Q. And your total for the other, the 1, 2 and 3, and your discount was $5,686.20?

A. Yes.

Q. A total of both studies apportioned to both analyses is $14,230.01.

A. $14,000. Well, the way we established that home office administrative expense was taken right from our total sales of the home office, less the figures that we had deducted, applicable to the branches, and we established a percentage that applied.

Q. You mean those figures under $3,380.93?

1891 A. Yes.

Q. What was the actual sales expense to those twenty accounts?

A. Well, that was direct sales account.

Q. That is what I mean.

A. Yes, that was the actual salesmen's salary and expense.

Q. Now, where would that $14,000 be found in this exhibit, page C in this exhibit, where you have selling expense as an item, where you determine the profit and loss in 1937—124-C—it is about the third page or second page of your exhibit, your report.

A. Well, those figures and the cost were computed on analysis No. 3, showing the various salesmen who called on the various accounts.

Q. That is all right, but I am just asking what proportion as a cross section proportion, is that of your total direct selling expense? It is pretty small, isn't it?

A. Well, I don't know how I would figure that offhand.

Q. Well, what was your total direct selling expense, as shown on your profit and loss statement, 124-C of the exhibit?

A. Well, our direct selling expense on all of our business was $619,077.97.

Q. And then you take the wholesale?

A. And on the wholesale it was $311,889.26.

Q. Now, would you say the $14,000 would be included in that?

1892 A. The $14,000 would be included in the $311,889.26.

Q. What percentage would you get out of that?

A. Well, it would run—what was that, roughly, 8,000 or 14,000?

Q. 14,000 compared to $311,000.00.

A. Roughly four and one-half per cent.

Q. Now, I notice on page 1,447 of the transcript, you were referring to Respondent's Exhibit 115 directly, but indirectly to Respondent's Exhibit 124, cost study, and you testified that you allocated expense over the sales volume in the various brackets, which you were studying on a percentage basis of cost to sales.

A. That is right.

Q. The question was asked:

"In other words, you allocated your direct selling expenses in accordance with the number of calls, as shown by the manufacturers' response."

A. That is right.

Q. And in that testimony, you were referring to this set up you are now just describing?

A. That is right.

Q. Is that right?

A. That is right.

Q. And then they said:

"But your indirect selling cost and overhead that
1893 is in both branch and home office, were allocated on the basis of sales?

"A. That is right."

A. That is right.

Q. Well, now, is it true that the application of the classes of expenses to the separate price brackets went indirectly on the basis of dollar sales?

A. Well, your brackets 1, 2 and 3 and your discount

as it is figured there in Schedule D, that is exactly as it worked out.

Mr. Gilpatric: May I interrupt, just off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Freeman: I have an exhibit I want to offer.

We offer in evidence on behalf of the respondent as Respondent's Exhibit 137, a bound volume of soft United States patent copies directed to primary controls, such patents being owned by General Electric, Delco, Williams Oil-O-Matic and others; and we are excluding from the group of primary control patents in Respondent's Exhibit 137, those patents owned by the respondent, owned by Perfex Corporation, by Mercoid Corporation and Penn Electric Switch Company; the Penn Electric Switch
1894 Company patents and the Perfex patents having been already introduced as separate exhibits; and we hope to get the Mercoid patents in when and if we get J. W. Owens on the stand.

Mr. Haycraft: I object to it. There is no value to it without a witness to explain it.

Trial Examiner Sheppard: What about that, Mr. Freeman? Are they highly important?

Mr. Freeman: Well, they are important first because the Commission in its complaint, under Count 1, Paragraph 2, charges the respondent with, and I now quote:

"The respondent owns or controls most of the existing patents on said primary control (Protectorelay) but there are many thermostats and limit controls being manufactured and sold by said competitors of respondent."

And we want to show that exclusive of Mercoid patents on prime controls, we have here a list of patents, taken together with those owned by Penn and Perfex, running up to approximately 88 patents, and we are putting this in to show that the respondent doesn't own most of the prime control patents, as alleged by the Commission.

Mr. Haycraft: And my answer to that is that to put in evidence a bunch of patents like this, without any showing of how they function, doesn't mean a thing. Even admitting, for the sake of argument, that these pat-
1895 ents are relevant and material to the allegation in the complaint, they are certainly incompetent, because there is no one to show, no testimony, of what use was made thereof.

Mr. Freeman: This is the first case I have ever had where a patent copy couldn't be introduced. In all courts where patent cases are ever heard, all you have to do is offer them.

I understand, Mr. Haycraft, that you are not objecting to them because they are not certified?

Mr. Haycraft: Oh, no.

Mr. Freeman: Then they are admissible and they have been accepted in every court in the land and the Federal Trade Commission should be no exception, but I will subject myself to any questions Mr. Haycraft want to put with regard to the patents.

Mr. Haycraft: I don't want to examine you, but I want to examine the man that is supposed to be using the patents on price controls. That is what I want to do.

Trial Examiner Sheppard: I want to know if there is anything mentioned here in reference to this patent matter in Commission's Exhibit 1 in this case.

Mr. Haycraft: The respondent's patents are listed.

Mr. Freeman: The respondent's patents are listed but they don't prove the case one way or the other.

1896 Trial Examiner Sheppard: The respondent's patents are listed?

Mr. Freeman: Oh, yes, and this is pertinent, very pertinent.

Mr. Haycraft: I didn't say it wasn't pertinent.

Trial Examiner Sheppard: Mr. Freeman, if you consider these important to your side of the case, I will accept them in evidence.

Mr. Freeman: We do.

(The document referred to was marked RESPONDENT'S EXHIBIT 137 and received in evidence.)

Trial Examiner Sheppard: Respondent's Exhibit 137 we will take for whatever connection they may have in the case.

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record. Now, this is all the testimony you gentlemen want to offer at this time here, is it?

Mr. Freeman: That is all we had here in Chicago and Mr. Lockrae will be present in New York, when we resume on Monday, December 13th, for further cross-examination.

Mr. Haycraft: You are not going to be back tomorrow?

1897 Mr. Freeman: No, he wants to go to Minneapolis tonight.

Trial Examiner Sheppard: Now, Miss Reporter, in view of what Mr. Freeman has said we will take an adjournment in this case.

Mr. Haycraft: I would like to have it shown that the adjournment, of course, is taken at the request of the respondent, so that I won't be put in the hole. I expected to run tomorrow—you said you were going to work on Saturday morning—and I made my plans accordingly.

Trial Examiner Sheppard: Well, my understanding is that these gentlemen have got to get away. Mr. Lockrae already has his transportation back home.

Mr. Freeman: And I am leaving for Washington tomorrow afternoon.

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: Let the record show an adjournment to New York City, to convene at 10 o'clock A. M., at Room 500, 45 Broadway, on the 13th day of December, 1943.

We stand adjourned in Chicago.

(Whereupon at 4:30 P. M., December 3, 1943, the hearing in the above entitled matter was adjourned.)

1898

Room 500,
45 Broadway,
New York, New York,
Monday, December 13, 1943.

Met, pursuant to agreement of Counsel at 10:00 a. m., E. W. T.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission,

Cravath de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and Paul Chase, Esq., 15 Broad Street, New York, New York, and Bair & Freeman, by Will Freeman, Esq., 135 South LaSalle Street, Chicago, Illinois, Attorneys for the Respondent.

1899

Proceedings.

Trial Examiner Sheppard: Come to order.

Mr. Reporter, you can convene the hearing in the Minneapolis-Honeywell case, Docket 4920, pursuant to agreement to reconvene in New York City on December 13, 1943.

Everett F. Haycraft, Esq., is appearing for the Federal Trade Commission, and Cravath de Gersdorff, Swaine & Wood, and Bair & Freeman, Esqs., are appearing for the Respondent.

Mr. Gilpatric: I will call Mr. Shields.

C. E. SHIELDS was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gilpatric.

Q. Will you please state your name and address for the record?

A. C. E. Shields, 47 Lafayette Place, Greenwich, Connecticut.

Q. With what oil burner company have you been associated in the past, Mr. Shields?

A. I was with the American Nokol in the past in Chicago and until 1929 when they were merged with Petroleum Heat & Power Company, and I became a mem-
1900 ber then of the merged companies.

Q. What position do you hold with the Petroleum Heat & Power Company?

A. I was Vice President in charge of manufacturing and merchandising of the equipment division, that is, the manufacturing division.

Q. How long did you stay with Petro?

A. I was there about 14 years.

Q. Until about what date?

A. Until about April 1, 1943.

Q. Can you recall roughly when Petro first began to manufacture oil burners for domestic use?

A. I think, well it was about 1922 or '23. They made industrial burners prior to that time. In fact they started about 1903.

Trial Examiner Sheppard: It is a pretty old concern?

The Witness: Yes. They made industrial burners in a small way for a number of years.

In 1920 they moved to this Stamford factory. They had been running 6, 7 or 8 years when I went there in 1929.

By Mr. Gilpatric:

Q. The American Nokol was a manufacturer, was it not, of domestic burners?

A. It was a manufacturer of the domestic for
1901 homes. It was the first automatic oil burner on the market as you may recall. I had charge of the manufacturing of that burner for them until from 1925 and '6 until the merger.

Q. Coming down to the period say from 1936 on down to the War period, what type of oil burner did Petro manufacture during those years?

A. Well, they manufactured several of the different domestic types.

Q. Did they manufacture a gun or pressure type of burner?

A. Yes, and they manufactured of course industrial, what we call industrial commercial burners.

Q. Yes, what about a Rotary type of burner?

A. We made two rotary burners for the home, that is in the automatic operation; one was the horizontal rotary

type and the other was the vertical. The vertical rotary type was discontinued I think around '31 or '32, along in there somewhere.

Q. They just make one type now?

A. No, they make a complete line at this time but not exactly the same as they were because there have been changes as we came down through the years.

Q. Meaning they make both horizontal rotary and pressure type now?

A. They are manufacturing no horizontal rotary type excepting for commercial industrial purposes.

1902 Q. What has been the sales territories speaking generally of Petro?

A. Well, we have always done a national business, the entire United States and some small amount of export.

Q. What makes of automatic temperature controls has Petro used on its domestic burners?

A. Well, from the start of course the old Nokol burner was set up with the Honeywell Control. That was prior to the merger of Honeywell and Minneapolis Regulator and then as the development came along we used Mercoid, Minneapolis-Honeywell, Penn and then Perfex when they came in and for industrial burners we used Wheelco.

Q. We are not concerned with industrial burners here so much?

A. That was strictly an industrial application.

Q. What manufacturers' controls have your purchases predominated, if any?

A. Well, the largest majority dollars and cents unit volume was Minneapolis-Honeywell.

Q. Did you also offer your trade other makes of controls?

A. Yes.

Q. What was your policy on that, Mr. Shields?

A. We had a standard policy giving the dealers what they wanted. If they preferred other controls, why we gave it to them.

1903 Mr. Gilpatric: Mark these for identification.

(The papers referred to were marked Respondent's Exhibits 138-A and 138-B; 139-A, 139-B, 139-C and 139-D for identification.)

By Mr. Gilpatric:

Q. Mr. Shields, will you identify for us Respondent's Exhibit 139-A and B, and 139-A to D, and tell us what those documents are?

A. 138-A and B, are pages 4 and 5 from a manual of instructions for models P11, 12 and 13 burners.

Q. Petro Burners?

A. Petro Burners, yes.

Exhibit 139-A is the wiring diagram covering R116-2 Protector Relay, a wiring diagram for the Penn Safety Type 607 Primary Control.

Q. 139-B?

A. 139-C is a wiring diagram showing a hook-up for the Protector Relay, Minneapolis-Honeywell R116-2 for these types of burners.

The 139-B is an electrical hook-up for the Penn Saftrol Type 607.

Mr. Gilpatric: I will offer these in evidence.

Trial Examiner Sheppard: Any objection, Mr. Haycraft?

Mr. Haycraft: No objection.

1904 Trial Examiner Sheppard: Let them be admitted.

(The papers referred to, heretofore marked for identification RESPONDENT'S EXHIBITS 138-A, 138-B, 139-A, 139-B, 139-C and 139-D, were received in evidence.)

By Mr. Gilpatric:

Q. For what period, Mr. Shields, was that manual to which you referred in effect?

A. This manual was in effect during the course of life of those models. They started in the last, the very last part of 1933 but became more widely used in 1934, the first part of 1934, and are in effect up to this time so far as these burners, these particular burners are concerned, but the principal production of those burners discontinued along 1937 or 1938.

Q. During the period they were offered I take it that both Minneapolis-Honeywell and Penn Controls were available for those burners?

A. They were available for those burners at that time.

Mr. Gilpatric: Mark this for identification.

(The papers referred to were marked Respondent's Exhibit 140-A and 140-B for identification.)

By Mr. Gilpatric:

Q. Mr. Shields, will you tell us what comprises Respondent's Exhibit 140-A and B which I hand you?

A. They are photostatic copies of pages 26 and

1905 27 of the manual of instructions for Petro Domestic Oil Burners.

Q. Is that manual the one which was in effect for your company up through say the War period for the type of burner that you were offering?

A. Yes, it was in effect up until the time I left on April 1st.

Q. Of the current year?

A. That is right.

Mr. Gilpatric: The Respondent offers in evidence Exhibit 140-A and B.

Trial Examiner Sheppard: Is there any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let them be accepted.

(The papers referred to, heretofore marked for identification RESPONDENT'S EXHIBITS 140-A and 140-B, were received in evidence.)

By Mr. Gilpatric:

Q. With respect to the models of oil burners referred to in that manual it is a fact, is it not, that both the Perfex and Minneapolis controls were available?

A. Yes.

Mr. Gilpatric: Please mark these.

(The paper referred to was marked Respondent's Exhibit 141 for identification.)

By Mr. Gilpatric:

1906 Q. Mr. Shields, will you describe for us Respondent's Exhibit 141 for identification?

A. This exhibit is a photostatic copy of a service department memorandum, their number 342. The signer of this was the manager of the National Service Department.

Q. It relates to a Perfex Control, does it not?

A. That is right.

Mr. Gilpatric: The Respondent offers in evidence Exhibit 141.

Trial Examiner Sheppard: Is there any objection?

Mr. Haycraft: No.

Trial Examiner Sheppard: It may be accepted.

(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 141, was received in evidence.)

By Mr. Gilpatric:

Q. Mr. Shields, you testified that the majority of controls purchased by your company were Minneapolis-Honeywell. How do you account for that?

A. Well, it was because of the general public demand. That is it.

Trial Examiner Sheppard: You mean dealer demand?

The Witness: Dealer demand, as well as the consumer demand. It was the public acceptance that had been accorded Minneapolis-Honeywell Controls which
1907 brought about the condition which whereby the dealers had confidence in them. The owners knew of them because of the National Advertising and they thought that the equipment was more easily sold with accessories of the kind that were well-known.

It was in fact a merchandising proposition all the way through.

By Mr. Gilpatric:

Q. How did the price of Minneapolis-Honeywell Controls compare with prices for other makes that you purchased?

A. They were about the same, probably a little bit more, not enough to make any particular difference.

Q. Did you ever charge your customers more for burners equipped with Minneapolis-Honeywell Controls than for those equipped with those of other controls?

A. Yes, slightly higher prices except with an ordered complete burner, then we only had one price.

Q. In other words your price differential was only charged in case of spare controls or replacements?

A. That is right.

Q. Has the Petro Company always made it a practice to equip its burners with the three standard controls of the same make or do you use different makes of controls on the same burner?

A. Well, there were times when they might be mixed. We never would of course mix the primaries with the thermostat. There has been a time perhaps when the
1908 limiting control might be different. It depends somewhat on the stock and things.

Q. When did your company start including as part of its original equipment limit controls as well as primaries and thermostats?

A. The inclusion of limit controls I think was my own undertaking way back in 1926.

At that time limiting controls were not required by the Underwriters and most manufacturers did not include them.

It looked to me like it would be a good thing for us in Nokol to include them, so that we knew that they would be used at least if we included them. We had every reason to believe that they would be installed. That would tend to cut down service and make the burners more safe because they would be limiting devices.

Q. You mean that your company, the Nokol Company, started that practice and not the control manufacturers?

A. Right, the control manufacturers did not. They had been selling their limiting controls as they were required, to distributors and dealers, and manufacturers did buy some, but they did not give them as standard equipment.

When we started of course that also had a little selfish motive. We wanted the markups on those controls that the dealers were buying elsewhere, and after we started, why of course the competition followed.

1909 Q. And it became a general practice?

A. They found it was required and it became a general practice and I think it was about that time that the Underwriters required a limiting device as part of the installations. The Underwriters never required that they should be part of the set of controls.

Q. Now referring to the period again from 1936 through 1941, did your company have contracts with Minneapolis-Honeywell for the purchase of controls during those years?

A. Yes, I cannot tell you just exactly what years we had them, but we had contracts. I would have to check back to see if we had one for each one of those years, but I know we did have contracts for several years.

I believe from that time we always had some agreement on prices or things of that kind.

Q. With Minneapolis-Honeywell?

A. Yes.

Q. Did you actually buy controls from other controls manufacturers during the same years that you had contracts with Minneapolis-Honeywell?

A. Oh, yes.

Q. Did you consider that Minneapolis-Honeywell con-

tracts prevented you from purchasing from other control manufacturers?

A. No, there was nothing in the contract that said it was exclusive.

1910 Q. Well, did you feel obligated to buy the quantity of controls that were specified in the Minneapolis-Honeywell contract?

A. Not particularly. I considered that the contract was a price agreement and that the manufacturers, we as a manufacturer, were making a statement as to about the quantity of controls we expected to use, in order to get into the proper price bracket.

Q. During this period were you solicited by other control manufacturers for the purchase of their makes?

A. Oh, yes.

Trial Examiner Sheppard: Mr. Shields, you speak of price brackets. I wish you would tell me what was your understanding, just your individual understanding, in reference to price brackets that you speak of.

The Witness: Well, there is nothing new in the having price schedules and set-up based on quantity purchases. Therefore in this set-up it was just another one of those circumstances where anyone who was using larger quantities would enjoy a lower price because of the quantity involved.

Trial Examiner Sheppard: In other words, the greater number let you have a lesser price?

The Witness: That is right. The reason for it all is because the greater quantity you make the lower your cost, your selling cost, all those ramifications of merchan-

1911 dising.

Trial Examiner Sheppard: All right, that answers the question.

By Mr. Gilpatric:

Q. Were you familiar, Mr. Shields, with what I might call the bracket set-up of Minneapolis-Honeywell on control prices?

A. Yes.

Q. Did you know that other oil burner manufacturers had to pay more for their controls than your company did in certain instances?

A. Yes, I knew that.

Q. And were those companies engaged in competition with you in the sale of their burners?

A. Yes.

Q. Did that price advantage to you in the cost of your controls help you in competing with those other manufacturers?

Mr. Haycraft: That is leading.

Trial Examiner Sheppard: It is a little suggestive. Just change that around.

By Mr. Gilpatric:

Q. Did it or did it not?

Mr. Haycraft: The same objection.

Trial Examiner Sheppard: Well, do you understand what he wants, Mr. Shields?

The Witness: I don't think that alone gave us any
1912 advantage because of the fact that even with their higher prices they were underselling us all the time.

By Mr. Gilpatric:

Q. You mean oil burner manufacturers who received better control prices as manufacturers than you were, were underselling you?

A. No, it was the opposite. Those who were paying higher prices were underselling us all the time.

Mr. Gilpatric: That is right I have that reversed, I mean those that were paying higher prices were underselling you?

By Mr. Gilpatric:

Q. Can you give us some examples and companies paying more for controls and underselling you all the time?

Mr. Haycraft: I object to that as immaterial and irrelevant.

Trial Examiner Sheppard: I don't know. It may be something to consider in this man's testimony, if you have some particular incident, Mr. Shields, to illustrate that, I think I will let you tell us about it.

The Witness: That would be very difficult to name specific instances this late but they came up from day to day. Many of the smaller companies who were doing business on smaller overheads and had less other costs were able to undersell us. They were not doing a complete job
1913 such as we and other larger companies were doing, as when we sold an oil burner we lived with that oil burner for as long as it was installed in a man's home. We assumed that responsibility of giving a complete service

whereas the smaller, lower-priced or localized manufacturer didn't have that expense and when the burner left their warehouse they were through.

Well, with us we maintained a large national service organization and a large sales department who helped the dealers sell their merchandise, had meetings all over the country. We had expenses that otherwise they did not have.

Q. Do you recall whether Gold Star Oil Burner Company is one of the companies that you had in mind?

Mr. Haycraft: That is objected to as leading.

Trial Examiner Sheppard: What is your answer if you know?

The Witness: Gold Star in the local territory, I cannot say definitely because I don't know what their prices were. It was just general information.

Mr. Haycraft: I am going to object and move to strike the witness's statement that it has no probative value.

Mr. Gilpatric: If he knows they were selling lower?

Mr. Haycraft: He does not know what they paid for controls. This is hearsay on his part.

Trial Examiner Sheppard: I think this is a matter of weight. The more detailed the testimony is on that
1914 line, the better, so, Mr. Shields, if you have got nothing definite about it I will have to give weight to the answer.

Mr. Haycraft: I object to weight being given to the answer. I do not think it deserves any.

By Mr. Gilpatric:

Q. Mr. Shields, how did the prices for your burners, that is the Petro Burners, compare with other oil burners on the market?

A. Our prices were generally higher than the majority. Our sales merchandising policy was that they cost more, that they give more. That was a sort of theme and was the system on which we operated and we did get higher prices generally.

Trial Examiner Sheppard: Does that mean that your burners equipped with controls, that were not manufactured by the Respondent, were higher than those that were so equipped?

The Witness: It made no difference which controls we furnished.

Trial Examiner Sheppard: I see.

By Mr. Gilpatric:

Q. But you included in your burner price the price of this service which you state your company gave?

A. That is right.

Q. What was the general price range of your burner when sold, say to dealers, selling the period 1937 on?

1915 A. Well, from '37 on through to '41 we changed our selling somewhat and our method of pricing them but the ultimate from the distributor to the dealer did not change very much. For instance, we started selling to the heating jobbing trade. We liked to have a trade discount and they can have a discount applicable to practically the entire line.

Q. I want to get some idea of your net prices to dealers and to the trade, to wholesalers?

A. Our average in 1941 was $78.08.

If you will permit me look at a memorandum which I have, I can give you what they are over the term.

Trial Examiner Sheppard: You can look at the memorandum and testify.

The Witness: This is a record taken from the Petro Annual Statements which I was familiar with and had copies of.

Trial Examiner Sheppard: Give it to us by the years.

The Witness: What year would you like to start with?

By Mr. Gilpatric:

Q. Start with '37?

A. '37, the selling price to the distributor and/or jobber was $99.67; 1938 it was $93.21; 1939 it was $88.99; 1940 it was $84.54; in 1941 it was $79.48; in 1942 it was $78.08.

Trial Examiner Sheppard: There was a decline there?

The Witness: The market declined, yes, sir.

Mr. Haycraft: Those are average or actual?

1916 The Witness: Those are average. Taking that average, it covered the domestic burner only.

Mr. Gilpatric: That is all we are interested in.

Trial Examiner Sheppard: Yes, we do not care about the others.

The Witness: This is the domestic burners and it covers the four or five sizes that were in that line of domestic burners.

Trial Examiner Sheppard: To what do you attribute that gradual decline?

The Witness: The change in design and more efficiency

in production and a reduction in the price of accessories and materials.

Trial Examiner Sheppard: Did competition figure in that?

The Witness: It may have but the difference, that is the cost between those, the cost price and the selling price are about the same mark-up all the way through.

By Mr. Gilpatric:

Q. How did your volume of oil burner sales run during those years, have you got some figures for us on that?

A. Yes, I can give you the volume, the quantity of domestic burners during those same years if you will let me read this.

Trial Examiner Sheppard: For the same years?

Mr. Gilpatric: Proceed.

1917 The Witness: The same years, yes, sir; 1937, the quantity of burners that made up the average cost prices was 9406. 1938 it was 6987; 1939 it was 6247; in 1940 it was 5896; in 1941 it was 6387; in 1942 it was 5425.

By Mr. Gilpatric:

Q. Mr. Shields, do you recall having any conversations with the representatives of the Perfex Company, I believe with Mr. Sheppard Barnes, regarding purchases by your company of Perfex Controls?

A. Well, over a term of years I had a large number of conversations with Mr. Barnes while he was a member of the Perfex Company.

Q. As a result of those conversations did you or did you not buy more Perfex Controls?

A. Well, we sold some more because of a greater activity on his part in promoting the sale of his controls to the dealers.

Q. What did you tell him, if anything, with regard to purchasing more Perfex Controls?

A. I told him the same as I did all the others, to go out and create a demand for his controls and we would have to use them whether we wanted to or not.

I recall particularly advising him to call on the dealers and get them to specify on their orders that they would like to have Perfex Controls and if they did that that

1918 is what we would ship.

Q. Mr. Shields, going back to your testimony about the manual from which Respondent's Exhibit 140-A and B

was taken, did that manual also show installation layouts for primary controls for Perfex and Minneapolis Controls?

A. Yes, page 101 shows a wiring diagram for Perfex, 52HD3 Primary Control. On the same page is the wiring diagram for Minneapolis RH6A Protectorelay.

Q. Were those comparable controls?

A. For the same purpose, yes.

Q. Turn to page 102 of the same manual and tell us what that shows, if you will?

A. That is a wiring diagram.

Mr. Haycraft: Will you offer that in evidence?

Mr. Gilpatric: Yes, I will offer that in evidence.

The Witness: For the Perfex 52HD3 Master Control.

By Mr. Gilpatric:

Q. The Master being sometimes referred to as the Primary Control?

A. The Primary Control, yes, sir.

Mr. Gilpatric: The Respondent offers in evidence as Respondent's Exhibit 142-A and B the pages to which Mr. Shields referred and asks leave to substitute a photostatic copy for the pages.

Trial Examiner Sheppard: Is there any objection?

1919 Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let the exhibits be received, it being understood that the photostats will be substituted.

(The papers referred to were marked RESPONDENT'S EXHIBIT 142-A AND 142-B and were received in evidence.)

By Mr. Gilpatric:

Q. Mr. Shields, did Mr. Haycraft call you by telephone about testifying in this case?

A. Yes, he did.

Q. Were you willing to testify?

A. I won't say that he did not call me about testifying. As I recall it, he called me relative to it I think or something like that, or there were a few conversations that led along those lines. I don't think that he requested me to testify. I don't recall that.

Q. You did not refuse to do so, to testify, did you?

A. Oh, no.

Mr. Gilpatric: That is all.

Trial Examiner Sheppard: Cross-examine.

1920 *Cross-Examination by Mr. Haycraft.*

Q. When was it that you had your conversation with Mr. Barnes, of the Perfex Company, that you referred to in your direct examination?

A. That was along in 1936 or 1937. I had so many conversations with him that to remember the exact date it would be impossible for me to do that.

Q. Do you remember what years it was that you bought any Perfex Controls?

A. That was during that time. Again, the exact dates I cannot give you, but the fact that it is in that manual, which became effective about 1937 or 1938—it may have been even that late—that would show that they were being bought during that time.

Q. Do you have anything in your possession by way of a memorandum that will refresh your recollection as to the quantity of controls that you purchased from Perfex during that time of 1936 to 1941?

A. No, I don't.

Q. As a matter of fact, do you remember whether you bought any devices, any controls, from the Perfex Corporation since 1937?

Mr. Gilpatric: May the record show that the document, the manual which the witness referred to, is the one
1921 from which is taken Respondent's Exhibits 140, 141 and 1942.

Mr. Haycraft: Will you read the question to the witness?

(Pending question read by the reporter.)

The Witness: Time has gone so fast. Yes, there were controls bought since 1937, I am sure.

By Mr. Haycraft:

Q. How sure are you of that?

A. Just of my own memory, that is all. If there had been any demand for their controls at all they would have to buy them; that is, if there was any call for them.

Q. Are you as sure of your recollection of that fact as you are of the other facts that you have testified to?

A. The other facts are more prominent in my mind. I am sure of those because that is general enough that I am supposed to know it. Some few details that did not have to do with policy I may not have at the tip of my tongue.

Q. Would you be positive that you bought any controls from the Perfex Company in 1938?

A. No, I could not say without looking up the records.

Q. How about 1939?

A. I could not say, say that.

Q. How about 1940?

A. I could not say that. That is a detail that I 1922 would not know.

Q. How about 1941?

A. I would not know that.

Q. How about 1941? That is not so long ago. Did you buy controls from Perfex in 1941?

A. We did not buy very many controls in the last three years I would say.

Trial Examiner Sheppard: Mr. Shields, in fairness to you, if you want to look up the records after you get home and give us more detailed information about your purchases of Perfex during 1938, 1939, 1940 and 1941, I will let you do it; that is, if you want to.

The Witness: Well, that would be a job for someone, for instance, the purchasing agent of the Petro Company.

Trial Examiner Sheppard: I just leave it to you.

Mr. Freeman: I don't think that the issue is whether they purchased any. They were offering controls in 1938, and we have the evidence right here, and the drawings are dated 1938. If Mr. Shields just wants to refer to the date on the drawings, he knows at least that at that time they were offering them for sale. You cannot make people buy them.

Mr. Haycraft: The question was whether he bought 1923 any.

Mr. Freeman: That is immaterial.

Mr. Haycraft: That is not immaterial.

Trial Examiner Sheppard: All right. We will continue.

The Witness: That is a question that should be answered from the records in detail, if they bought any. Whether they did or not, we may have had enough on hand because in some cases we did. There were prior years that we had controls on hand for several years due to the fact that there was no real demand for them.

By Mr. Haycraft:

Q. Would you say that the records of the Perfex Company showing the sales would be the best evidence of how many they sold to your firm?

A. I imagine it would be. They must have them.

Q. And if the records of the Perfex Company show, as they do in this case, in Respondents' Exhibits 23, 43, 70 and 71, and the testimony of witness, Tate, who identified those exhibits, that the only year they sold to your firm was 1937, and the amount was $976, would you say that that testimony was wrong?

A. I am not in a position now to say that it is. We never did buy many Perfex controls, I know that; that is, the quantity we bought was very limited.

1924 Q. Do you know what bracket you were in when you bought from the Minneapolis Honeywell Company, and the prices that you paid?

A. We were in the number five bracket, that is, the lowest bracket. I don't know the prices that we paid.

Q. What did you have to do with the purchasing end of the business?

A. I set the policy, and the purchasing records were all kept by the Purchasing Department. The orders were placed by them, but the policy in regard to what controls were to be used and the general merchandising policy I set that.

Q. When were you in the number five bracket, what year?

A. We were in the higher bracket—I don't know whether it was number five in all those years, but we were in the highest bracket during all that time.

Q. During the entire time?

A. Yes.

Q. In other words, you understood you were getting their best price?

A. That is right.

Q. Was that regardless of whether you bought the full amounts that you were required to buy that you were getting that bracket?

A. Yes. We made the statement each time that
1925 we was entitled to that bracket.

Q. They did not do any checking up to see whether or not you bought the quantity required?

A. No, there was no penalty at that time for nonperformance.

Q. Did you, as a matter of fact, ever see or study the language of those contracts that you entered into with Minneapolis Honeywell?

A. Yes.

Q. Do you remember the language in this contract that you entered into in the year 1936 for 1937 business, or the early part of 1937?

A. No, I could not quote at this time anything from that contract.

Q. Well, you stated that it was not an exclusive contract, that you were not required to buy from Minneapolis Honeywell exclusively. In making that statement just to what extent are you familiar with the language of the contract?

A. Each time I signed it I was acquainted with it, otherwise I would not have signed it.

Q. Your testimony is now that you would not recall any such terms in the contract?

Mr. Freeman: He said he could not quote the contract. He did not say terms.

1926 Mr. Haycraft: I object to counsel for the respondent prompting the witness.

Mr. Freeman: I am not prompting him. I am just calling your attention to the term the witness used.

Mr. Haycraft: May I be allowed to continue the examination of this witness without being interrupted?

Trial Examiner Sheppard: Yes.

Mr. Freeman: I object to the question as an unfair question and a misstatement of fact.

Trial Examiner Sheppard: Go ahead, gentlemen.

Mr. Haycraft: You are just taking in a little too much territory.

Read the last question.

Trial Examiner Sheppard: Read the last question.

(The pending question was read.)

Mr. Freeman: Did he answer that one?

Mr. Haycraft: No.

Trial Examiner Sheppard: Do you have anything to add to the last answer you made, Mr. Shields?

The Witness: Does that pertain to an exclusive feature of the contract?

Mr. Haycraft: Yes.

The Witness: Or just in a general way?

By Mr. Haycraft:

Q. I am asking you do you recall any phrase ever

1927 in the contract that could be termed, as you term it, an exclusive phrase or an exclusive clause?

A. I answered that if I thought at any time that it was exclusive and a firm commitment I never would have signed it. Now if there is a copy of the contract here, and I am wrong, it is all right. I never intended to sign any firm commitment for a year's business that had not happened yet. I would be crazy. It is an estimated quantity because it was in anticipation of something that had not happened yet.

Q. Did you ever see this clause in any contracts submitted to you by the Minneapolis Honeywell Corporation, "The purchaser agrees that at least 95 per cent of his control requirements, consisting of thermostat primary controls and limiting devices, will be purchased from the company"?

Mr. Freeman: Why don't you show it to him? You said do you recall seeing.

The Witness: That pertained to complete sets, didn't it, that 95 per cent were to be complete sets?

By Mr. Haycraft:

Q. That is another one. I will get to that in a moment. This was separate from that.

Mr. Freeman: I think the witness is entitled to have these contracts presented to him. This is not a guessing contest, and if Mr. Haycraft has any records, and 1928 has asked questions with respect to the records, I think the witness is entitled to see them, especially as to events that happened seven or eight years ago.

Trial Examiner Sheppard: Do you want to see them, Mr. Shields? If so, Mr. Haycraft will show them to you. I thought probably you are familiar enough with them to remember.

The Witness: No. Of course, they have not been available to me. I have seen one or two of the latest. I suppose I could go back and get the copies that the Petro had on file, but I did not do that. My idea on the contracts has not changed from the first one up to the present time.

By Mr. Haycraft:

Q. During that entire period of time from 1937 to 1941 what controls were you putting on your burners if there were no requirements on the part of the dealer?

A. Unless otherwise specified we gave them Minneapolis Honeywell Controls. That was the general understanding with the dealers.

Q. And would you call that a standardization, you standardized on the Minneapolis Honeywell Control?

A. I would say so, yes.

Q. Was there any understanding to that effect with the Minneapolis Honeywell Company?

1929 A. Nothing, only a general idea. I suppose they could assume that we were when we were using them principally.

Q. Now, then, I will ask you about this clause. I have it here, and you can see the printed language. See whether you are familiar with that third or fourth paragraph there where it begins "The Company agrees to sell"?

Trial Examiner Sheppard: What exhibit is that?

Mr. Haycraft: Commission's Exhibit 2.

Mr. Gilpatric: Commission's Exhibit 2.

By Mr. Haycraft:

Q. The printed form with respect to the percentage?

A. That is 90 per cent as many room thermostats as we bought primary controls. That does not mean exclusive.

Q. What about 125 per cent limit controls?

A. We cannot buy more than 125 per cent limit controls.

Q. Is that what it says?

A. That is what it says there.

Q. You read it.

A. That is the way I take it.

Q. You read it again. Read it out loud. Read it into the record.

A. Where do you want me to start?

Q. "It is specifically agreed."

A. "It is specifically agreed that other control equipment is not to be considered as a part of a set within

1930 the terms of this contract period because the Company's costs are figured to cover a complete set of controls, and the following breakdown of prices are purely for invoicing purposes.

"It is agreed that the purchaser's yearly purchases will consist of at least 90 per cent as many room thermostats and 100 per cent as many limit controls as primary controls (at the company's option not more than 125 per cent)."

Q. What does that mean?

A. I would say that that means that you are not to buy more than 125 per cent of your limit controls. I say

that knowing that sometimes two limit controls are required on one job.

Q. Does it not also require 100 per cent limit controls as primary controls?

A. I would not say so.

Q. Read it again. You did not finish it.

A. "90 per cent as many room thermostats"—

Q. All right, go ahead.

A. "And 100 per cent as many limit controls." All right, when you read it through that way that 125 throws you off a little bit.

Q. 100 per cent limit controls is that what you mean?

A. Yes.

Q. Did you follow that contract? Did you ob-
1931 serve it through these years?

A. No.

Q. You don't know how many limit controls you did buy?

A. No.

Q. Again, their records would be the best evidence of that?

A. That is right, that Minneapolis-Honeywell's records.

Q. Yes, Minneapolis-Honeywell's?

A. Yes, and the other control manufacturers would all know how many they shipped. That necessarily would not be the quantity that was used because they may have been an inventory at the beginning or at the end of the period.

Q. You knew when you signed that contract though that that clause was in there, did you not?

A. I certainly did.

Q. Is it usually your intention to carry out an agreement that you have signed?

A. If I signed that contract, and that is a copy of it I signed.

Q. Is it usually your desire to carry out an agreement with the Minneapolis-Honeywell?

A. To the best of my ability it was an estimate based on the next year's quantity of controls to be used.

Q. But this printed language which you just got
1932 through reading was not any estimate, was it? It was an agreement that you were to buy 100 per cent?

A. Of the quantity that was specified in the memorandum.

Q. In other words, 100 per cent as many limit controls as you did primary controls?

A. Yes.

Mr. Gilpatric: I object. The contract said what the provision was. Why go on with this?

Mr. Haycraft: That is all right. I am entitled to do that on cross-examination.

Trial Examiner Sheppard: Go ahead.

By Mr. Haycraft:

Q. In other words, you attempted to live up to the contract, did you not?

A. I answer that broadly. Naturally we would like to have sold 10,000 instead of 5,000. Always when you set up for your year's business you hope to do better than your budget or better than you think you are going to do. We always signed for what we thought we were going to use. It did not always work out that way. Sometimes it did in dollars and cents volume.

Q. You did not agree to buy a certain number of sets, did you?

A. No, never considered it as a firm commitment.

Q. But you did agree that as many primaries as 1933 you bought you would buy an equal number of limit controls?

A. According to that contract, yes.

Q. And you tried to do that, did you not?

A. Yes, we tried to, yes, and as far as I know we probably did because you buy more limit controls normally than you do other controls because of the fact there is a big service quantity used.

Q. There were other limit controls that you could use with the Minneapolis Honeywell primary and thermostats, were there not?

A. Yes.

Q. Now as to the prices you received for your burners equipped with thermostats, as I understand you to testify there was a decline in prices but it was due to improvements in your manufacturing operations and more efficient production costs?

A. And during those periods there had been a change in designs.

Q. To what extent do you think your competition had effect on your price?

Mr. Gilpatric: Mr. Examiner, I object to this question because Mr. Haycraft fails to state as to the third element. He is not fair to the witness.

Mr. Haycraft: I don't have—

Mr. Freeman: Tell the truth.

1934 Mr. Haycraft: I heard what you said, and I want you to quit it.

Mr. Freeman: Mr. Examiner, I ask that when he asks this witness a question and repeats what this witness testifies to, that he present the facts correctly—either that or let us have this record re-read.

Trial Examiner Sheppard: Go ahead and re-read the record then. Let us get him straight.

By the way, Mr. Shields, do you understand what Mr. Haycraft wants you to answer?

The Witness: His last question?

Trial Examiner Sheppard: Yes.

The Witness: I understand the substance of it. I don't know.

Trial Examiner Sheppard: I think I asked you the same question myself when you were on direct examination. I asked you did competition have anything to do with that. If you understand what he wants, I will let you go on and answer.

Mr. Freeman: Then I think we have the right to call the witness' attention to a material fact which Mr. Haycraft refuses to tell this witness about, and which in fairness to this witness I think Mr. Haycraft ought to tell.

Trial Examiner Sheppard: I will let you tell

1935 him.

Mr. Freeman: We will, and in so doing—

Trial Examiner Sheppard: If there is anything to remind this witness before he answers this question I will let you do it.

Mr. Freeman: We will only stick to the record, which it would be helpful if Mr. Haycraft would.

Trial Examiner Sheppard: Just tell him any other element that you want him to consider in answering that question.

Mr. Freeman: I don't want him to consider any element except to refer back to his own testimony. Mr. Haycraft tells him what he heretofore testified to. You know you can tell the truth by telling the whole truth.

Mr. Haycraft: Wait a minute. I am getting sick and tired of this truth proposition.

Mr. Freeman: That is all I am interested in. If you get sick and tired of it, I don't care.

Trial Examiner Sheppard: There is nothing to argue about or fight about. It is just a question of misunderstanding.

Mr. Haycraft: It is just a question—

Trial Examiner Sheppard: Of getting these things from the witness.

Mr. Freeman: Mr. Haycraft just said in so many
1936 words that he does not have to tell the witness the whole truth.

Mr. Haycraft: I did not say anything of the kind. I move we have a recess until this man gets cooled off and conducts himself like a gentleman.

Mr. Freeman: You learn to be a gentleman, and then we will try law suits as you should.

Trial Examiner Sheppard: All right, don't get excited. If all the elements are before you that you want to answer this question on, go ahead; otherwise go back and read the record. I want to be perfectly fair and to make sure the witness understands the question that is being asked of him before he attempts to answer it.

The Witness: Well, as I understand the question it was in reference to these selling prices and these reductions over this term which was asked about, and what they were caused by.

By Mr. Haycraft:

Q. My question was whether competition had anything to do with it, and that is all my question is.

Trial Examiner Sheppard: All right, answer it on that basis.

The Witness: I answered before that it had something to do of course with it.

By Mr. Haycraft:

1937 Q. To what extent?

A. I don't recall.

Q. I notice that during that same period of time that your volume of sales declined quite substantially from the figures that you gave. I will ask you whether or not your competition, the prices of competitors, had anything to do with that?

A. No doubt about it because at one time talking about volume decreasing we enjoyed one hundred per cent: We

made the only domestic oil burner made. We had to divide it and got down over a term of years where we were only doing ten per cent of the total volume, and then less. During the time that I had, the last few years, I was not interested in large volume as I was in some profit, and to sell the most oil burners that were being sold did not interest me as much as doing a good job and making some money; and I set up the selling prices on a basis where I thought we could do a reasonable business and make some money. Naturally, I would take into consideration as a merchandise man costs, competition and other elements of sound merchandising. Now you can figure it out any way you want to.

Q. Did you ever hear of the Quiet-Heet Manufacturing Company?

A. Yes.

1938 Q. Did they sell in your territory?

A. Yes.

Q. Do you know anything about the prices they obtained for their burners?

A. I used to get a postcard on my desk every few days that they were sending out direct to dealers. From $53 I guess under $50. And here is one thing may save you some time: I did not pay a lot of attention to competitors. I meet them in meetings, and have talked things over, but competition never worried me a lot because I went out and tried to do my own job. I was too busy doing my own job to keep worrying about what Quiet-Heet was doing or someone else was doing.

Q. Is it your testimony that Quiet-Heet did not get any business away from you?

A. Yes, they did, naturally. Others did. A lot of people buy on price only.

Q. I understood you to say a while ago that you got the best price that Minneapolis Honeywell had on its controls. Now I have understood you to say on direct examination that you knew that other companies had to pay less than your company paid.

Mr. Gilpatric: I made the misstatement. I asked whether he knew that other companies paid more. He said he did.

1939 The Witness: He corrected himself on that, I recall that.

By Mr. Haycraft:

Q. I am asking you what the situation is. Is it still your understanding that you got the lowest price?

A. Yes, I always understood that.

Q. As to the brackets, these different brackets, did they mean much to you that you could always get the lowest price?

A. Well, that was the generally accepted practice in many lines, and I don't suppose I thought very much about it so long as my company was in the way I considered was the lowest bracket.

Q. How did they tell you about those brackets? Did they give you a sheet of paper showing what the volume was that was required to get into a certain bracket?

A. I don't recall what the approach was on it. I believe I have seen what the differentials were as a matter of courtesy. I don't know whether they ever published it or not. I don't think they did.

Q. Did the use of these brackets in your judgment have a tendency to influence or induce a purchasing agent or a firm such as yours was to buy exclusively or the majority of the purchases from the manufacturer to get such bracket prices?

1940 Mr. Gilpatric: I object to that question.

Mr. Haycraft: You have got plenty of opinion. I want a little too. He is a good witness.

Mr. Gilpatric: I limited my examination to the facts, but you are going beyond the facts of the direct examination, and you are calling for opinion.

Mr. Haycraft: I want his opinion.

Mr. Freeman: That is for the Court to find out.

Trial Examiner Sheppard: Read that question, please.

(Pending question read by the reporter.)

Trial Examiner Sheppard: I will let you answer that.

Mr. Gilpatric: Mr. Examiner, that is what the Commission is to decide in this case. That is a conclusion of law.

Mr. Haycraft: It is a conclusion of fact.

Mr. Gilpatric: This man is not here as an expert in the control industry.

Mr. Haycraft: I am not asking that. I am only asking him in regard to his own business. I don't want any broad answer, only in regard to his own business.

The Witness: I can only answer that, in that way. My personal viewpoint is that it would make no difference to me personally.

1941 By Mr. Haycraft:

Q. In other words, you don't make any attempt to increase your purchases from Minneapolis Honeywell in order to get the lowest bracket?

A. I would not do that as for myself personally; now other men may be different.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Is there anything else?

Mr. Gilpatric: One question.

Redirect Examination by Mr. Gilpatric.

Q. Referring back to the manual from which Respondent's Exhibits 141 and 142 were taken, I just want the record to be clear that this manual was in effect from 1936-37 on down until Petro stopped making burners for domestic sales, is that correct?

A. That is right. They never did actually stop.

Q. It is in effect today in other words?

A. It is in effect today; that is right; that is, I can only answer from April. I have not been there since April 1st.

Q. Up to April 1, 1943?

A. Up to April 1, 1943, that was in effect.

Trial Examiner Sheppard: That was my under-
1942 standing.

By Mr. Gilpatric:

Q. Up to that time Petro was offering Perfex Primary and Limit Control?

A. As published in there.

Q. And Petro was willing to sell to anybody that wanted them?

A. Up to April 1 they were.

Mr. Haycraft: I want the record to show that wherever the word "Petro" is used it refers to Petroleum Heat & Power Company, or whatever it is. I know it has been used a number of times.

Mr. Gilpatric: Yes, I used that.

The Witness: It is an abbreviation of that. It is our trade-name. We always speak of it as Petro.

Trial Examiner Sheppard: All right, let the record so show.

Mr. Gilpatric: That is all.

Trial Examiner Sheppard: Any recross?

Mr. Haycraft: Just one question.

Recross Examination by Mr. Haycraft.

Q. When did you ever meet me, Mr. Shields, before?

A. I never met you that I recall. You probably recall that you called me over the telephone at Greenwich,
1943 Connecticut, relative to this case.

Q. Do you remember when it was that I called?

A. I can find out. I made a little note of it because I was a little cagey as you remember in talking over the telephone to a stranger about this case.

Q. I just want to clear up the record. This point was brought up on direct.

A. I told you that time substantially what I said here today, a lot of it. I told you I would be available at any time you wanted to see me further. I think I told you that.

Trial Examiner Sheppard: All right, Mr. Shields. If they wanted you bad enough, they would have sent you a subpoena.

We will have a five-minute recess.

(Witness excused.)

(There was a five-minute recess.)

Mr. Gilpatric: Will you please mark these for identification Respondent's Exhibits 143 and 144-A and -B?

(The documents referred to were marked Respondent's Exhibits 143 and 144-A and -B for identification.)

Mr. Gilpatric: I am recalling Mr. Lockrae.

A. H. LOCKRAE, was thereupon recalled as a witness for the Respondent, and having been first duly sworn, testified further as follows:

1944 *Direct Examination by Mr. Gilpatric.*

Q. Mr. Lockrae, I show you Respondent's Exhibit for Identification 143, and ask you to identify that for the record?

A. This is a table showing certain oil burner manufacturers and the price brackets that were extended them by Minneapolis Honeywell Regulator Company from 1937 to 1941 inclusive.

Mr. Haycraft: What is the number on that?

The Witness: 143.

By Mr. Gilpatric:

Q. Were those statistics taken from your records under your supervision?

A. They were.

Q. They are correct?

A. As far as I know they are right, they are correct.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Gilpatric: I offer that in evidence.

Trial Examiner Sheppard: Is there any objection?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let it be accepted as Respondent's Exhibit 143.

(The document referred to, heretofore marked for
1945 identification as RESPONDENT'S EXHIBIT 143, was received in evidence.)

By Mr. Gilpatric:

Q. Mr. Lockrae, will you also state on the record just what is shown by Respondent's Exhibit 144-A and -B?

A. This is a tabulation of prices from the years 1937 to 1941 inclusive that were extended over our various brackets for the same years.

Q. Are those the same prices shown in the schedule to Commission's Exhibit 1, the stipulation, with the exception of the fact that Respondent's Exhibit 144-A and -B for identification shows unit prices instead of set prices?

A. That is correct. This tabulation also shows the set price for the constant ignition as well as the intermittent ignition.

Mr. Gilpatric: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Gilpatric:

Q. Mr. Lockrae, in the set prices shown in Commission's Exhibit 1 are they for constant or intermittent type ignition primaries?

A. The intermittent ignition primaries are included.

Q. And the paper I have just handed you, Re-
1946 spondent's Exhibit 144-A and -B, shows both constant and intermittent types?

A. Correct.

Mr. Gilpatric: The respondent offers that in evidence.

Trial Examiner Sheppard: Is there any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Accepted. That will be considered in connection with Commission's Exhibit 1.

(The document referred to, heretofore marked RESPONDENT'S EXHIBIT 144-A and 144-B for identification, was received in evidence.)

By Mr. Gilpatric:

Q. During your examination in Chicago, Mr. Lockrae, you testified as to the purchases of controls by Automatic Burner Corporation, and you stated that you would supply at a later date the sales of controls to the Holland Furnace Company for use on oil burners purchased by that company from Automatic Burner Corporation. Do you have with you those sales, and if so, give them for the record please?

A. Yes. In 1937 we sold the Holland Furnace Company controls to be used with the Automatic Burner Corporation's burners totaling 3207 units; in 1938 it was 3717 units; in 1939 it was 10,224 units; in 1940 it was 15,129 units; 1947 in 1941 it was 21,315 units.

Q. Will you give the totals then of the sales of controls on the basis of which your company extended prices to the Automatic Burner Corporation during that period, in other words, add the total sales of controls to Automatic Burner Corporation to the total sales of controls to Holland Furnace?

A. In 1937 it was 20,863 units; in 1938 it was 10,286 units; in 1939 it was 21,753 units; in 1940 it was 30,868 units; in 1941 it was 41,166 units.

Q. Mr. Lockrae you testified in Chicago, page 1661 of the record, that the Williams Oilomatic Company never signed a contract with Minneapolis-Honeywell for the purchase of controls. Have you any comment to make about that testimony?

A. Well, there was one year that we gave Williams a season's requirement contract which they did sign.

Trial Examiner Sheppard: Was that the only one?

The Witness: Yes.

By Mr. Gilpatric:

Q. I show you Commission's Exhibit 6, and ask you if that is the contract to which you refer?

A. Yes, this was signed by Mr. Ellerbrock on February

16, 1938, and covered their 1938 season's requirements
1948 of Minneapolis-Honeywell controls.

Q. Do you want to correct your testimony?

A. I would like to do that.

Trial Examiner Sheppard: I don't remember. What was your former testimony?

The Witness: I think I said broadly that I did not recall that they ever signed that contract.

Trial Examiner Sheppard: And there was that one exhibit, Commission's Exhibit 6?

The Witness: The season's requirements.

By Mr. Gilpatric:

Q. Mr. Lockrae, could you give us an idea of the number of oil burner manufacturers whom your company sold controls to during the period 1937 to 1941?

Mr. Haycraft: That is restricted to the type of controls we had up to this time under discussion; that is to say, the controls used on domestic burners of the rotary or pressure type.

Mr. Gilpatric: I will limit my question to that extent.

The Witness: In view of the way the question is worded I would answer it this way: that throughout those years of 1937 to 1941 we did business with roughly 150 to 200 different oil burner manufacturers.

1949 Mr. Gilpatric: That is all I will ask Mr. Lockrae at this time.

Mr. Haycraft: I have no questions to ask this witness at this time.

Trial Examiner Sheppard: You are excused, Mr. Lockrae.

(Witness excused.)

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Under the circumstances then, we will take an adjournment now until 2:30 o'clock this afternoon.

(Whereupon, at 11:50 o'clock, a. m., a recess was taken until 2:30 p. m., this day.)

1950 Afternoon Session.

2:30 p. m.

Trial Examiner Sheppard: Come to order, Gentlemen.

Mr. Gilpatric: I want to call Mr. Toker. He testified previously in this proceeding for the Commission.

Trial Examiner Sheppard: Show Mr. Toker, previously called as a witness for the Commission, now called as a witness for the Respondent.

HARRY A. TOKER, was thereupon called as a witness for the Respondent and, having been previously duly sworn, testified as follows:

Direct Examination by Mr. Gilpatric.

Q. I believe you testified before that you were president of the Joseph Toker Company?

A. That is right.

Q. And that that company has been engaged in manufacturing the Mohawk burner since 1939?

A. That is correct.

Q. And prior to that date you had been an oil burner dealer, had you not?

A. That is right.

Q. What type of burner is the Mohawk, pressure type or rotary?

1951 A. Pressure type burner.

Q. Where do you market your burners? Where have you in the days when you were free to sell them?

A. My burner was marketed all over the country.

Q. Do you sell through dealers or agents?

A. Through dealers, agents and direct.

Q. What makes of controls have you used on the Mohawk burner?

A. We bought from two companies, from the very inception, from the very inception of our business, Minneapolis-Honeywell Control Company and the Mercoid Control Company.

Mr. Gilpatric: Will you mark this Respondent's Exhibit 145 for identification.

(The paper referred to was marked Respondent's Exhibit 145 for identification.)

By Mr. Gilpatric:

Q. I show you Respondent's Exhibit 145 for identification and ask you to tell us what that is please?

A. That is a price list and specification of the Mohawk Oil Burner effective January 2, 1941.

Mr. Gilpatric: The Respondent offers in evidence Respondent's Exhibit 145 for identification.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: The same will be accepted.

1952 (The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 145, was received in evidence.)

By Mr. Gilpatric:

Q. Did you make it a practice to equip your burners with a set of three controls of the same make or with different makes of controls used on the same burner?

A. Do you mean mix the controls when we sell the burner?

Q. Yes.

A. Generally no. It is a rare, a very rare instance when there is a call for a mixed control. I don't recall any of them to be very candid with you.

Q. Did you purchase controls in sets from Minneapolis-Honeywell?

A. Yes.

Q. How about the Mercoid?

A. The same way.

Q. Did you have a contract with Minneapolis-Honeywell for the purchase of controls during the years '39 and '40 and '41?

A. Yes, sir.

Q. Did you have a contract with any other control manufacturers during those years?

A. With the Mercoid Corporation the same years.

Q. Did your contract with Minneapolis-Honey-
1953 well impede you, in purchasing controls from the Mercoid during those years?

A. Not in any way.

Q. Were Minneapolis-Honeywell controls higher or lower in price than Mercoid controls?

A. Higher.

Q. Did you charge more for your burners when equipped with Minneapolis-Honeywell than when equipped with Mercoid?

A. Yes, sir.

Q. Do you recall generally what that differential was?

A. The differential was approximately $1.50 which we charged when Minneapolis controls were purchased.

Trial Examiner Sheppard: And of course gave the rebate when Mercoid controls were purchased?

The Witness: That is right.

Trial Examiner Sheppard: There were all three units in the set?

The Witness: The relay, the pressuretrol and the thermostat. There was approximately $1.50 difference.

Trial Examiner Sheppard: And that was the difference in your cost?

The Witness: That is right.

By Mr. Gilpatric:

Q. Did your company increase its sale of oil burners during the period 1939 to 1941?

A. Our company increased the sale of oil burners 1954 every year we have been in business with the exception of the last year when the war took us out of the burner business.

Q. Up until that time you were increasing every year?

A. That is right.

Q. How did your prices to the wholesale trade range during the years '39 through '41, do you remember, or does this exhibit show?

A. Our prices, if I gather what you mean, were competitive.

Q. The best prices?

A. They were very competitive. They necessarily had to be and while this price list shows the price of single burners, in larger lots these prices were naturally shaded.

Q. Did you consider yourself in the low price field in the oil burner industry?

Mr. Haycraft: That is objected to as leading.

Trial Examiner Sheppard: What is that?

Mr. Haycraft: That is objected to as leading, as a leading question.

Mr. Gilpatric: I am just trying to save this witness's time.

Trial Examiner Sheppard: I will let you answer. Go ahead.

The Witness: Ours was entirely in the low price field. It was a strictly competitive proposition.

By Mr. Gilpatric:

1955 Q. What companies furnished your principal competition in this area?

A. Quiet-Heet Oil Burner Company and Radiant Oil Burner Corporation of Brooklyn. What is the name—I don't recall the name of the company from Chicago. They came into this territory. Michaelson would probably know that.

Q. Aldrich?

A. Aldrich.

Trial Examiner Sheppard: Did you do a local business?

The Witness: No, our business was throughout the entire country.

Trial Examiner Sheppard: Then you came in competition with many throughout the country?

The Witness: That is correct, but the principal factors were the ones I named.

By Mr. Gilpatric:

Q. They all being low-priced?

A. That is right.

Q. Did your purchases of Minneapolis-Honeywell controls predominate, that is, did you buy more from Minneapolis-Honeywell than you did Mercoid?

A. Yes.

Q. Why was that?

A. Our demand was more Minneapolis-Honeywell controls.

1956 Trial Examiner Sheppard: You mean by that, Mr. Toker, your demand from whom?

The Witness: From the dealers?

Trial Examiner Sheppard: Yes, your own dealers.

The Witness: That is right. In other words, we made no attempt to persuade the dealer what to take. We had to give him just what he wanted.

By Mr. Gilpatric:

Q. If the dealer asked for Mercoid controls, for example, he could always get your oil burner equipped with those controls, could he?

A. Yes, sir.

Trial Examiner Sheppard: In the event that your dealer did not specify, what would you use or what was your practice of using?

The Witness: We always had the dealer specify what controls he wanted.

Trial Examiner Sheppard: You did?

The Witness: Entirely.

Trial Examiner Sheppard: So you did not standardize on any?

The Witness: No, the custom in our business when a new dealer is set up he immediately tells us what controls he wants. He may want a steam control. He may want a pressure control or he may want a hot air control,
1957 and they immediately set up the brackets the way they want them and the name of the company that manufactures the controls and his price is based of course upon that setup.

Trial Examiner Sheppard: All right, I see.

By Mr. Gilpatric:

Q. Did your dealers know when they were called upon to specify and name the controls they desired, there was this price differential in favor of Mercoid controls?

A. They were always shown our price list.

Mr. Gilpatric: That is all.

Trial Examiner Sheppard: Cross-examine.

Mr. Haycraft: Nothing further.

Trial Examiner Sheppard: Thank you, Mr. Toker, you are excused.

(Witness excused.)

Mr. Gilpatric: Mr. Examiner, we have a message here that the witness we called from Philadelphia is sick in bed with the flu. He offered to send his son over but we said we would excuse him for today, and our next witness, who is also from Pennsylvania, won't be available until the morning. We are sort of caught short here.

Trial Examiner Sheppard: All right, then we will take an adjournment until the morning.

Mr. Gilpatric: We expect to conclude with our witnesses here tomorrow.

1958 Trial Examiner Sheppard: Then you will not want the third day?

Mr. Gilpatric: I believe we shall be able to finish up tomorrow afternoon.

Mr. Haycraft: May we go off the record?
Trial Examiner Sheppard: Off the record.
(Discussion off the record.)
Trial Examiner Sheppard: On the record.
If there is nothing further this afternoon, we will take an adjournment in this proceeding until tomorrow morning at this same place at ten o'clock.

(Whereupon, at 2:40 p. m., December 13, 1943, the hearing in the above-entitled matter was adjourned.)

1959

Room 500,
45 Broadway,
New York, New York,
Tuesday, December 14, 1943.

Met, pursuant to adjournment at 10 a. m., E. W. T.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Esq., Attorney for the Federal Trade Commission,

Cravath de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., and Paul Chase, Esq., 15 Broad Street, New York, New York, and

Bair & Freeman, by Will Freeman, Esq., 135 South La Salle Street, Chicago, Illinois, Attorneys for the Respondent.

1960

Proceedings.

Trial Examiner Sheppard: Mr. Reporter, you can convene the hearing pursuant to adjournment.
Mr. Chase: I would like to call Mr. Charles Bendix.
Trial Examiner Sheppard: Give the reporter your full name and address.
The Witness: Charles B. Bendix, 303 Grant Avenue, Highland Park, New Jersey.

CHARLES B. BENDIX was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Chase.

Q. Mr. Bendix, with what oil burner company are you or were you connected?

A. Electrol, Incorporated.

Q. Can you state during what period?

A. With Electrol from 1931 to 1936; with Delco from '36 to '39, at which time I returned to Electrol. Prior to that with May Oil Burner Corporation and in business for myself from 1924.

Q. And you have been in the oil burner business since 1924?

A. That is right.

Q. What type of burner did Electrol manufacture?

1961 A. Gun type burners.

Q. When did Electrol commence the manufacture of oil burners?

A. 1919, under the name Newcomb. In 1923 it became known as Electrol.

Q. That was the trade name?

A. That was the trade name.

Q. And also the corporate name?

A. That is right.

Q. What was the principal sales territory of Electrol Burner?

A. The United States, Canada, South America and England. We made shipments to foreign countries as well.

Q. What type of controls did you use on the Electrol Burner?

A. We used on the Electrol originally Electrol Controls. We used Mercoid, Minneapolis-Honeywell and Perfex, and Penn for a short time, Penn Controls as well.

Q. That is, then Electrol made their own controls?

A. Originally and we always made for one type our own master control, the Primary Control.

Q. What type of burner was that?

A. That was the Electrol Ball Flame Burner.

Q. Did Electrol have contracts with Minneapolis-Honeywell during the years 1936 to '41?

1962 A. Yes, in 1939, '40, '41, I was with them and they had them, and during the years 1936 to '39 I know they did because I still kept contact with them while I was with Delco. They always had contracts with every manufacturer of controls.

Q. What other manufacturers?

A. Perfex and Penn, Mercoid and Minneapolis-Honeywell.

Trial Examiner Sheppard: Those were during the same years, Mr. Bendix?

The Witness: That is right.

By Mr. Chase:

Q. That is, they bought controls from all those other control manufacturers during that period?

A. They did, yes.

Q. Was that true during the period you were connected with them?

A. Yes.

Q. Can you state why Electrol used Perfex Controls principally?

A. For probably three reasons: first, because of the price condition. We could buy them cheaper than any other controls. Secondly, because through Perfex we were allowed to put our own name, the Electrol name, on the thermostat and our Primary Controls used for that particular type of burner; and third, because there was a close affiliation between the officers of Perfex and the officers of Electrol Corporation.

1963 Q. Did Electrol Burners equipped with Minneapolis-Honeywell Controls cost more than burners equipped with other makes of controls?

Mr. Haycraft: I object. They cost more to whom, the manufacturer themselves, the man who bought it or how?

Trial Examiner Sheppard: You can indicate.

Mr. Freeman: We will eliminate that question. They cost more to the Electrol Company.

The Witness: Yes, they did.

By Mr. Chase:

Q. That is, you paid more for Minneapolis-Honeywell Controls?

A. Certainly.

Q. Did the Minneapolis-Honeywell contract prevent you from purchasing from other control manufacturers?

A. No.

Q. Did you freely purchase from other control manufacturers during the time you had Minneapolis-Honeywell contracts?

A. Yes.

Q. Was the Electrol Burner always shipped with a set of three controls of the same make or with different makes of controls, sometimes used on the same burner?

A. Ninety per cent of the cases were shipped with three controls from one manufacturer. Occasionally we used some Minneapolis-Honeywell Clock Thermostats with 1964 other controls shipped with the burner.

Q. But not the regular thermostat?

A. No.

Q. When you used the clock thermostat you used a relay along with it?

A. Yes, that is right.

Q. And that relay was for adapting the clock to the rest of the oil burner?

A. That is right.

Q. Did you find more or less dealer demand for Minneapolis-Honeywell Controls that for other makes of controls?

A. Well, I did. The demand for Minneapolis-Honeywell Controls was great with dealers that we tried to appoint, new dealers, but with the Electrol Dealers it was about fifty, fifty.

Q. What was the range at which you sold your burners wholesale duirng the years 1936 to '41?

A. $115.00 to $62.50.

Q. Did you then know what the installed price was?

A. From $395.00 to $265.00.

Q. Can you state the difference in price of burners equipped with Minneapolis-Honeywell Controls and those equipped with other makes of controls, that is, the difference in price?

A. Of other burners?

Q. That is, at which you sold your burners to the dealer?

1965 A. The cost price?

Q. Your selling price?

A. We had a price list issued after much deliberation in 1939 and carried that through the years of '39, '40, '41 and '42 where we put a standard, the Perfex Controls, and

noted on the price list that if Minneapolis-Honeywell Controls were desired there was an extra charge of $2.50.

Q. Why did you charge $2.50 more for Minneapolis-Honeywell?

A. We paid more for the Minneapolis-Honeywell Controls. I answered that question before.

Q. Were you aware of the fact, Mr. Bendix, that some of the Minneapolis-Honeywell's customers who purchased controls in larger volume got a somewhat better price than Electrol received?

A. Yes.

Q. And did that fact hurt the sale of Electrol Burners?

A. No.

Q. Did you service your burners?

A. In particular territories, yes. In other words, the surrounding territories—I have to elaborate a little bit, if you don't mind—we operated out of Clifton, New Jersey, that was our manufacturing center and we covered all of the New Jersey Counties and New York City pretty nearly direct from the factory.

In other words, the dealers that were appointed 1966 were more or less operating as a selling dealer. A lot of installations were made by the factory hired installation men.

Q. Can you state generally who were your competitors, what type of burners?

A. All oil burner manufacturers and dealers and distributors were our competitors. Are there any particular trade names? Is that what you want?

Q. Yes.

A. The Quiet May, Quiet-Heet, Petro, Timken, Gilbert and Barker, Esso, Aldrich.

Q. Aldrich?

A. Yes, all makes. I could sit here for an hour and repeat about four hundred different makes.

Q. Then you were in competition with everybody who sold oil burners?

A. The entire field, General Electric, Westinghouse and all the big ones, Delco.

Mr. Chase: That is all.

Trial Examiner Sheppard: Mr. Bendix, I want to ask you one question before the cross-examination. I think that you have had a good long experience in this line and can explain to me something that I do not quite understand.

Is it preferable or not to have all make of the controls made by one manufacturer?

1967 The Witness: I say no.

Trial Examiner Sheppard: Why is it not practical to use some portion of the control by one manufacturer and other portions by another?

The Witness: Because of the electrical set-up, the system of the different types of controls. In other words, one type of control may be high voltage and another one may be low voltage. If low voltage, it may be two-wire and three-wire and primary controls, and all those things influence the set-up, the hook-up of the controls.

If you have to use one thermostat of one make of control it is entirely possible that you have to put a relay in-in between those to operate the primary control of the burner and the more relays and the more things you have to put on, the greater, the higher your expense and price goes.

It, of course—

Trial Examiner Sheppard: It is better then from a price basis and also from a practical basis to use all the controls made by one manufacturer?

Mr. Freeman: On one burner?

The Witness: On one burner, but not one manufacturer's.

Trial Examiner Sheppard: I mean for one burner?

The Witness: Yes, for one burner.

Trial Examiner Sheppard: All my questions which I have asked are for one burner.

1968 The Witness: I would certainly say that that is so, that the system set up with one type of controls is the preferable system to that which have different makes of controls.

Cross-Examination by Mr. Haycraft.

Q. Is that true with Limit Controls as well as thermostat and primary controls?

A. To a certain degree, not as much degree as the thermostat but the Limit Control manufactured by the majority of control manufacturers are of one type. It is either low voltage or high voltage. I mean they can be used with both. It is just a breaker. It is just a switch in the line between the thermostat and the primary control,

so the type of breaker that is put in there does not make much difference.

Q. As a matter of fact, there was quite a considerable time that you bought, that you used your own primary control and bought your other controls from one manufacturer, and your thermostats from another?

A. That is exactly right.

Trial Examiner Sheppard: That is the reason I asked you those questions, Mr. Bendix. I noticed that when you first began you used your own controls.

The Witness: That is right. On a certain make of burner, on the ball flame burner, that is right.

1969 Trial Examiner Sheppard: I see.

The Witness: You see, we manufactured two distinct different types burner. The Electrol Ball Flame Burner, which was the original Electrol Burner, which was our pride and prize class, in other words, that was quality throughout, and we made for competition sake a straight shotgun burner in 1936, we started in 1936, and through 1937, and that became our volume in 1939, '40 and '41. That is when it went into volume.

That straight shotgun type burner was comparable as to how it burned its oil and operation with any other straight shotgun type of burner.

Trial Examiner Sheppard: I understand.

By Mr. Haycraft:

Q. When you came out with the straight shotgun type burner, you did not use your own primary?

A. No, sir.

Q. You bought—

A. We bought sets of controls, sets of three controls.

Q. Was there ever a time in your experience when the set controls were sold in sets of primary and thermostat, and the oil burner manufacturer bought his Limit Control where he pleased?

A. If I recall back in 1926 or '27, '28, with May Oil Burner, I believe so, but they preferred to buy it
1970 from one, three sets of controls. There was a short while there when we got through some different type of Limit Controls for our burners from the manufacturer.

Q. You still manufacture your own ball type burner?

A. That is right.

Q. And use your own primary on it?

A. That is right.

Q. And what Limit Control do you use on it now?
A. Perfex.
Q. And also the thermostat?
A. Either Perfex, Minneapolis-Honeywell or Mercoid.
Q. I see, any of the three?
A. Any of the three.
Q. What proportion of your business from 1937 on to 1941 was the ball type and what percentage of your business was the gun type?
A. Fifty, fifty.
Q. About fifty, fifty?
A. Yes.
Q. After you got started?
A. It may have been 52-48, it is so negligible the difference.
Q. What position do you hold in the firm?
A. I was District Sales Manager of the company as well as Field Engineer and Field Serviceman and 1971 General Office Boy, Director, Assistant to Directors and all the people that were connected at one time or another who had either been working with me or for me in the past 10 to 12 years, and I knew everything that transpired in the corporation.
Q. In 1939 what was your position?
A. That is what I meant. Pardon me—did you ask prior to that?
Q. I meant from '39 on?
A. That is what I am talking about. In other words, it was a very close affiliation with the President of the company, the Vice President and the Treasurer and myself. There were four men and we lived together pretty nearly.
Q. Who were the others?
A. Stanley H. Brown, Theodore H. Cox, he was Vice President, and Edward LaBahn was Factory Manager and Vice President of the company.
Q. Do you know Harry Brown?
A. Very well.
Q. He was with you?
A. Service Manager.
Mr. Haycraft: That is all.
Trial Examiner Sheppard: Is there anything else?
Mr. Chase: Yes, sir.

Redirect Examination by Mr. Chase.

1972 Q. Did your sales increase or decrease during the period 1936 to '41?

A. Increase.

Q. That is every year there was a steady increase?

A. 1937 I won't vouch for but I know in 1938, '40 and '41 they increased.

Recross Examination by Mr. Haycraft.

Q. You say the highest percentage of your burners were shipped out with three controls purchased from one manufacturer, you are referring to your gun type burner when you say that?

A. That is right.

Q. You made your own primary for the Electrol?

A. The primary.

Redirect Examination by Mr. Chase.

Q. You made your Electrol Primary Control for the ball type burner, to fit the electrical characteristics of the thermostat you bought, is that true?

A. That is right.

Q. There had to be electrical cooperation between the two?

A. Very definitely and the primary control was made in such a fashion with the high voltage thermostat necessary to control it. It was not necessary but without
1973 the relay if you only wanted to buy a thermostat and not use a relay in between you would have to buy a high voltage thermostat, whereas if you wanted to buy a low voltage thermostat you would have to put the relay between that and the primary control.

Recross Examination by Mr. Haycraft.

Q. Where did you buy your thermostats that you used with your primary controls that you used during that period of time?

A. We bought from Perfex. We bought from Minneapolis-Honeywell. We bought from Mercoid and we bought some from Penn.

Q. And you used them with your primary control?

A. That is right.

Redirect Examination by Mr. Chase.

Q. The thermostats you bought from Minneapolis-Honeywell for the ball type burner was not the series 10, was it, the series 10 thermostat?

A. Yes, in years gone by it was. We could use either one with the relay in between. We could use that series 10 with the relay. We used to use the old series 20, way, way back with the relay in between that and the primary control.

Mr. Chase: That is all.

1974 Mr. Haycraft: That is all.

Trial Examiner Sheppard: Thank you, Mr. Bendix.

(Witness excused.)

Mr. Gilpatric: Can we have a short recess?

Trial Examiner Sheppard: Yes, we will have a five minute recess.

(A short recess was taken.)

Trial Examiner Sheppard: Gentlemen, come to order.

Mr. Chase: Mr. Examiner, I would like to recall Mr. Bendix for a few questions.

Trial Examiner Sheppard: Show Mr. Bendix previously sworn recalled for further examination by the Respondent.

CHARLES B. BENDIX was thereupon recalled as a witness for the Respondent and, having been previously duly sworn, testified further as follows:

Direct Examination by Mr. Chase (Resumed).

Q. Mr. Bendix, you referred in your previous testimony to some of your competitors. Did you ever make a comparative study of the prices at which your competitors were selling their burners and the price at which you sold your burners?

A. Yes. In 1940, I had rejoined the Electrol, in the latter part of 1939, it was my job to really promote the sale of Electrol and having started in the industry in the

1975 form of a laborer, digging holes for thousand gallon tanks with a couple of colored fellows and making oil burners, and having made pumps and controls and installed burners for a lengthy period, I was familiar with the break-

down of oil burners, and we made a complete study and broke down the cost of the construction of an Electrol Oil Burner as compared to six or seven or eight different makes of oil burners, that is, as to those that we felt we wanted to reach down to and compete with them, if we could. The net result was that after much study we found that the construction cost of the Electrol Oil Burner in a crate without controls was greater than that of the price for instance, like Gold Star and Quiet-Heet, Mohawk, Citro Oil Burner, which was made up in New Jersey for a short while, and several other makes; Paragon was one that was less than ours with controls, in other words, less with controls than ours were without controls. We right there made a decision to continue our practice of selling quality, installation, etc., and so on.

In other words, the comparison showed us that we could not even compete with them on the basis of price ever at any time.

Why? The answer to that was—I have yet to have an answer inasmuch as I know that Electrol had all the machinery, the proof of which is what they turned over to the War manufacturing plant in a very short time because
1976 of the good and efficient equipment that they had out there at that time. But I have yet to find the answer how they could sell the burner for say as low as $36.50, $37.50 with controls when our cost of manufacturing the burner alone put in a crate was, disregarding overhead, more than that.

Q. That was your cost without controls?

A. That is right, our cost without controls. It ran so close to where we could not even think of adding the controls to it and competing with them.

Mr. Chase: That is all.

Trial Examiner Sheppard: Is there anything further, Mr. Haycraft?

Mr. Haycraft: No.

(Witness excused.)

Mr. Chase: Mr. Examiner, I would like to call Mr. Edward Kraber.

Trial Examiner Sheppard: Come around, Mr. Kraber, and give your full name to the reporter, please.

The Witness: Edwin I. Kraber.

Trial Examiner Sheppard: And your address.

The Witness: 30 North Penn Street, York, Pennsylvania.

EDWIN KRABER was thereupon called as a wit-
1977 ness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Chase.

Q. Mr. Kraber, with what oil burner company are you or were you connected?

A. York Oil Burner Company.

Q. What position did you hold?

A. I was the Treasurer.

Q. Then you are not at present connected with the oil burner company, the York Oil Burner Company?

A. Financially I am but not officially.

Q. Where is the York Oil Burner Company located?

A. York, Pennsylvania.

Q. And how long were you Treasurer of the York Oil Burner?

A. From 1928.

Q. And how long have you been in the oil burner industry?

A. Since 1914.

Q. What type of burner did the York Oil Burner Company manufacture?

A. The gun type.

Q. When did they commence the manufacture of it?

A. 1928.

Q. That was under the trade name of York?

A. That is right. York Heat was the trade name.

1978 Q. What was the principal sales territory of the York Burner?

A. Well, we had an international set-up. We sold in the United States and in all foreign countries.

Q. What make of controls did you use on the York Burner?

A. Minneapolis-Honeywell, Penn, Mercoid and Perfex.

Q. Do you use more or less Perfex Controls?

A. We used more Minneapolis-Honeywell Controls, that is during a certain period.

Q. What period?

A. When I was with the company up until the time that I was with the company, why we used more Minneapolis-Honeywell Controls than we did the others but after I left the company then they changed to Perfex.

Q. Do you know if they did standardize on Perfex?
A. Yes, they standardized on Perfex.
Q. Do you in your own knowledge know why they made this change?
A. Well, in the first place they were allowed to put the name of York on the controls. They called them York Controls and there was a price differential. In other words, they cost less.
Q. What period was that?
A. That was about 1940.
Q. Was it or was it not optional with the pur-
1979 chaser of the York Burner whether his burner would come equipped with one or the other make of control?
A. They were allowed, the burner would be furnished with whatever control the dealer wanted, whatever set of controls the dealer wanted.
Q. Did you have any price sheet?
A. Oh, yes, there was a differential in the price too. In other words, Minneapolis Controls cost more money than any other.
Q. That is, you sold oil burners equipped with Minneapolis-Honeywell Controls at a higher price?
A. A higher price, $2.00.
Q. Did you have yearly contracts with Minneapolis-Honeywell during the period 1936 to 1941?
A. Yes, we had a contract with all companies that we dealt with, all control companies.
Q. Will you name the other control companies?
A. Mercoid, Penn, Perfex and Minneapolis-Honeywell.
Q. Did your Minneapolis-Honeywell contract prevent you from purchasing from other control manufacturers?
A. No.
Q. As a matter of fact, you did purchase from other companies?
A. We purchased all makes of controls.
Q. Did you ever sign a contract with Minneapolis-
1980 Honeywell which provided in part that you would buy 95 percent of your control requirements from them?
A. No, at no time.
Q. Then did you ever sign a contract with Minneapolis-Honeywell calling for season's requirements rather than a specific amount?
A. That's right, correct.
Q. What did that language "season's requirements" mean to you?

A. Whatever controls we felt we needed, why we bought from Minneapolis-Honeywell.

Q. That is of Minneapolis-Honeywell?

A. Yes.

Mr. Haycraft: I object, it is leading.

Trial Examiner Sheppard: Just be careful.

Mr. Chase: I will withdraw the question.

By Mr. Chase:

Q. Did that contract mean that you had to buy only from Minneapolis-Honeywell?

A. No, at no time did we buy exclusive from Minneapolis-Honeywell.

Q. Did you ever receive a retroactive credit from Minneapolis-Honeywell?

A. Yes, on two different years.

Q. Do you recall what years?

1981 A. It was for the years 1937 and '38.

Q. Have you been aware of the fact, Mr. Kraber, that some of the Minneapolis-Honeywell's customers purchased controls in larger volume and got a somewhat better price than your company?

A. Yes, sir.

Q. Did that fact hurt the sale of your oil burners?

A. No.

Trial Examiner Sheppard: What bracket were you in, Mr. Kraber?

The Witness: Next to the highest bracket as far as I know.

By Mr. Chase:

Q. Just so the record is clear, did you charge more or less for your burner equipped with Perfex Controls?

A. Less.

Q. And Mercoid Controls?

A. Well, the Mercoid and Perfex and Penn were all the same price and the Minneapolis was $2.00 higher.

Q. Was the York Burner always shipped with a set of three controls of the same make or were different makes of controls some times used on the same burner?

A. I don't know of any case where we would use different controls, I mean on a burner. In other words, it was our policy that we did not want to divide the re-

1982 sponsibility when it got out to a dealer because with the set-up which the companies had around, the

servicing of controls, if you had different make controls on the burner, why of course it would be divided responsibility and you would not know whose responsibility it was.

Q. Did you or did you not find more dealer demand for Minneapolis-Honeywell Controls?

A. In our case it was more Minneapolis-Honeywell dealer demand, there was more dealer demand for the Minneapolis-Honeywell Controls because of the set-up all around all over the country, the service set up, the advertising and dealer contact.

Q. What was the price range at which you sold your burners wholesale during the years 1936 to '41?

A. The prices were $187.50 and they got down to $59.75 in the latter years.

Q. How did your prices compare with the average in the industry during this period?

A. Well, at the start we were in the low priced field and of course toward the last we were up with the higher priced burners.

Q. What do you mean by "at the start"?

A. Well, when we started in the burner business we were the cut-price burner manufacturer. In other words, I guess you would call it, in fact some of them called us the 1983 bastards of the oil burner business. That is the way it was.

Q. What time was that?

A. 1928, '29 and '30.

Q. Then what happened?

A. Well, then of course the other people followed in suit with us and came down in price and some of them started to go lower than we were, so finally we came to the point where we were or had gotten to be among the high priced burners.

Q. Did you ever give service with your burners?

A. At first we did not give service with the burners. We sold it to a dealer as is and he assumed the responsibility but in later years we had to change that policy and then we had a Service Department.

Trial Examiner Sheppard: I don't think I know exactly what you mean by giving service on a burner. Tell me about it. What do you mean by that? After a burner is installed?

The Witness: A dealer might need help and of course

if you did not have a set-up you forgot about it. You just sold the burner. In fact, we sold a lot of them by mail and of course we sold a lot of them throughout the West. We had no means in fact if they ever got in trouble we had no means to go out and do anything because of the cost of sending a man out there would cost more than the price of a burner.

Trial Examiner Sheppard: Therefore, what do you
1984 mean when you state you serviced a burner?

The Witness: In later years we had service engineers. When a dealer got in trouble we would send a man out to help him out.

Trial Examiner Sheppard: In other states?

The Witness: That is right, in other words, to make a better public acceptance.

Trial Examiner Sheppard: You had traveling men to do that?

The Witness: On, yes, sure, at first we didn't.

Trial Examiner Sheppard: At first you didn't?

The Witness: Towards the last we had a big service force. We traveled around. That was expensive and we had to maintain that service, and the traveling expenses in a lot of cases would cost a lot more than the price of the burner.

Trial Examiner Sheppard: A good many people testified that they serviced things here and some have testified that they have not.

The Witness: At first we did not but towards the last when our name got to be accepted by the public, why we had to do that in order to maintain that name.

Trial Examiner Sheppard: Well, when you did that it made your burner sell at a high price?

The Witness: That is right.

Trial Examiner Sheppard: That is when you went
1985 into the high class field?

The Witness: We did not raise the price of the burner but held it at a certain price. Instead of going lower we held it. We just could not go any lower.

Trial Examiner Sheppard: All right, that answers my question.

By Mr. Chase:

Q. Who was some of your low priced competitors?

A. Well, we had Gold Star, The Mohawk. I just can't think. There is a peculiar name—

Trial Examiner Sheppard: Quiet-Heet?
Mr. Chase: Quiet-Heet.
The Witness: Yes.

By Mr. Chase:

Q. Aldrich?
A. There was Paragon and Aldrich.
Q. In contrast then, who were your high priced competitors?
A. May Oil Burner, Timken, Petroleum Heat & Power, Electrol.
Q. Do you consider as competition high priced burners as well as low priced burners?
A. What do you mean by that?
Q. Do you compete with everybody in the oil burner industry?
A. Oh, sure, we would have to compete with them in order to sell the burners, but we figure that the
1986 service we give them had some sales value and therefore we could get a higher price.

Trial Examiner Sheppard: As a rule in the case of the low priced oil burners, who do not have service, that is one reason for the low price, isn't it?

The Witness: That is right. You are absolutely correct in that.

In other words, I know in several cases that Quiet-Heet in particular they sold their burner and made no bones about it that you bought as is; after it left the platform it was your burner and you either took it or left it. That was all there was to it.

Trial Examiner Sheppard: And a whole lot of concerns who manufactured high price burners, serviced them, is that the fact? Do most of the high priced manufacturers service them?

The Witness: They all maintain good service departments and they have advertising. That makes their price higher. Some of them advertise nationally and things like that you know, so that all raised the price of the burner.

Trial Examiner Sheppard: And a good many of the low price manufacturers do not?

The Witness: They do not.

Trial Examiner Sheppard: There is where the
1987 competition comes in?

The Witness: That is right. In other words,

I would not say they were nationally accepted burners. They did in a small territory. They did not cover over a big space.

As I said before, the cost in lots of cases going out to service burners cost more than the burner, but we did that for public acceptance. Of course the average price of the burner that we had we tacked that on to every burner and so eventually paid for that service.

Trial Examiner Sheppard: All right.

By Mr. Chase:

Q. Did your oil burner sales increase or decrease during the years 1936 to '41?

A. There was in 1938 a slight dip in the sales but during the other period why they increased.

Q. Then you showed a profit every year?

A. We showed a profit understand but the sales, the amount of the sales dipped; there was a dip in the amount of sales during the year of 1938. I think that was general.

Mr. Chase: That is all.

Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Haycraft.

Q. When did you first notice the competition of 1988 Quiet-Heet? Was that about 1938?

A. I believe it was '37, in that neighborhood.

Q. And did you lose any business to Quiet-Heet?

A. No, I would not say we did because during 1937 our sales increased.

Q. How about '38?

A. 1938, the dip was general. I think you will find that the chart will show that the dip in the sales of all manufacturers was down in 1938.

Q. Would it surprise you to know that Lapidus of Quiet-Heet went up in 1938?

A. What do you mean?

Q. The volume of sales?

A. That might be very true.

Q. Do you know whether or not as a matter of fact you did lose any business to Quiet-Heet at any time?

A. Well, there was, I know of one case that we did. We lost a dealer in Atlantic City because of the price, but I know the price. Our dealers were busy understand. We did not lose so many dealers but the dealers might have

lost sales. I don't think there was any doubt about that but we sold more burners during those years.

Q. The general business of the oil industry went up, in other words, the total volume of sales increased?

A. That is right. We got our share of business.

1989 We were always among the top.

Q. When you say you got your share of the business, you don't mean that Quiet-Heet and others of that type did not increase their sales more than you did during those years with that low price?

A. No, I would not say that because I remember we started back in 1929 and we were satisfied with a certain sales volume that we could take care of where Lapidus he started in—

Q. '37?

A. (Continued.) in '37, along in there and he got to be one of the largest manufacturers of burners in quantity possibly, not in dollar volume, but in quantity.

Q. You said you knew that some of your competitors had a better price on controls from Minneapolis-Honeywell than you did but that did not hurt the sale of your burners. What bracket were you in? What was the price you were paying?

A. We were in the next to the highest bracket as far as I know.

Q. You don't know what price the others were paying?

A. No, I don't, but there was possibly, there could not be more than 50 cents a set, in that neighborhood, so it could not make much difference.

Q. Would it make any difference—you say 50 cents would not make much difference. How much would

1990 you think would make a difference, how much would you think would hurt?

A. Well, I don't know what to say about that. I think it would be $4.00 or $5.00. That would be something different.

Q. When was it you started charging your dealers $2.00 more for the Minneapolis-Honeywell?

A. We always did that. There was always a differential between Minneapolis-Honeywell and other makes of controls because we bought the other makes of controls for less.

Q. You say "always". What years were you with the firm, from 1928 until when?

A. I was one of the owners of the company.

Q. From 1928 until when?
A. Till?
Q. When did you leave it?
A. 1938, when I sold out my interest but I remained with the company until last year.
Q. In what capacity were you with them from 1938 until last year?
A. Vice President.
Q. What do you mean "you sold out"? You still remained a Vice President. I don't quite understand that.
A. I left the business. I sold my interest out. I owned two-thirds of the company.
Q. You sold in 1938?
A. I sold to Thomas Shipley, Inc.
1991 Q. Then you stayed on?
A. Yes, I worked for five years.
Q. After you sold out?
A. Yes.
Q. So you really did not leave the firm until last year?
A. Last June.
Q. June 1942?
A. No.
Q. June 1943?
A. Yes.
Q. This year, then?
A. Yes, June 1943. I am still financially interested in the company.
Q. Let us get this straight about that. When was it that you bought more Minneapolis-Honeywell Controls for your burners than you did any other make?
A. 1937 and '38 and '39.
Q. Are you sure about '39?
A. Yes, I am pretty positive about this because 1939, the fall time, the winter of that year, is when they changed over to Perfex. It was the start of the change-over.
Q. How about 1938?
A. Well, that was in 1939. I am pretty near correct. I think until 1939 there was a lot of Minneapolis-Honeywell Controls sold. In fact I believe there was more.
1992 Q. Have you got any figures on that?
A. No, I don't.
Q. Is there any way of refreshing your recollection? Will this refresh your recollection: in 1936 you bought $25.00 worth of Perfex; in 1937, $899.00; in 1938, $2447.00; in 1939 $20,197.00; in 1940, $27,862.00; in 1941—

A. In 1939, you say about $27,000? Then I imagine there was Perfex Controls sold in 1939. I will change that. I did not have anything to do with the books. I was just in the Engineering Department.

Q. What was the price that you paid for your controls to Minneapolis-Honeywell during the years that you bought most of your controls from them as compared with the price of Perfex and Mercoid Controls?

A. About $1.50 a set more.

Q. Do you remember what they paid Perfex when you standardized on them in 1939?

A. No, I don't know what to state on that at all. I would say around—if you want near—it was around $15.50, $16.50.

Q. And you cannot tell us how much you paid Minneapolis-Honeywell?

A. No, because as I say there was about $1.50, because we had a 30 per cent mark-up on controls and that would make the $2.00 differential in the selling price of the burner.

1993 Q. How do you account for the jump there, the difference there, in the volume of purchases of controls from Minneapolis-Honeywell and Perfex, that change-over there?

A. When are you talking about?

Q. 1938 and 1939?

A. You mean the change-over from Perfex to what?

Q. Minneapolis-Honeywell to Perfex. Up until 1938 you were buying most of your controls from Minneapolis-Honeywell?

A. Well, as I stated—I stated that. The company that I sold out to then, they decided they wanted to put their own trade name on the control and called it York Heat Control and that is the reason that they standardized on Perfex.

Q. Minneapolis-Honeywell would not allow you to do that?

A. No, we had no arrangement with Minneapolis-Honeywell where we could do that.

Q. Did you try to do that?

A. As I say, I had no control in 1939 as far as purchasing was concerned, so I don't know. I think that really would be an unfair question to ask me because I had nothing to do with the policy of the company. I was only in an advisory capacity.

Q. You say you were a Vice President?
A. I was only Vice President.
Q. You did not control the company?
A. I sold out my interest.
1994 Q. What did you do as Vice President?
A. I was Consulting Engineer.
Q. How often did they consult you?
A. I was right there at the plant all the time.
Q. You did not have anything to do with that?
A. That is right. If you know the Shipleys you know that outsiders can have nothing to say about their outfit.
Q. At the time that you state that you had something to do, did you standardize on Minneapolis-Honeywell?
A. Yes, up to the time I left, when I sold out, Minneapolis-Honeywell, we sold more Minneapolis-Honeywell Controls.
Q. Well, now suppose the dealer should send in an order during the time that you were in charge there and did not indicate or designate what control he wanted, what control would you put on it?
A. Minneapolis-Honeywell.
Q. That was in 1938, '37, '36?
A. 1938, '37, '36.
Q. What other controls were you putting on burners in those three years, '36, '37 and '38?
A. Mercoid, we sold some Mercoid and we sold some Penn and Perfex.
Q. But in order to get a Mercoid, or Penn or Perfex the dealer had to indicate that that is what he wanted?
A. That's right.
1995 Q. Did you give him when you sold him a burner with a Minneapolis-Honeywell Control on it, was that your list price and then you gave him a $2.00 reduction if he took another control?
A. Our Sales Department tried out different ways, in other words, during the year we would have different mark-ups, new price sheets and just to see how it would work in some cases we would specify that the price was with Minneapolis-Honeywell Controls, and if you wanted another control there would be a deduction. Then in other cases, we would make the lower price and put it where the Minneapolis-Honeywell would be $2.00 higher.
It was just an experiment to see what would happen as far as the sales went along.
Do you understand what I am talking about?

Q. Yes, I understand. Do you know what years it was that you made the experiment?

A. That was as long as I was with the company we did that. We never had any set rule. It was entirely up to the Sales Department; if they felt like getting out a price list of that type they got it out and sent it out.

Q. In 1939 and '40 you say you did not have anything to do with the business policy of the company?

A. That is right.

Q. Do you know then the reason for the shift over?

1996 A. Well, I know the reason because of the fact—

Q. (Continued) from Minneapolis-Honeywell to Perfex?

A. (Continued) because I was at the meeting that it was done. We had engineering meetings and I was always in those meetings, and of course my vote did not amount to very much. I did not have much to do about it. As I told you, the Shipley organization controlled the thing and I had nothing to say about it.

Q. Did you oppose the change-over?

A. I did not think it was a good policy at the time.

Q. You voted no?

A. That is right.

Q. You were overruled?

A. That is right.

Q. Were you a director, a member of the Board of Directors?

A. No. At those committee meetings my vote counted.

Q. What committee meetings?

A. Well, it was the committee meeting that formed the sales policy of the company. We had meetings once a week.

Q. Executive Committee Meetings?

A. Every Monday morning we head a meeting, nearly every Monday morning. At those meetings everything was brought up and it was either carried to the next meeting or finally decided at those meetings.

Of course, I don't know what went on in the back

1997 room or anything like that, because sometimes those things would come in and be all cut and dried. As I say, I had nothing to do about it.

Trial Examiner Sheppard: Give me some idea about the size of your concern. How many burners would you manufacture in a year during the time you were there?

The Witness: Between 3000 and 4000.

By Mr. Haycraft:

Q. Was that true all through the years or did that increase? About how many did you manufacture in 1937, if you remember?

A. In 1937 about 3000.

Q. Was 1936 about the same?

A. A little bit less.

Q. 1938?

A. '38, it went down, dropped slightly.

Q. How much?

A. Oh, I would say about 2600 or 2700.

Q. And '39, what was it?

A. In 1939 it went up; we possibly sold about 4000.

Q. And '40?

A. That is '39 and '40 would be about 500 more, something like that.

Q. '41—

Trial Examiner Sheppard: Is that a small company or a big company?

1998 The Witness: Well, I consider that a big company.

Trial Examiner Sheppard: Did you?

The Witness: That is right.

Trial Examiner Sheppard: One follow told me in Chicago last week, I believe it was Mr. Aldrich, that his went up to 20,000 in one year. Now that is a big company, bigger than yours?

The Witness: It is.

Trial Examiner Sheppard: Do you know Mr. Aldrich?

The Witness: Oh, yes, I am one of the oldest oil burner manufacturers. I started in 1914.

Trial Examiner Sheppard: Yes, I noticed that in your testimony.

Is there anything else, Mr. Haycraft?

Mr. Haycraft: That is all.

Redirect Examination by Mr. Chase.

Q. Is it not true that with the York name on the controls it did not make any difference who made the controls?

Mr. Haycraft: I object to that as a leading question.

Trial Examiner Sheppard: Turn it upside down.

By Mr. Chase:

Q. Who made the control with the York name on it?

A. Perfex.

1999 Q. And that was a cheaper control than the Minneapolis-Honeywell?

A. It cost less.

Q. How did you rate yourself as to the total oil burner industry in relation to volume? Were you at the top or the bottom of the list?

A. We were always among the first ten during that period, from say 1932 on, we were always among the first ten in the oil burner industry.

Q. Did you make boiler units along with your oil burners?

A. We made a complete line of burners.

Q. So your dollar volume in the heating industry was rather large?

A. Oh, yes, we made industrial type burners as well. We made from the smallest to the largest type of burner. It was up to burning 700 gallons of oil an hour.

Q. Can you give us in round figures your over-all volume in dollars?

Mr. Haycraft: That is objected as irrelevant and immaterial. If it is not domestic oil burners I object to it, or if they are not using the controls.

Trial Examiner Sheppard: Limit it to the oil burners. I will let him testify on that. I am not interested on something else.

By Mr. Chase:

2000 Q. Limit it?

A. That would be hard for me to tell. I could not remember those figures.

Mr. Chase: That is all.

Trial Examiner Sheppard: Is there anything else, Mr. Haycraft?

Mr. Haycraft: No.

Trial Examiner Sheppard: Thank you, Mr. Kraber.

(Witness excused.)

Mr. Gilpatric: Mr. Examiner, the next witness we have scheduled is coming in from New Jersey. He will not be here until after lunch.

Can we have an adjournment until 2 o'clock?

Trial Examiner Sheppard: We will adjourn until 2 o'clock this afternoon.

(Whereupon, at 11:25 a. m., an adjournment was taken until 2 p. m., this day.)

2001 Afternoon Session.

2 p. m.

Trial Examiner Sheppard: Come to order, gentlemen.

Mr. Gilpatric: I will call Mr. Eckhart.

Trial Examiner Sheppard: Will you give us your full name and address?

The Witness: Arnold Eckhart.

Trial Examiner Sheppard: And your address?

The Witness: Business address?

Trial Examiner Sheppard: Your business address?

The Witness: 123 Hawthorne Street, Roselle Park, New Jersey.

ARNOLD ECKHART was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gilpatric.

Q. Mr. Eckhart, will you state your business connection?

A. I am President and Treasurer of Korth Oil Burner Corporation.

Q. How long have you been associated with that company?

A. Since 1934, approximately August I would say.

Q. What was the company known as at that time?

A. Carter-Korth Oil Burner Corporation.

2002 Q. When did the name change take place?

A. 1937, July.

Q. Had the company been engaged in the manufacture of oil burners prior to the time you came with them in 1934?

A. Yes, they had then.

Q. What types of burners has the company manufactured in the course of its business existence?

A. Originally the Rotary Type, the Wall Flame Type, the Rotary Flame Type Burner, and then branched into the gun type or pressure atomizing type.

Q. Was that before you came with them, that change?

A. Yes, in fact they had both types when I did join them.

Q. In what areas has the company offered for sale and marketed its burners since your connection with it?

A. We had operated all through the New England States, Atlantic States, part of the Midwest and Far West, that is the Northwestern States, some of the Southern but not too far down because of climatic conditions.

We have exported very little.

Q. What make of automatic temperature controls does your company use on its burners?

A. Now?

Q. Go back to the time when you came in there, or before, if you know?

A. When I first joined the company in 1934 they
2003 were using Penn Electric Controls.

Q. On what type burner?

A. On the gun type burner and previously on the Rotary Burner they had used Mercoid Controls.

Q. Did you make any change?

A. Yes.

Q. What was that?

A. Just what year I don't know, if it was the first year. It may have been 1935 when we first put on Minneapolis-Controls.

Q. What has been your policy with regard to controls since then, 1935?

A. Our policy in purchasing controls is that we limited our purchasing to Minneapolis and Mercoid Controls for more than one reason. One was that we could not afford to carry too many varied types of controls due to our lack of financial capital and the other was that we felt that in purchasing these two types of controls it would help us in the sale of our equipment, not having any national advertising and national acceptance.

We took on equipment in addition to controls. We took General Electric Motors and transformers to help in the sale of our equipment because they were known by the general public.

Q. Is that the reason that you switched from Penn
2004 to Minneapolis-Honeywell Controls?

A. Well, it was, that was the main reason, and the other was that there was a personal preference, knowing the background of Minneapolis and Mercoid, personally feeling that they could both help us better in not only the sale of the burner but in any service that might be required in connection with the operation of the burner be-

cause the controls in my estimation were the main function of the proper operating of the burner.

Not having a field organization of our own, we felt that while we were standing back of our equipment which we placed on the burner, we were not in a position to render proper service to the ultimate consumer if something went wrong with the controls.

Trial Examiner Sheppard: You don't have service?

The Witness: No, sir. I say that "no" in this way: We guarantee our equipment for a period of one year and if there is any serious difficulty we do take it back and replace it, but for service in the field, no, we felt it was not necessary.

Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. When you came to offer your burner to the trade, the dealers, what was your policy in that regard as to the type of control or make of control rather?

2005 A. We gave our dealers a choice of the controls which we furnished with our equipment. In other words, we listed Minneapolis Controls at a basic price and included in our price sheet a deduction if Mercoid Controls be required. If a dealer would request a different type than those two, we just did not have it because we could not afford to carry so many different controls in stock due to our limited capital.

Q. On that point, just to give us some idea of the size of your company at the time you started in with it, what was the number of burners that your company sold say in 1934 and '35?

A. In 1934 they sold less than 400 burners according to their book record which I checked.

Mr. Gilpatric: Mark this Respondent's Exhibit 146 for identification.

(The paper referred to was marked Respondent's Exhibit 146 for identification.)

By Mr. Gilpatric:

Q. Mr. Eckhart, will you tell us what this piece of paper is I am handing you, marked Respondent's Exhibit 146 for identification?

A. It is what we issued as our dealer price sheet which was effective according to this sheet March 1941. We

changed this price sheet periodically depending upon general conditions in the industry.

Q. That is 1941?

2006 A. This is 1941, sir.

Trial Examiner Sheppard: Does that represent your prices in 1940, did you say?

The Witness: 1941.

Mr. Gilpatric: The Respondent offers in evidence Respondent's Exhibit 146 for identification.

Trial Examiner Sheppard: Is there any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be admitted.

(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 146, was received in evidence.)

By Mr. Gilpatric:

Q. Prior to the date on this exhibit, March 1941, did you have a similar price sheet?

A. We issued a price sheet regularly.

Q. Mr. Eckhart, if one of your dealers did not in a particular purchase of burners specify the name of controls desired, what would you ship him with the order?

A. Well, that would depend if he was a new dealer we would definitely determine what his requirements would be, what his choice would be rather.

Q. You would go back at him and make him specify?

A. We would ask him because we had both on our sheets and we would want to know what his requirements were.

2007 Some had preference for one and others had preference for the other, and in order to get started on the right foot we used to try to determine what controls he required and we would ship that type of control.

Q. Suppose he was not a new dealer, then what?

A. If he was a dealer that we had and sent in an order, if we didn't know from memory we would check our previous invoices and ship him the type of control which he used previously.

Q. Is it a fair statement to say that you standardized on both Minneapolis and Mercoid Controls?

A. Those were the only two types of controls offered to our dealers for since we will say I think the ar 1935. In other words, when we did take on Minneapolis-Honey-

well Controls we continued with the Mercoid, the two types and we never offered a third or fourth type.

That is with the exception, I may correct one year, I think we offered Perfex Control in between Minneapolis and Mercoid. I just don't know what that year was. I think it was the first year that Perfex came out and they asked us to squeeze it in there, but I was not interested in it for the reason that they did not have a dealer set-up or the help, nor was I sold on their particular type of primary control. Regardless of the fact that they were an excellent control I was afraid of service, bearing
2008 in mind that we guaranteed for a year and would be unable to back up that guarantee on controls if Perfex were unable to do so, and they were not able to assure me that they were in a position to take care of dealers' requirements should a user call up and ask for help and the dealer was unfamiliar with the particular operation of the primary control or the thermostats, or the other controls.

Trial Examiner Sheppard: You were standardizing on the two that you mentioned?

The Witness: Yes, we did but I wanted to be sure. We had Perfex in there. We did not sell any. We did not buy any. We had no calls for them, so we did not buy any. We did not sell any.

By Mr. Gilpatric:

Q. Were you solicited by Perfex in other years than the year that you mentioned?

A. Oh, yes, we had been solicited by Perfex up to I don't recall the year, but I am hazarding a guess. I don't know when that Philadelphia Show was. I think it was in '40. We were solicited up to a year previous to that Philadelphia Show and we were solicited at the Show at that time. I think that was in March 1940 in Philadelphia. I am not sure of the date.

Q. How about Penn, did they try to sell you controls also?

A. Penn came in spasmodically. They did not
2009 attempt a good selling job so far as I was concerned. However, I doubt—perhaps they felt they would not have gotten very far because we were pretty well standardized on what we were selling and we had no calls for Penn Controls. They did not create the field for us which was our volume which created our volume of burners.

Q. What, if any, difference in price to you was there between Mercoid and Minneapolis Controls?

A. Well, of course, it depended upon I don't think the price differential always remained alike. It depended upon what bracket we were in and I would say that Mercoid prices were always lower regardless of what bracket we were in in either company.

Q. Did you also charge your customers a differential or allow a deduction as between the two makes of controls?

A. Always, yes, because there was a differential on price and on our price sheet most times we indicated such as I said.

Our basic price was based on Minneapolis Controls, consisting of thermostat, relay and plain limit controls and you could deduct in this particular price sheet $1.00 if Mercoid Controls were furnished. We did that in most of our price sheets. We gave the dealer the option.

Q. Did you ever have any greater differential than $1.00 that you recall?

2010 A. I believe that was one time we had a $2.00 differential. I don't recall just when that was. I don't know whether we have a price sheet available indicating that. I think we did have a $2.00 price at one time.

Q. Now confining my question to the three types of controls making up the standard set of three, did you make it a practice to put a Mercoid Control with a Minneapolis Control, or did you use three of the same make when you shipped out your burners?

A. Our general practice was if the man ordered Mercoid Controls we would ship him Mercoid Controls, or if he ordered Minneapolis Controls we would ship him Minneapolis Controls, the three of them, providing we always had three in stock.

We would substitute only a Limit Control which was line voltage, the type which we used, because it made little difference between the two and the dealer did not complain so much and the costs were the same, and there were no allowances or differential in connection with it. But we tried to if they asked for Minneapolis or Mercoid to give them Minneapolis or Mercoid.

Our records would indicate such was our procedure in the billing of our invoices because if we billed a burner we billed what thermostat, what relay and what type Limit Control, whether constant ignition or intermittent relay

or pressuretrol or line voltage aquastat, or immersion aquastat or hot air control went with that.

2011 Q. Did you have contracts with each of these companies, Minneapolis-Honeywell and Mercoid?

A. Yes, we did.

Q. Every year?

A. I would not say every year. I think it was practically every year. I would think every year but I am not too sure.

Q. Did your contracts with Minneapolis prevent you from buying controls from other companies?

A. They did not to my knowledge. We bought controls from other companies.

Q. In other words, you had contracts with both companies at the same time?

A. Yes.

Q. Would you state the range in the wholesale prices of your burners from the year 1936 down to 1941, if you have that?

A. The range would be due to the circumstances in the industry and the greater volume of burners being sold; our range was predominantly down.

Q. Where did you start from roughly?

A. When?

Q. Where, what figure?

A. Well, I would say it was about $80, perhaps in 1935 or '36, somewhere in there. It might have been the latter '35 or '36, because previously they were way up in

2012 the hundreds due to the condition of the industry.

Q. What did it come down to by 1940 or '41?

A. '41, according to our price sheet I think was about $52.50 with plain thermostat, Minneapolis plain thermostat, relay, that is, the intermittent relay and plain limit control, and a dollar less for Mercoid. I think that is on that price sheet.

Trial Examiner Sheppard: 1941?

The Witness: Yes, sir.

By Mr. Gilpatric:

Q. What happened to your volume of oil burner sales during those years, '36 through '41?

A. With the exception of one year—

Q. What year was that?

A. (Continued.) 1936, we continually made progress from, as I say, about 400 burners in 1934 when Mr. Korth

was still alive and operating until 1941 when we sold close to 9000 burners.

Trial Examiner Sheppard: 90,000?

The Witness: 9000.

By Mr. Gilpatric:

Q. Was that your best year?

A. Yes.

Q. Did you make more or less money in 1941 at the lower price than you made in '36 at the higher price?

2013 Mr. Haycraft: I object. It is irrelevant and immaterial.

Trial Examiner Sheppard: If you want that information, I will let him give it to you.

Mr. Gilpatric: I don't want any figures. I just want a general idea.

The Witness: If we sold more burners we made more money, not much, but we made more money naturally.

By Mr. Gilpatric:

Q. Even at a lower price?

A. Naturally because our costs were greatly reduced, our machining cost. We bought our iron from the foundries. We bought from a foundry that would only take long runs on iron and naturally our cost in our casting was lower and we could make a run through 500 or a thousand of one type of part, one set-up, without breaking it. We had enough iron ahead. We ran the year around.

We had iron come in all the time rather than wait for the peak season in the fall of the year when burner sales were highest. We went out. We worked twelve months around. We kept our operating comparatively even and normal, and that is the way we were able to get our cost.

We could machine most of the burners. Most of them have a motor, transformer and a pump, which means two holes. You drill two holes and set the machine. It 2014 takes the same for all burners. I mean you could run.

We also got into a better bracket with the motor manufacturers. I believe when we first started with General Electric—

Q. Are you talking about price brackets now?

A. Yes, our discount was 20 and 5 from the list, and as we progressed and purchased more motors in larger quantities we progressed from 20 and 5 to 20 and 10, and then to 20 and 15, until 1941 our discount was 21 and 15 from the list price.

Q. Was that true also of your purchases of controls, of your control prices?

A. Yes, when we reached a certain volume of controls we were given the next bracket price, which meant a little reduction in our costs.

Q. What about transformers and pumps?

Mr. Haycraft: That is objected to as irrelevant and immaterial. Let us stock to controls.

Trial Examiner Sheppard: We are interested in controls.

Mr. Gilpatric: I would like to have the answer to that.

Mr. Haycraft: I object. He is encumbering the record.

Mr. Gilpatric: We have had that from other witnesses.

Trial Examiner Sheppard: I will let you tell that.

2015 The Witness: The transformer was about the same. The greater the amount of transformers you bought the lower your price became. There was a differential in transformers, probably running up to 75 cents in transformers. The motor people were not quite so strict, but the more you bought from them the lower your price was. You got the better bargain. In fact, they had 500, they had 1000 and up to 5000, and over 5000 price brackets in the pumps, and the higher the quantity the lower your cost.

Trial Examiner Sheppard: What bracket did you start in with the Respondent in 1934?

The Witness: In 1934 we were in the bottom, the low bracket, the first bracket.

Trial Examiner Sheppard: Where were you in '41?

The Witness: I don't know. I think it was what the Minneapolis would call the 4 or 4-A bracket, over 5000 bracket, because while we sold close to 9000 burners, the balance of the controls were Mercoid. I was told by the Mercoid representative in the territory—

Mr. Haycraft: That is objected to as hearsay.

The Witness: (Continued.) —well, we purchased more controls from them than any other burner manufacturer in the territory.

Mr. Gilpatric: Mr. Examiner, referring to your question, the exhibit, Respondent's Exhibit 143 which is in

2016 evidence shows that this company, Mr. Eckhart's company moved up through the Minneapolis-Honeywell brackets up to bracket 4-A.

Trial Examiner Sheppard: Respondent's Exhibit 143?

Mr. Gilpatric: 143.

Trial Examiner Sheppard: Mr. Lockrae testified to that.

By Mr. Gilpatric:

Q. You were aware then at the time that other burner manufacturers were getting better prices than you were from Minneapolis-Honeywell?

Mr. Haycraft: That is objected to as leading.

Mr. Gilpatric: If we can lay the foundation for this we could shorten it.

However, I will withdraw the question.

By Mr. Gilpatric:

Q. Do you know whether or not other burner manufacturers have at times received better prices than you have?

A. I was familiar with the control manufacturers' set-up of prices based on the volume of controls which were purchased.

Q. Mr. Eckhart, would you tell us something about your competition in the oil burner field, with what companies did you compete most in marketing your burners?

A. That would be hard to say, I am afraid. We 2017 had competition with everybody that was selling an oil burner.

Q. Well, were you in what has been referred to here as the low priced field or high priced field would you say?

A. In 1937 we tried to maintain a reasonable price in the wholesaling of domestic oil burners and I think you will find in Oil Heat a full page write-up due to that fact because of a certain underselling going on for low price of burners being made in the industry.

We found that we were not getting any cooperation and therefore we looked to a means toward an end for self-preservation and we stepped up our volume by lowering our price and meeting competition, the lower price competition. That is what brought us down from our $80. started us down to this lower price.

Q. Some of your competition continued, did it not, to sell at higher prices?

A. Yes, we had both higher and lower competition.

Q. How were you able to sell at lower prices than the high priced manufacturers?

A. I imagine it was going out and getting the business and meeting competition and talking and selling yourself and then selling your product.

Q. Did you have any greater or lesser overhead than that of other companies?

A. We did.

2018 Mr. Haycraft: That is objected to unless the foundation is laid that he is familiar with the overhead of other companies.

Trial Examiner Sheppard: Give me what experience you have on that line if you want to.

The Witness: Ours is a small organization. We don't have any advertising expense. We are not nationally advertised. We don't have an advertising agency. We don't have a sales manager. We don't have a field sales organization.

I hop from pillar to post, town to town, contacting and doing the other work in between. It was a one man organization to a great extent, sir.

Trial Examiner Sheppard: In other words, your overhead is very low?

The Witness: Our overhead was extremely low.

Trial Examiner Sheppard: I think that answers my question on that basis.

By Mr. Gilpatric:

Q. Mr. Eckhart, to your knowledge was your business injured as a result of the different price brackets that Minneapolis-Honeywell had on the sale of its controls?

Mr. Haycraft: That is objected to. There was no foundation laid as to any knowledge on the part of the witness as to who of his competitors had a lower price.

2019 The Witness: I disagree. We all knew each others prices in the industry.

Trial Examiner Sheppard: If you know I will let you testify.

The Witness: Well, it was common knowledge in the industry, sir, what your competitors' price was.

Mr. Haycraft: It is not a question of competitor's price. It is a question of what the competitors paid for controls. That was the question.

Mr. Gilpatric: The evidence in this case shows, Your Honor, that this particular company moved up from the bottom to almost the top of the price bracket system of Minneapolis. Of course he knew what the price bracket system was.

Mr. Haycraft: There is no testimony here, Mr. Examiner, that this witness knew what prices his competitors paid. He did not know how many they bought.

Mr. Gilpatric: He knew there were better prices than he was getting.

Mr. Haycraft: How did he know that?

Mr. Gilpatric: He told you how he knew it.

Mr. Haycraft: I am not satisfied unless he knows how much people paid for other things.

Mr. Gilpatric: You can cross examine him on that.

Mr. Haycraft: I object. There has been no founda-
2020 tion laid.

Trial Examiner Sheppard: I will let you testify whatever you have to offer, sir.

The Witness: What is the question now?

By Mr. Gilpatric:

Q. My question is whether your business was hurt or injured as the result of Minneapolis-Honeywell's price bracket system?

A. I don't know how it could be. I don't know how I could answer that question. We did expand every year with the exception of the year 1938 which was a very poor year in every type of industry, sir, and therefore we got up to the year 1941. We could not have taken any more business. We were just going at capacity. We could not have handled it, so I don't think we were hurt to any degree.

If we did not get business—may I answer in this way—the reason they did not get business previous to 1934 was because they did not go out and get it. It was more—

Q. By "they" you mean the Korth Company?

A. Yes, I am only talking about my own company. They did not go out and get it. They used to do a lot of detail letters, etc. You could not sell unless you met the people. It was that type of contact which permitted us to go out and get business.

2021 Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. Did you, yourself do some of this contact work?

A. I did most of it for our company.

Q. You traveled around the country?

A. Yes, sir.

Q. And talked to dealers?

A. Yes, I have gone as far west as Seattle, south and north, and I attended the shows to get the business. We did have a few representatives which we appointed.

Q. Referring back again to your knowledge of Minneapolis-Honeywell's price bracket, were you ever told by Minneapolis-Honeywell's representatives themselves of their price methods?

A. Yes, we all knew it. I don't believe there was a soul in the industry who didn't know there was a differential in price. When we attained that certain volume that you would be eligible for that price bracket. I know, I tried often, I tried to get that price but never was able to get it until I could show them or their books showed that we purchased from them the required number of controls, that is thermostats and relays, to qualify us for the next bracket.

Q. So you grew from one bracket to the next as your volume increased?

A. Yes, and I repeat again, we attempted in good buying trying to persuade them to give us a bracket which
2022 they felt we were not entitled to and which we had not purchased a sufficient volume of controls to warrant them giving us the bracket.

Q. When did you first hear of this proceeding, Mr. Eckhart?

A. I would have to hazard a guess. I don't know how many months it was.

Mr. Haycraft: That is objected to as irrelevant and immaterial.

By Mr. Gilpatric:

Q. Have you met Mr. Haycraft before this hearing today?

A. Yes.

Mr. Haycraft: That is objected to as irrelevant and immaterial.

By Mr. Gilpatric:

Q. How did you happen to meet Mr. Haycraft?

Mr. Haycraft: I would like to get a ruling here. I have a couple of objections here.

Trial Examiner Sheppard: I don't know. Both sides have been doing that. I will let it go on.

Mr. Haycraft: When did I ever do it?

Trial Examiner Sheppard: I don't remember that you have.

Mr. Haycraft: I move to strike the last few answers as not relevant to any inquiry in this case.

Mr. Gilpatric: I am going to make a point of this
2023 because I feel it is very material to show in this case and if I cannot show it I have got to make an offer of proof because the circumstances under which this witness was brought into this case I feel are very material and I

know why Mr. Haycraft does not want this to go in, but nevertheless I am going to press that if he objects.

Trial Examiner Sheppard: I will listen to him. If I don't think it is proper, I will listen to a motion to strike. Go ahead.

By Mr. Gilpatric:

Q. Mr. Eckhart, will you explain the occasion how you happened to meet Mr. Haycraft?

A. I received a telephone call from Fenton Fisher, who is Mercoid's representative in New York, and after passing the time of the day in regular formalities, etc., he said there was—I don't know the exact words—but he said to the effect that there was some type of inquiry into the control price bracket and that there was a representative of the Federal Trade Commission by the name of Mr. Haycraft or Haycroft. It is Haycraft, I believe—I am sorry—who was there and would like to talk to me.

Mr. Fisher at the time said, "Arnold, didn't you use a lot of our combination controls with Minneapolis thermostats and relays?"

2024 I said, "Certainly we did. You know because we bought a thousand or more combination controls from you, which we shipped out with Minneapolis thermostats and relays. In other words, it would show that we bought one thousand or more additional Limit Controls from you than we did your Primary Controls."

"Well", he said, "Mr. Haycraft would like to talk to you", and Mr. Haycraft introduced himself over the wire and said he would like to come out and talk to me. I think it was an arrangement made for that afternoon. I am not definite about it, but he found that he could not make it and called up and made an arrangement for another day.

Mr. Haycraft called on me in our shop and we talked back and forth about this thing, which I told him was not a bit familiar with me. I had not heard about it except that Mr. Fisher had called me when he was in his office, and Mr. Haycraft proceeded to talk to me about the price brackets and the controls, whether we were asked to buy, furnish a certain type of control only with our burners, or I can't remember the exact conversation as it was. I can't remember, I can't repeat the words identically that Mr. Haycraft said nor my answers other than he did tell me—I did tell him rather that in purchasing controls from Minneapolis as friendly as we were with Minneapolis and equally as

friendly with Mercoid, we were never able it seemed to
2025 get any price other than what we were entitled to by having stepped from one bracket to the other, and if we stepped up to one bracket, that at the end of the year we were given a retroactive merchandise rebate only when we earned it.

It was at that time that I think I mentioned to Mr. Haycraft that Mr. Fisher told me that we were the largest manufacturers, purchaser of their equipment out of the New York office for the year 1941, and that we did furnish different Limit Controls, for instance, Mercoid Limit Controls with Minneapolis Controls.

Q. What else was said?

A. The question was brought up by Mr. Haycraft regarding the Quiet-Heet organization, wanting to know whether their activity had hurt us and also about other concerns having been given the lower price bracket, although they had not purchased sufficient controls from Minneapolis to entitle them to that price. He said, "Did you know that?"

I said, "No, I had often thought that might have been the case, but I know in my case I had never been able to get any other price than what we had definitely earned by the volume of sales."

He also asked me, mentioned the name of one or two. He said there were 5, 6, or 7 of these manufacturers that had gotten this low price and asked me if we had lost business to them due to their having gotten this lower
2026 price from Minneapolis.

I told him I did not think so for the reason we were getting all the business we possibly could handle at the time and I didn't know where we were losing any to other concerns, feeling that everyone was entitled to a certain volume of business if they went out progressively and actively went after it.

Q. What did he say to that?

A. I don't know.

Q. Do you recall the substance of the conversation from there on?

A. Well, before, unfortunately just before a telephone rang, Mr. Haycraft said to me, "If you manufacturers don't want to help in this case how are we going to help you?"

I said, "Why? It is kind of late if you are referring to the Quiet-Heet situation because that was back in '36 and

'37. Here we are in 1942. We are out of business through Limitation Orders and we are interested in other things and I don't know how it is going to help us now."

A telephone bell rang and we were doing war work, and I answered the telephone. Mr. Haycraft got up. I thought that he was ready to leave and shook hands with him and he left the office.

That is the only conversation I had with him until I met Mr. Haycraft today, sir.

2027 Q. Did he name any of the other companies which you referred to as having received better prices?

A. As I recall he named two, that was Williams Oilomatic and Timken, and I cannot recall whether he named others. I doubt very much whether he did name the others.

Mr. Gilpatric: That is all.

Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Haycraft.

Q. Do you recall, Mr. Korth—

A. Eckhart.

Q. (Continued.) Eckhart, that you asked not to be called in this proceeding because of your friendship with both Minneapolis and Mercoid?

A. To you?

Q. Yes?

A. I might have said that. Yes, I would rather not be in on any case.

Q. That is what you told me?

A. Yes.

Q. Don't you have a definite recollection of saying that?

A. It is quite possible, yes. I have never testified in any case and I don't, as I mentioned to you, sir, my friendship with Mercoid is just as great as it is for Minneapolis and I certainly would not want to hurt anybody, but I

2028 certainly am interested in answering any questions that you, sir, or anyone else, sir, would like to ask me if I can honestly answer it and give you my feelings why things were done that we did in our company.

Q. Well, what is your recollection as to losing business to Quiet-Heet?

A. Let us go back a little further, if I may. We made the first Quiet-Heet Burners. He was a dealer of ours. We did object when he started when our prices were $80 and he

immediately started out at $65 and he did sell promiscuously. We sold through dealers and the majority of dealers sold through dealers. He did sell promiscuously. We did, and I believe most everyone in the industry did accuse Minneapolis of doing or giving him a price which he was not entitled to. We could never prove it. We attempted. I did, others did. We were asked to furnish proof where they were giving him an advantage. We were unable to do so, but not wanting to pass any reflections on a competitor, I will say that the majority of the oil burner manufacturers did stand back and give a year guarantee whereby this other account served over the counter, practically to home owners or anybody, a storekeeper or anyone who would come in and buy a burner, as long as they paid for it. If it was all put together it was all right or if a transformer was handed to them in the original carton in which the
2029 transformer was shipped to him they would take it as a package and we know from experience and competition that a good many of these fellows bought from the concern because he was underselling.

They were using the parts for spare and because they could buy these various parts, motors, pumps, transformers, nozzles, controls, cheaper in the bulk and throw the iron away than they could buy the part elsewhere.

Q. When was it that you first felt this competition from Quiet-Heet?

A. We felt the competition shortly after he started up, which I think was sometime in 1936.

Q. Do you remember what price you sold your burners at in 1937 when he was selling his burner?

A. It was a little lower than $80. I don't know, Mr. Haycraft.

Q. Was it still higher than his price?

A. We were always higher.

Q. You never did meet his price?

A. Not to my knowledge.

Q. Do you have any instances to your knowledge of loss of business to Quiet-Heet?

A. In the first place you don't lose business that you don't have in my estimation. We have been all in competition and if I don't get the order somebody else gets the order. It just depends upon who is a better man. That man can sell.

2030 Q. In 1938 you said your prices, your volume of your sales declined, didn't they?

A. Yes, sir.

Q. Do you know whether or not Quiet-Heet sold more burners in 1938 than they did in 1937?

A. I don't know his records.

Q. Do you know as a matter of fact what price he actually paid for controls that he bought from Minneapolis-Honeywell?

A. I don't know off-hand.

Q. Do you know what price anybody paid beside yourself?

A. I don't know definitely other than I know those brackets.

Q. You would have to know how much they paid?

A. Not necessarily. If I sold over 300 or less than 300 I got one price. If they sold from 300 to a thousand or whatever the bracket was at that particular time, they got another price. They could sell 301 and get the price, just the same price as they got on 999.

Q. You know he would have to sell in between?

A. That is correct. We would have to do likewise.

Q. You were in bracket two in 1938?

A. I cannot answer, sir.

Q. Well, do you know about how many controls you bought from Minneapolis-Honeywell in 1938?

A. I do not off-hand because we purchased some Mercoid Controls as well.

2031 Q. According to Respondent's Exhibit 143 you purchased 2250?

Mr. Gilpatric: That is the bracket quantity, not necessarily the number of controls purchased.

Mr. Haycraft: The figure does not show how many he purchased?

Mr. Freeman: Not Respondent's Exhibit 143. That does not show it.

By Mr. Haycraft:

Q. You don't know how many you actually purchased that year?

A. It is a matter of book record and I don't have it in memory, sir.

Q. You don't know what price you paid that year either for controls that you bought from Minneapolis-Honeywell?

A. No, sir, I have not looked at any of this information. I have not looked up as far as prices or volume or any-

thing else is concerned. I was not asked to and I did not. I cannot remember that.

Q. How does it happen that you are down here and testifying?

A. They asked me to come down here.

Q. Who did?

A. Mr. Michelson.

Q. Who is Mr. Michelson?

A. The man that I always contact when pur-
2032 chasing equipment from the Minneapolis-Honeywell Regulator Company.

Q. Did you tell him that you would rather not testify in this case because you were friendly with both Minneapolis-Honeywell and Mercoid?

A. Yes, I told him that in the presence of these gentlemen.

Q. They asked you to come down anyway?

A. Yes.

Q. They were not as considerate as I was?

Mr. Freeman: I move that that be stricken.

The Witness: If you had asked me to testify for you—apparently you did not like the answers I gave you and that is why you did not.

By Mr. Haycraft:

Q. That is in your estimation?

A. You did not ask me.

Q. That is your estimation?

A. You can take that for granted. You did not ask me to come down. I would have. I would have answered you just the same.

Q. Didn't I ask you something about coming down here to testify and you told me that you rather would not?

A. They told me the same thing. If I asked an oil burner man to buy a burner and I walked away I would never get the 10,000 burners, but they did not walk away.

They asked me again and I said, "Sure, if I can tell
2033 the truth as I feel it and see it and I am willing to admit it, I am willing to do it, yes," and it is the same question that you could ask me, Mr. Haycraft.

Q. Well, I am not saying that I am dissatisfied with your testimony. In fact, I am very happy that you are here and I am glad I did not have to bring you, and I am glad the other side did bring you.

A. All right.

Trial Examiner Sheppard: Off the record.
(Discussion off the record.)
Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. I notice on Respondent's Exhibit 146 that down here you have at the bottom of the page "Deduct: Mercoid Controls taken in place of Minneapolis-Honeywell Controls $1.00; short hour motor taken in place of long-hour motor $1.50".

"Add: For following equipment when purchased with burner: Mercoid M-51 warm air control in place of limit control $1.00; M-80 combination fan and limit switch in place of limit control $2.75"?

A. Yes, sir.

Q. That M-80 combination fan and limit switch control that is what you were questioned about by me about that time?

A. That is correct. We used that in large volume.

Q. That is used in what sort of a furnace?

2034 A. That is used in forced hot air furnace, so-called air conditioning units.

Q. Which one of Minneapolis-Honeywell's items on that page correspond to that?

A. The LA401A combination. We used that on line voltage.

Q. In that one you had an additional price of $3.25?

A. Yes, 50 cents difference, or actual cost.

Q. That represented the difference in your cost?

A. That was the actual difference in our cost and the reason for it is if you take the M-80 which was $2.75 and our cost which was $4.75, we deduct the cost of the limit control from that. The difference being LA401A and M-80. We just made that allowance.

Q. What did you pay for the LA401A?

A. Our price was $4.25.

Q. As compared with $4.75?

A. They were about the same year after year on those two.

Q. At the top of the page you have Series Sr-1 burner $53.50 dealer price. Is that your burner complete?

A. Yes, that includes, down below I think it would read price includes three Minneapolis-Honeywell Controls consisting of plain thermostat, intermittent relay and

plain limit control because some dealers would try to want immersion aquastat which cost us 50 to 75 cents more and they would have to pay that if they wanted the immersion
2035 aquastat, sir.

Now the same way that motor was equipped, I think it shows specifications with a long armed motor and if they wanted a short armed motor which some of them wanted to use, they could deduct $1.50. They had their choice.

Q. These other prices on the same burner were different equipment on them or did you have two or three?

A. We had different models.

Q. What is the Sr model?

A. Sr-1 model is our plain model, not as efficient as the Sr-1 DeLuxe model which has a different type turbulator on the end which gave better efficiency.

Q. For which you charged a little bit more?

A. We charged a little bit more. It cost us a little more.

Q. T-2?

A. It was a greater capacity burner. Now the difference between our Sr-1 and Sr-2 was a greater capacity and we went into a different model; when we went into a different model casting altogether when we went into the T model.

Q. The last one is P-4?

A. That is an old type burner which we never changed. It was made by the company before my connection with the company and the sales were very small because I was not a believer in using large burners of that type for domestic heating. I felt, having been originally trained in Bunker Oil, I felt it was a Bunker job when you got
2036 up to 10,000 feet or more.

Q. What is "capacity steam-EDR"?

A. That is direct radiation.

Q. The Sr-1 is a 565. Do you interpret that when translated into room size that that is the size of the house that it would heat?

A. Probably about a 6 room house.

Q. Sr-2, was 800?

A. That would probably go into an 8 or 9 room house, depending on the size of the house and efficiency of the heating plant and whether the house was weather-stripped, etc.

Q. T-2 and T-3, 1400 and 4000?

A. That may take a small store of some kind with apartments in it.

Q. It is more of the industrial type?

A. The same type of burner, Mr. Haycraft, all the way through, with the parts interchangeable. For instance and the motor on the two could be interchanged with the Sr DeLuxe or Sr-1, but when we got into the T-3 we put in a bigger motor. The specifications would show that it is a one-quarter horsepower motor and was not interchangeable. It was not the same diameter.

Q. Now on the back of this where you have parts and control parts?

A. Dealers at times would purchase controls from
2037 is to go with the burner where a control had been out of guarantee or had gone haywire and wanted to replace it.

Q. How much of a mark-up was this from your cost price?

A. I think this was 25 from the list.

Q. From the list?

A. Yes, sir.

Q. And the list was made up by whom?

A. Minneapolis.

Q. It is for the dealers?

A. That was a general published list by Minneapolis to all dealers, distributors, manufacturers, when buying Minneapolis materials.

Q. Can you take the Minneapolis items at the top of the page there and indicate which of the Mercoid items they correspond to?

A. Yes, we run down about two, four, six, eight, ten, twelve, thirteen, sixteen, eighteen, Minneapolis Controls in order which they be used when grouped, the thermostat, relays and limit controls, cutoffs, and vaporstat and then go into Mercoid.

Now if you will go to the top of the page, Minneapolis-Honeywell T11A acratherm would be comparable to the Mercoid type H sensatherm, as far as being a plain room thermostat. It would be a different wiring hook-up.

The Minneapolis RA117A relay would be compara-
2038 ble with Mercoid JMI pyratherm, and then of course any one of the Minneapolis Limit Controls such as P404, LA409, LA419, would be comparable with Mercoid

DA31 and F35 and M51, except that Mercoid M51 warm air control costs us a little bit more money than the Minneapolis 419 airstat, which would be a comparable control. I think we show a higher price.

Q. Take this Minneapolis T42A thermostat, what is that?

A. That is a line voltage thermostat which we used very few of.

Q. What does that correspond with in the Mercoid?

A. That would be similar to Mercoid 855T thermostat. That is a line voltage.

Q. In other words, you paid more for Mercoid line voltage than you did for Minneapolis-Honeywell?

A. That is correct. That one you will notice they charge more for. We charged extra for it. "T" means thermometer and there is a little additional for that.

Q. The T105A chronotherm, what is that?

A. That was an electric clock thermostat.

Q. Mercoid did not have one at that time?

A. They came out with a combination of some sort and I might say we sold very few. The 105A's not having been sold on it I never recommended it and regardless of Minneapolis theory in case of its use.

2039 Q. Take the next one, Minneapolis T111A chronotherm?

A. That was a newer model, their later model.

Q. Did Mercoid have anything to compare with that?

A. I don't know if they compared their combination thermostat and relay which was a relay located in another room other than where the thermostat was. I was not very familiar with any of their clocks.

Q. What is their RA116A relay?

A. That was a constant ignition relay comparing with Mercoid JM, which we don't show on there because at that time we did not sell too many constant ignition relays for domestic use.

For domestic use we used the intermittent relay. It was only when we got into the F. H. A. sales for the builder-trade where we went into the constant ignition, at which time we bought a great many JM's from Mercoid.

Q. Now the P404A pressuretrol, did you say that was comparable to Mercoid DA31 steam control?

A. Yes.

Q. And the price is the same?

A. Well, the price would be the same. That is a plain Limit Control, one we would call a plain Limit Control for steam.

Q. Do you mean that this indicates the price was the same, you paid the same for the Mercoid that you did
2040 to Minneapolis-Honeywell?

A. On Limit Controls?

Q. Yes?

A. They were about the same. I don't think there was any differential.

Q. The next one is L404A?

A. L404A that is a special scale. The first L404A ran from zero to 10 pounds low pressure steam. When we put it on the pressure boiler we would need a high pressure steam control and had two scales, either if the boiler was rated from two to 50, or 5 to 150 pounds, we would need a scale for that range.

Q. The LA409A, what is that?

A. That was the Mercoid F35 risertherm.

Q. The price was the same?

A. Yes.

Q. The LA419A is an airstat?

A. Yes,

Q. The LA419A was $3.85. That corresponds to M51?

A. M51 cost more money for the Mercoid.

Q. Was it a better, heavier job, or how do you account for that difference?

A. Their price was more than the Minneapolis.

Q. Then this combination control LA401A, what does that correspond with on here?

2041 A. 401A combination was the same as M80.

Q. M80, you don't have that?

A. No, we don't have that.

Q. L170A or L444A immersion aquastat?

A. L117A was a low voltage for heating domestic hot water which was equivalent to Mercoid 115W immersatherm.

Q. What is the difference in price there? Was Minneapolis higher?

A. Yes.

Q. The Minneapolis was higher than the Mercoid?

A. Yes, I looked over here but I remember it is higher.

Q. The R19A relay, does Mercoid have anything to correspond with that?

A. No. It is used where a person did not want to use a T42A the second Minneapolis-Honeywell item which would necessitate running bx cable up to the thermostat. You would use a low voltage thermostat, you would use a relay in connection with a circulator job.

Q. Minneapolis-Honeywell C401A low water cut-off fittings, did you have anything corresponding to that?

A. It is a low water cut-off, DA123.

Q. The price was the same on those two?

A. Yes, they had DA131Q Mercoid which was a little different.

Q. A little more expensive?

2042 A. Yes.

Q. As you will note Minneapolis had two types there too?

A. Yes.

Q. Would one correspond with the other at all?

A. No.

Q. They are just a little different?

A. Yes, the second, C401A is the same type, a newer type, and if the blower had an opening to take a screw-type low water cut-off rather than one attached with fittings.

Q. L408A vaporstat, did Mercoid have anything like that?

A. I think—I don't think in all our sales of our company we sold three vaporstats.

Mr. Haycraft: That is all, Mr. Examiner.

Redirect Examination by Mr. Freeman.

Q. Mr. Eckhart, isn't it true M51 warm air control Mercoid which you price at $4.85 contains adjustable mechanism, does it not have a differential adjustment?

A. Yes, it does. They have a differential adjustment there, yes.

Q. And isn't it true that the Minneapolis-Honeywell LA419A airstat does not have such a differential adjustment?

A. No, it does not have it.

Trial Examiner Sheppard: Does that make a difference in price?

2043 Mr. Freeman: That as a matter of fact is the reason.

The Witness: That is the reason I imagine for the difference.

By Mr. Freeman:

Q. Is it not true that the Minneapolis-Honeywell T11A acratherm is comparable to Mercoid H sensatherm?

A. It is true except that the Minneapolis T11A acratherm is 3-wire low voltage whereas the Mercoid sensatherm is 2-wire low voltage.

Q. The T11A acratherm gives you heat acceleration?

A. That is correct.

Q. And the Mercoid type H sensatherm does not give you either acceleration or anticipation, is that correct?

A. Not to my knowledge. It does not, no, sir. There is additional items in the T11A, which gives you that heat acceleration and if you do not want to take advantage of heat acceleration in T11A you just take out, remove that screw, and you get the same operation as a normal thermostat.

Q. But your price quoted here and when you buy the thermostat from Minneapolis-Honeywell it includes that feature of heat acceleration?

A. Definitely, yes, which was a sales feature.

Q. Now isn't it true that when you sold a burner equipped with Minneapolis-Honeywell controls you
2044 always used a T11 acratherm—I am speaking normally now—and a primary control to go with it either of the constant ignition type or the intermittent type?

A. That is correct.

Q. That was standard whether you used the oil burner for hot air furnace or steam boiler or any other kind of heating apparatus?

A. Yes, sir.

Q. Isn't it true that the Limit Control was of the kind dependent upon the particular heating plant?

A. Naturally.

Q. Now isn't it also true then that when you sold oil burners equipped with Mercoid Controls you always used a Mercoid-type H sensatherm together with its primary control, either the JMI, which is the intermittent ignition type or the JM constant ignition type with a particular kind of limit control depending again upon the particular type of heating plant?

A. Yes, that is right.

Q. So isn't it fair to say that with every oil burner which you equipped with Minneapolis-Honeywell Controls you invariably used the T11A acratherm?

A. That is right.

Q. And likewise that is true with those equipped with Mercoid you used a sensatherm and a primary?

2045 A. That is correct.

Q. Then as to limit controls that was dependent upon the particular type of installation, that is, hot water installation with one kind of a limit control, and hot air furnace took another kind?

A. Yes, but there were one or two occasions if we didn't have the particular make limit control in stock through our negligence in ordering them in sufficient time or they did not come in on time, we might substitute a different control, and that is the only control we substituted. If Minneapolis were ordered we might substitute a Mercoid Limit Control, or if Mercoid were ordered and we didn't have a Mercoid we would substitute a Minneapolis-Honeywell. That was a rare occasion but that was the only time we would substitute without the dealer ordering it, and if he would complain we would replace it if he requested it when we got the other controls in. We did it to expedite installation.

Q. Even in such cases where you crossed limit controls, the type of limit control was always dependent upon the type of heating equipment in the house, correct?

A. Yes, surely.

Q. But as far as the primary control and thermostat was concerned it didn't make any difference whether it was on a hot water job or on a hot air job, correct?

A. That is correct.

2046 Q. The only difference they made if they wanted a clock thermostat or something like that then you substituted the clock thermostat for the plain?

A. Yes, the clock thermostat for the plain thermostat but standard controls were plain thermostat and relay of the intermittent type.

Q. That was standard?

A. Plus a plain Limit Control, three controls.

Q. And that plain Limit Control was dependent upon the type of heating plant, is that correct?

A. That is correct, yes, sir.

Q. And whenever anybody wanted an extra you just charged extra for it?

A. It was on our price sheet. If they wanted anything for instance, we would say on a steam job they would ask for immersion aquastat in addition to the three controls which we originally furnished and at that time if they were purchasing Mercoid Controls we would furnish them an

immersion type aquastat or the 115W immersatherm of Mercoid at an additional cost, whatever it would be on our sheet, or if it was a Minneapolis set of controls and they wanted an immersion aquastat for the control of domestic hot water, we would furnish them with the L170. I believe the last one was L170A. That is a low voltage immersion aquastat. That was a three wire and could be used
2047 with Minneapolis-Honeywell Controls and 115W immersatherm. The Mercoid was a two wire immersion aquastat and it was not good policy to mix them up because the majority of dealers had difficulty enough anyway if they tried to cross controls.

It was to their distinct advantage not to do so.

Q. You said that these prices with respect to controls on the backside of the Respondent's Exhibit 146 were the list prices of Minneapolis-Honeywell less 25 per cent?

A. Yes, in most cases. There might be some little difference there but was about the list, the differential.

A. And isn't it true that you likewise followed that same practice with respect to Mercoid's type?

A. Oh, yes.

Q. In other words, you just took the list prices?

A. That is correct, because when you take your limit control prices the prices for Minneapolis-Honeywell and Mercoid with the same discount and we showed them on our price sheet the same.

For instance, the F35 risertherm at $3.85 is the same as L409 surface aquastat at $3.85, because our cost was the same on the list, and the list, you don't have the same list on the limit controls.

Q. As far as thermostat then, Minneapolis-Honeywell and Mercoid, they had different prices?

A. Yes, sir.

Q. And also with the primary controls, they were
2048 different list prices?

A. Yes, and I believe the immersion aquastat showed a different price. Those were the four major controls we usually sent with the burners.

Mr. Freeman: That is all.

Trial Examiner Sheppard: Is there anything further, Mr. Haycraft?

Mr. Haycraft: No, sir.

Trial Examiner Sheppard: Thank you, you are excused.

(Witness excused.)

Mr. Gilpatric: That concludes the list of witnesses we have scheduled here except for one man who is not able to come over. We will have to pass him up.

Trial Examiner Sheppard: All right then gentlemen, in view of the fact that we are not certain as to when we can resume this case, I am going to adjourn the matter on five days' notice and expect around the middle of January Mr. Freeman and Mr. Gilpatric will you two write me the first available date that you can arrange to continue the case in whatever place you want to continue the hearings, and we will make the proper arrangements for you at that time.

Mr. Gilpatric: We will do that, Mr. Examiner.

Trial Examiner Sheppard: You can take an ad-
2049 journment in this case on five days' notice to be called by the Examiner after due notice to all interested parties.

(Whereupon, at 3:15 p. m., December 14, 1943, the hearing in the above entitled matter was adjourned on five days' notice.)

2050

Room 532, Federal Trade Commission Building,
Washington, D. C.,
January 11, 1944.

Met, pursuant to notice, at 2 o'clock p. m., ewt.

Before:

The Federal Trade Commission.

Present:

Commissioner Robert E. Freer (chairman).
Commissioner William A. Ayres.
Commissioner Ewin L. Davis.
Commissioner Charles H. March.
Commissioner Garland S. Ferguson.

Appearances:

Everett F. Haycraft, Esq., attorney for the Federal Trade Commission.

Cravath de Gersdorff, Swaine & Wood, by R. L. Gilpatric, Esq., 15 Broad Street, New York, New York, Bair & Freeman, by Will Freeman, Esq., 135 South LaSalle Street, Chicago, Illinois, attorneys for the Respondent.

Nicholson, Snyder, Chadwell & Fagerburg, by Erwin P. Snyder, Esq., 135 South LaSalle Street, Chicago, Illinois, attorneys for the Mercoid Corporation.

2052 Chairman Freer: The commission has set this time for hearing on the request of the Mercoid Corporation that the subpoena duces tecum be recalled.

There is also, apparently, another request that came in yesterday. Does that involve the matter today also?

Mr. Snyder: That is the same thing, if you are referring to the motion. I just put it in the form of a motion, so it is the same thing.

Chairman Freer: It involves the same matter?

Mr. Snyder: The same matter yes, sir. I thought that was the proper thing to do.

Chairman Freer: The Commission will hear argument in support of the motion at this time. You will have half

an hour, Mr. Snyder. Would you like to reserve some of your time?

Mr. Snyder: Yes, I think I will reserve at least five or ten minutes.

May it please the Commission, this is a motion in behalf of the Mercoid Corporation, asking the Federal Trade Commission to recall a subpoena duces tecum that they issued to Mr. James William Owens, Executive Vice-President of the Mercoid Corporation, under date of November 5, 1943, asking him to appear with copies of some 90 contracts with oil burner manufacturers, or such of them as they had,

and also asking that he produce price lists, discount
2053 sheets and other data showing the various prices at

which Mercoid Corporation offered and sold such controls to said oil burner manufacturers during the years 1937 to 1941, inclusive.

Before I came in I stopped in the Document room and looked at the Documents in this file, and I wonder if you would request that they be sent up, because I want to refer to the exhibits in the file. I could not get them.

Chairman Freer: We will have them brought up.

Mr. Snyder: This is a motion in behalf of the Mercoid Corporation, which is not a party to the matter of the Minneapolis-Honeywell Regulator Company. A complaint was issued by the Commission against the Minneapolis-Honeywell Regulator Company, and in the course of the trial of that matter a subpoena was issued at the request of the respondent, directed to the Mercoid Corporation, as I have said. I want to particularly draw your attention to the fact that the Mercoid Corporation is neither a party to the situation nor has there been any complaint made against the Mercoid Corporation. In fact, the Mercoid Corporation, whenever any request from the Commission for information has been made, has gladly complied with that request, but the Mercoid Corporation has taken the position in respect to this subpoena duces tecum, which is in behalf of the respondent, that it should not be asked to furnish this confidential information, which would

be spread upon the public record or be given to its
2054 competitors, which is more important.

In the motion which I filed there is embodied an affidavit by Mr. Owens that sets forth these various facts. It also sets forth the relationship which has existed between the Mercoid Corporation and the Minneapolis-Honeywell Regulator Company. It has been the recipient of a long,

harassing patent litigation with that concern, and which the Supreme Court on January 3rd handed down two opinions, in both of which it held that the Minneapolis-Honeywell Regulator Company had violated the anti-trust laws in the way it handled the patents under which it was either an exclusive licensee or the owner.

I have drawn your attention to these facts because, while I know the Commission has always been mindful, when requesting information from a concern that it is investigating, or anything of that kind, to hold the thing confidential, I think there has been some misapprehension of the facts here, or the Commission would not have issued this subpoena duces tecum in this case.

In the case of the Commission investigating an industry or a concern, it has always held that information confidential. In fact, the law provides, in Section 6, that if it does make public any information, it is not to make public trade secrets or lists of customers. Now, the con-
2055 tracts called for here are simply lists of the customers of the Mercoid Corporation, and if that determines the policy of the Commission—and it should set the policy of the Commission to some extent—certainly it should be considered in this matter. Now, I know the Commission has taken the position that it should issue subpoenas for the respondents. There is nothing in the Federal Trade Commission Act that requires it to do so, but it has taken that position, but it certainly is discretionary with the Commission whether it should do it or not. There is nothing in the Act that requires the Commission to issue these subpoenas, and I think that when the Commission issues a subpoena to a party that is not a party to the litigation, against whom there is no complaint, and which is not in the course of an investigation of an industry, it should hew to the line, where it will not ask for any information which is confidential or which would work to the harm of the corporation if it is disclosed.

In this particular case I think the first thing we ought to do is to look at the complaint and see upon what this complaint is based.

In Count 1 of the complaint we have a series of seven paragraphs, and the seventh paragraph states that Count 1 is a complaint of unfair methods of competition within the meaning of Section 5 of the Federal Trade Com-
2056 mission Act. Two of these paragraphs embody the actions which the Minneapolis-Honeywell Regulator

Company was held, in these two cases that I have attached copies of, to be in violation of the anti-trust laws, so it could not be under those two paragraphs that they wish the list of our customers and our prices.

In the first paragraph and paragraphs 3 and 4—3 in particular—it is alleged that they have embodied in their contract clauses restricting the purchasers to purchase only from Minneapolis-Honeywell—or at least, purchase a certain portion of their control from Minneapolis-Honeywell. In connection with that—first of all, I want to refer to this first exhibit in this case, which is a stipulation signed by Minneapolis-Honeywell and the Government, and in that they have stipulated that they have entered into these contracts with certain companies.

Now, the subpoena which was issued to us names those companies, but it also names several in addition—three, in fact. If they are seeking to use the subpoena in relation to those companies, why did they put in the three extra companies, except to unlawfully get information?

In the next place, the list of our contracts, or our contracts, are not the best evidence as to why any manufacturer didn't live up to their exclusive contract with the Minneapolis-Honeywell. If they want to get that kind of
2057 evidence, the best evidence is the customer himself.

Why don't they call the customer? Why ask for our confidential list of customers? I don't think that the Commission in its discretion should grant such a request, and especially when we find that they have not stuck to the companies that are mentioned in the stipulation, but have added other companies, showing an improper intent.

Now, if we go on in the complaint, the second count is a complaint of violation of Section 3 of the Clayton Act. It embodies the same paragraph, so the same argument applies to that as applies here.

On the third count, may I refer again to the reason why this is not the best evidence, why our contracts are not the best evidence in this matter? The mere fact that some on these lists, stipulated lists of customers, of Minneapolis-Honeywell had contracts with Mercoid would not show that they did not live up to their contracts with Minneapolis-Honeywell. It does not show how many bought from Minneapolis-Honeywell, which is the question in point.

The stipulation shows that in some of the cases they call for the exclusive buying of the regulators from Minneapolis-Honeywell. Now, the fact that we might have a con-

tract with them, even though we did not furnish them any regulators under it, would not show that they were not living up to their contract. The only way that that
2058 can be shown is by calling the customer. t would not show that perhaps he bought 5 per cent from us because his customer insisted on it. It would not show that he bought from us because Minneapolis-Honeywell could not furnish them to him.

I don't see where our list of customers is really relevant in this matter.

Now, coming to the third count, which is the complaint of discrimination in price between different purchasers buying automatic temperature controls of like grade and quality, what have our prices got to do with that? How does that show that they have not indulged in discrimination among the purchasers? The fact that we have given them prices less than theirs or more than theirs has no bearing on whether they have discriminated under this section of the complaint.

I was not able to see the basis on which they asked for this subpoena, because that was not in the public files, so I don't know the basis on which they requested it from you, or on what basis it was issued, but I can conceive no possible basis on which the Commission ought to exercise its discretion and ask a competitor, a competitor which it has a hard time competing with, says the evidence in these two cases before the Supreme Court—why they should ask that competitor to give to the competitor which has, by its own acknowledgment in the stipulation, up to 60 per
2059 cent of the business—why it should give it its list of customers, give it its prices.

Chairman Freer: As I understand it, the list of customers referred to is contained in the subpoena, is it not?

Mr. Snyder: Yes.

Chairman Freer: Apparently furnished by someone.

Mr. Snyder: We are to tell them which ones we have contracts with, and furnish copies of our contracts, which, in effect, is giving our list of customers, because the affidavit I filed shows that these are practically the entire oil burner industry. So it really is requiring full information from my client.

Now, as to prices, in Exhibit 84, filed in this case last August, I find that the prices are limited to '37, '38 and '39, which Minneapolis-Honeywell has put into the case,

and yet, in the latter part of October they come in and ask for our 1941 prices, and our 1941 prices, as shown by the affidavit of Mr. Owens here, are the present prices. Now, why do they do such things if it is not from improper motives? Are the prices for 1941 of the Mercoid Corporation important in this matter when they are only putting in their own prices through 1939?

I think this is a matter that the Commission can very well feel that, within its discretion, it should refuse
2060 to issue such a subpoena, and should recall it.

Chairman Freer: You have about six minutes left, Mr. Snyder. Mr. Freeman?

Mr. Freeman: May it please the Commission, first of all I might say that the issue here is one between Mr. Owens of the Mercoid Corporation, and the Commission. The Commission issued the subpoena upon application duly made. The materiality, the relevancy, of the evidence there sought was clearly set forth in our application. Upon that application this Commission issued the subpoena.

Now, my good friend Mr. Snyder does not know all of the facts. First, had he carefully examined Exhibit 1 he would have there found the prices set forth at which this respondent sold its controls in the years 1940 and 1941. That is attached to and forms a part of Commission's Exhibit 1. Incidentally, he says that we are unfair because we have added three additional names not set forth in the stipulation, Commission's Exhibit 1, and I call his attention, and your attention, to the fact that the application was based upon those names included in Commission's Exhibit 1, as well as the three additional names referred to in Commission's Exhibit 84.

Commissioner Ferguson: What was Commission's Exhibit 1?

Mr. Freeman: Commission's Exhibit 1 was an
2061 agreed statement of facts to eliminate a lot of proof which otherwise the Commission would have had to put in.

Commissioner Ferguson: Just what did it involve?

Mr. Freeman: It sets forth certain customers of the respondent. It sets forth the type of contract which the respondent had with those specific customers.

Commissioner Ferguson: Does it set forth anything in regard to the Mercoid Company?

Mr. Freeman: No, sir. Now, these names—I think

there are 88, but in any event the names set forth in the subpoena and set forth in our application were those that were specifically referred to by the Commission in its case. Every one of those names has been specifically referred to by counsel for the Commission in examination of some of the witnesses.

Now, Mr. Owens, about whom the issue is here today, testified in behalf of the Commission. He referred to some of these customers. Other competitors of the respondent were called and examined by the Commission, and the sum and substance of the Commission's case hinges around those 88 accounts. I take issue with Mr. Snyder that those 88 accounts represent the majority, or substantially all of the oil burner manufacturers in this country. There are several hundred, and the 88 is only a small proportion of them.

Commissioner Ferguson: What did the Commis-
2062 sion undertake to prove by Mr. Owens?

Mr. Freeman: The Commission's case—they endeavor to show that we had contracts with certain oil burner manufacturers, whereby they would purchase controls from the respondent. I think it is the Commission's position—and when I say "Commission" at least counsel for the Commission, you understand—that in our entering into those contracts with these 88 customers which have been specifically referred to, those customers were precluded from buying controls from respondent's competitors, and respondent's competitor in this case is the Mercoid Corporation, of which Mr. Owens is an officer, the Penn Electric Switch Company, and the Perfex Corporation.

Now, I might say that when we endeavored to put in our case to meet the Commission's case we felt that the best way to get good evidence, not secondary evidence, was to go to the source. So we subpoenaed in like form a Vice President from the Penn Electric Switch Company, and I believe it was the secretary, or at least an officer of the Perfex Corporation. They received the identical subpoena. They responded and furnished us—or the Commission at least made available, subject to our examination and subject to the right of cross-examination on the part of Commission's counsel—all of the information requested.

Now, Mr. Owens of the Mercoid Corporation was
2063 served in due time—on November 5th, to be exact—to report on November 29th. On November 29th he did

report. He took no steps at all, did nothing at all between the 5th of November and the 29th of November, and appeared, came in a little late that morning, and we put on another witness in order to save our time and save the time of counsel for the Commission. He then decided he needed a lawyer. He appeared, and Major Sheppard, who was the Trial Examiner, asked him to take the stand in response to the subpoena, which was duly issued. I then endeavored to examine him, and he refused to answer questions. It got to the situation where he refused to identify documents that we had—and I might say now that we have certain price lists put out by the Mercoid Corporation—and I will get to this question of confidential information—we have some of these 1938 price lists, and I asked Mr. Owens whether or not his company put out a price list of this kind, Form 11, Form 22, Form 33. Those are code numbers to indicate the particular position or price at which a particular customer was to receive controls purchased from the Mercoid Corporation. On advice of counsel he refused to answer. In other words, he would not even identify an exhibit that we handed to him. In one case he said to me: "If you will tell me where you got it I will answer." Now, I am not bargaining for testimony with anyone, and the Commission should not tolerate that kind of a position on the part of a witness who was duly called and who appeared. When I asked him "Do you have the information?"—I wanted to know what he did between November 5 and November 29—he said: "I took it up with the executives of our company, and they said to go ahead and gather this information. You have the information."

2064

"You have the information here?" was the next question. The answer, "I have it here." "Will you produce it?" "No. I was getting it for the Commission. The Commission can have it but not the respondent."

Then I said: "Well, didn't you read your subpoena?" Well, he pleaded that he was a layman and he didn't understand who the respondent was. Now, I say it makes no difference whether he was subpoenaed by the Commission for and in behalf of the Commission, or whether he was subpoenaed in accordance with the law by the Commission for and in behalf of the respondent.

This is not confidential information. In the first place,

these 88 names were not taken from the hat. They were taken from the records produced by the Commission.

I asked him whether he had a contract with this company. That is a question to which he can answer yes or no. Well, he wouldn't answer that. We know, as a matter of fact, that he doesn't have contracts with these 88 com-
panies. He may have contracts with 15 or 20 or 25. I
2065 don't know, but I do know that the Penn Electric
Switch Company, I think, have 15 or 20, and I think I am correct in saying that Perfex had 15 or 20, and I can assume—but this Court does not take mere assumptions—that Mercoid had contracts with some of these companies.

I might say further that in the course of our examination, having been met by the refusal on the part of Mr. Owens to give us certain information requested, we had certain witnesses who were coming on, so we asked them to produce what contracts they had with the Mercoid Corporation, and some of those contracts are now in evidence. These are printed price lists. They are printed contracts. They are sent out to the trade generally—to be sure, the oil burner trade.

Commissioner Davis: I wish you would explain what your contention is as to the competency and relevancy of the contracts between the Mercoid Company and their customers.

Mr. Freeman: I am very happy that you asked that question, Mr. Commissioner, because I can answer that point.

In paragraph 4 of Count 1 of the complaint the respondent in this case, Honeywell, is charged with having agreements—annual contracts, to be specific—with certain oil
burner companies—and I now quote—"and competi-
2066 tors of the respondent have been prevented from
selling their thermostats and limit controls in substantial quantities to the oil burner manufacturers for domestic heating plants, purchasing primary controls from the respondent."

In other words, our annual contracts, so the complaint states, prevent competitors—Mercoid—from selling controls to those companies.

Commissioner Davis: You say "in substantial quantity." Just what do you mean by that?

Mr. Freeman: Well, we are entitled to know that they do actually sell. In other words, we are charged here

with having contracts that tend to limit or stifle competition, and we want to show the true condition, and the best way to show it is by the records of the Mercoid Company, just as we have the records of the Penn Electric Switch Company and the records of the Perfex Company, a corporation, and likewise what records the Detroit Lubricator Corporation of Detroit, Michigan, have on that point. We can show, when we get such evidence as has been asked for from the Mercoid Corporation, that it was not prevented from selling one control, not one penny's worth of merchandise because of any contract that any of these companies had with the respondent. In fact, Your Honor, we have had some witnesses called in our behalf who have

contracts for 1937, 1938, 1939, 1940 and 1941 with all
2067 four of the control companies, and they have testi-

fied that they bought controls whenever they wanted to buy them, in any quantity they wanted to buy them. Now, that goes to paragraph 4 of Count 1.

Commissioner Davis: Isn't the burden upon counsel for the Commission to prove that charge in the complaint?

Mr. Freeman: That is correct.

Commissioner Davis: Has counsel done that?

Mr. Freeman: Mr. Haycraft and I will differ on that. I mean he at least will differ from my version as to whether the Commission has or has not made a case. But I certainly do not want to be precluded from making the best case I can and presenting to the Commission all of the facts. That goes to the question of restrictive contracts.

Then I turn to another phase of the case, and that is the violation of the Robinson-Patman Act, and our defense is that we had to do certain things, that is, give certain prices to meet competition. Now, what is the best way to bring out those facts? Isn't it to go to the place where sales were made? That is the kind of competition we had to meet.

To be sure, we can go out to these 88 companies, and I think we will get from most of them, unless Mercoid writes them, as it has done recently, not to furnish us with any information. But most of these companies will let us have

whatever files they have. There isn't anything secret
2068 about the prices they pay or the quantities they buy.

There isn't anything confidential about it.

We can go out to these 88 companies and we can tour

the United States—the Commission can trail along with us, but we have all of the information gathered up—it was there in the court room in Chicago—Mr. Owens would have given it to the Commission, but he didn't want to give it to the Commission if the respondent might have it. That is the difference.

Now, I might say this: If the Commission should recall this subpoena on the basis that prices are confidential, what is going to happen to one of your investigators when he walks into Mercoid's, or let us say he walks into the respondent's place, assuming that the complaint has not been filed, and he asks for our prices or copies of our contracts and we say, "Oh, no, that is confidential"? That is the kind of precedent Mercoid Corporation is asking the Commission to establish here.

We can get this testimony, but instead of getting it in half an hour or an hour, we will devote our time, the time of your Trial Examiner, the time of your reporters, the time of your trial attorney, and we will go to Connecticut, we will go out on the West Coast—

Commissioner Davis: (Interposing) If it is not competent here, it would not be competent when you in-
2069 troduce it.

Mr. Freeman: It is competent, Your Honor. It is material. It is competent. It is the best evidence. If we do not get this subpoena, if you should recall it, then we will do the next best thing.

I might say this. I think Your Honor will recall the Staley case, which was decided out in the Seventh Circuit, wherein this Commission after the decision by the Seventh Circuit filed a new set of findings of fact in connection with the Robinson-Patman Act, and there the Commission set forth the yardstick as a measure to determine whether or not you had granted certain prices in order to meet competition, and this Commission there correctly stated that you just can't take the word of some purchasing agent, because, after all, the purchasing agent will try to buy at the lowest possible price. So, instead of our going out and getting purchasing agents, where there might be some little thought in your mind as to whether or not the purchasing agent was giving us a ride or a run in order to get a better price, we want the prices at which this company, or these 88 companies, or any one of the 88 companies, actually bought controls. That is the true yard-

stick. That is the true measure. It is competent, very competent, and it is material.

We are charged with carrying on certain discrim-
2070 inations under the Robinson-Patman Act. We can justify that if we show that we had to meet certain prices of our competitors.

We have some oral testimony that invariably Mercoid's price was lower than ours, but again the Commission in the Staley case said, "You can't follow any given pattern." In other words, just because we had to meet it with X company, that doesn't justify our meeting it with Y company or B company or C company.

Now, using the Staley case as a yardstick—and it is a good one—we want to show to this Court that, whatever prices we granted were granted in direct competition, to meet a competitor, something that we are entitled to under Section 2(b) of the Robinson-Patman Act.

Now, I want to come back a little bit to the attitude of Mr. Owens. As I have said, I won't bargain for testimony from anyone, but if we are to have a fair hearing we should have Mr. Owens appear. He has the information. He is ready and willing to give it to the Commission. Why shouldn't we be entitled to examine him with respect to the information, so that the Commission will have full information upon which it may issue any order or do whatever it thinks ought to be done in the light of the full facts?

Now, I think they are very tardy in coming in here—or rather, coming up to the hearing on the 29th, after
2071 they had the motion, or rather the subpoena, for three and a half weeks, and there for the first time raising any question concerning it.

That information is not confidential. These price lists go out to hundreds of oil burner manufacturers. They are printed price lists. They have discount sheets. They are printed. To be sure, we want to know the actual prices, because the Commission is interested in facts. We want to know the prices at which they actually sold.

We did not ask in this subpoena for the amount of dollar volume sold by the Mercoid Corporation. I don't think that is material. When I say it is not material, I mean with respect to the Commission's allegations that our contracts are restrictive, that by our contracts we have kept others from selling controls in any substantial quantity,

or any controls at all. We have had lots of witnesses who have testified that they got controls wherever they wanted to. If they needed Minneapolis-Honeywell controls, they bought their controls. If they needed Mercoid controls, they bought Mercoid controls.

Now, Mr. Owens refused, upon advice of counsel—and I am now quoting from the record—at least, I am paraphrasing—Mr. Owens just refused to identify exhibits that we handed to him. They had to do with the year
1938, and when I gave him a document which pur-
2072 ported to be some sales manual or sales instructions
with respect to contracts when they are entered into—that is, you have to get an order for 25 before we consider it a contract—then he said: "If you will tell me where you got it, I will consider answering it."

Incidentally, on paragraph 4 also, of Count 3—that is the Robinson-Patman count—there is this allegation: "The effect of said discrimination in prices, mentioned in paragraphs 2 and 3 hereof, has been, or may be, substantially to lessen competition in the line of commerce in which respondent is engaged, and to injure, destroy and prevent competition between the respondent and its competitors."

Now, if we can show that Mercoid's prices on the three major controls that are involved were always lower than ours, then how did we tend to lessen competition, or how did we tend to destroy competition, or how did we tend to keep Mercoid from getting its share of the business?

The information we are asking for is material and it certainly is not confidential, because these are published prices. And I think it would be bad practice if, after a subpoena has been issued for three and a half weeks, to come here, after you had had the hearing, or at the appointed time,
for responding to this subpoena, and say that the rec-
2073 ords of the kind that we are asking for are confidential.

Further, as I have said, this witness not only refuses to produce documents which we asked for, but he refuses to identify documents that we have, and the Commission ought not to tolerate that, and the Commission should lend its support to the respondent in this case, so that Mr. Owens will testify, because I know that if the Commission makes a request from Judge Barnes of the United States District Court for the Northern District of Illinois, where we filed a petition, asking for him to enforce this subpoena, we will get it—holding that this is not confidential informa-

tion. And I might say that Judge Barnes is holding that matter open—that is, the petition that I filed—maybe it was improperly filed under the law, but it is still there, held open for some determination on his part, pending a decision on the part of this Commission, and as I left—Mr. Snyder will bear me out—he was there—Judge Barnes said: "They ought to grant this, or at least they ought to tell you why they will not grant it." And I think the Commission should lend its support to the respondent in this case. In other words, if Mr. Owens is willing to testify and give the information to the Commission, the Commission is a litigant in this case just as much as we are, except we do not have the power of enforcement. We must ask that they endeavor to get the proof which we think is material and
2074 important to our case, proof of a kind that, if we get it, we can then say we have had a fair hearing; otherwise no.

Chairman Freer: Mr. Snyder?

Mr. Snyder: Mr. Freeman raises many points that I do not believe have any bearing on this matter. For instance, this one about Judge Barnes. Mr. Freeman went before Judge Barnes and tried to get the witness ordered to testify, and I want to point out that the Act does not provide for the respondent going before any court and asking for an order directing a witness to testify. And Judge Barnes was impressed by it to such an extent that he didn't want to decide the matter, and that is why he stated that they should come down here and ask you whether you would ask the Court to order the witness to testify. It is very plain from the Act that the respondent has no right—

Mr. Freeman: (Interposing.) I agree with you on that.

Mr. Snyder: (Continuing.) —to get a subpoena from the Court, just the same as he really has no right to get a subpoena from you, except at your discretion.

Mr. Freeman: I take exception to that statement.

Mr. Snyder: Because nothing in the Act gives the respondent a right to a subpoena except that you have made some rules of practice that give them such a right.

It was pointed out that there has been a great
2075 deal of delay in this matter. Well, I don't know how delay is of any importance in this matter, when the Mercoid Corporation has no right to appear. It was not consulted at the time this subpoena was asked. It could not present its views on it. And I think Mr. Freeman can be

excused for not recognizing that this was a subpoena of the respondents and not the Commission asking for confidential information.

Mr. Freeman also stated that the prices for 1940 and 1941 were given in this stipulation. That is true as to their general practice, but in Exhibit 84, which lists the prices which were given to each one of these companies, they very carefully took off the prices given after 1939. Now, why should they ask our prices given to these companies after 1939, when they would not give them themselves? That is, I think, the answer to that assertion.

I still contend that, as a matter of relevancy, this subpoena should be refused. I fail to understand how a contract between the Mercoid Company and the prices stated in that contract in any way show that these people, who entered into exclusive contracts stipulated to in Exhibit No. 1, could enter into a contract with Mercoid and not give them any business. That has no bearing on whether these exclusive contracts tied up the business or not.

The only people who can give good and relevant testimony as to that matter are the customers, and Mr.
2076 Freeman states that they called a great many of the customers. I don't see why they need this extraneous list of customers of the Mercoid Corporation. I say the Mercoid Corporation should not be asked to furnish its list of customers.

The law in Section 6 states that when the Commission conducted investigations they are not to make public the list of customers of the investigated companies, and this is just the same thing. They are taking a list of corporations in the oil burner business—and I have the affidavit of Mr. Owens attached, and his testimony—I don't know whether they had his testimony, but they certainly had it in the affidavit—that this constitutes most of the oil burner industry, and I think the facts that they stipulate about most of these corporations show that, and then they want to know which ones named in that list Mercoid sells to, and at what prices. Now, I say, why should they need that information? It is confidential information. Mr. Owens in his affidavit states that this is confidential information between itself and its customer. I don't think the Commission needs to go back of that statement in the affidavit. That is the basis on which his case is made. I don't think the Commission ought to go out and ask confidential information at any

time, and this is only bearing on the discretion of the
2077 Commission, this subpoena. Why should the Commission issue a subpoena to a competitor to furnish the respondent its list of customers and its prices up to 1941, which are the prices that are frozen today? Those are the prices that we have to charge today, and I fail to understand why justice requires this action on the part of the Commission, when the respondent can go out and get his customers to testify about these matters.

Chairman Freer: We will take the matter under advisement and render a decision in due course.

We have another argument set for three o'clock. We will take a recess for five minutes.

(Whereupon, at 2:55 p. m., January 11, 1944, the hearing before the Commission in the above-entitled matter was adjourned.)

2078

Room 1123, New Postoffice Building,
Chicago, Illinois,
July 22, 1944.

Met, pursuant to notice, at 10:00 a. m.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Attorney for the Federal Trade Commission.

Cravath, Swaine & Moore, by R. L. Gilpatric, 15 Broad Street, New York, New York; and Bair & Freeman, by Will Freeman, 135 South La Salle Street, Chicago, Illinois, appearing for the respondent.

2079

Proceedings.

Trial Examiner Sheppard: All right, Mr. Reporter, convene the hearing in the Minneapolis-Honeywell case, Docket No. 4920. Let the record show that the hearing is convened, the last hearing having been held in December of 1943.

J. W. OWENS, a witness called by and on behalf of the respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination.

Trial Examiner Sheppard: Now, Mr. Owens, give us your initials again.

The Witness: J. W.

Mr. Hamilton: If the Examiner please, Mr. Chadwell of our office represents Mr. Owens and the Mercoid Corporation and, if your Honor please, I would like to just review the history of the controversy that has surrounded the appearance of Mr. Owens here and there has been an agreement entered into between the Commission and Mr. Chadwell of our office and I would like to bring your Honor up to date on that, if I may.

Mr. Freeman: We object to any such statement and any reference to there being any agreement. There has been no agreement made where we were a party and there has been no agreement made with the Commission.
2080 Mr. Owens is here in response to the subpoena that was duly issued and that is where we stand right now. There has been no agreement as to what is to be produced.

Mr. Hamilton: There is an agreement between the Commission, according to my instructions, between Mr. Chadwell and the Commission and, if your Honor please, I would like to read it.

Trial Examiner Sheppard: Do you know anything about it, Mr. Haycraft?

Mr. Haycraft: I know there is some correspondence between the chief counsel and Mr. Chadwell.

Trial Examiner Sheppard: In reference to his appearance here?

Mr. Haycraft: Yes. I think it would be a good idea, Mr. Examiner, to have some such statement in the record because you will recall at the last hearing that Mr. Owens attended he declined to bring certain information required by the Commission's subpoena and thereafter certain things transpired which are outside of the record up to this time. I think it would be a good idea to have the record show what did transpire since that time. In other words, there were certain motions made before the Commission and there was an argument held before the Commission, the Commission took certain action and the matter is now before the—as I understand, the matter is now before the regular District Court awaiting presenta-
2081 tion.

Trial Examiner Sheppard: I thought that had been settled by Mr. Owens coming here to testify.

Mr. Haycraft: It has not been settled. It is a question of whether or not it will be settled as a result of that testimony. As counsel for the witness has stated, there was some correspondence passing between Mr. Chadwell and the chief counsel that had some relation to Mr. Owens coming here to testify.

Trial Examiner Sheppard: All right, make it short. I will let you put it in as a matter of record. I don't know anything about it myself.

Mr. Hamilton: I would like to bring you up to date on it, if I may.

Trial Examiner Sheppard: All right.

Mr. Hamilton: The subpoena was issued under date of November 2nd, 1943, returnable on November 29, 1943. At that time Mr. Owens appeared on the return day but he refused to testify under a misapprehension, as he stated, that the testimony was for the Commission and not for the respondent in this case and he declined to testify at that time on the ground that he was advised not to divulge certain trade secrets and so on to competitors.

On December 31, 1943 there was a petition to the court for an order requiring Mr. Owens to testify and pro-
2082 duce certain documents in accordance with the petition. On that date, December 1st, 1943, the court postponed action on the petition pending a determination of the attitude of the Commission with respect to the enforcement of the petition.

On December 13th Mr. Owens and the Mercoid Corporation moved the Commission to recall the subpoena and a hearing was had on January 11, 1944 and on April 28, 1944 the motion was denied and on May 28, 1944 a petition to require Mr. Owens to appear was filed and there was a hearing on that and I understand it was continued pending this arrangement to which I will call your attention.

Now, there was correspondence and, as I understand, some telephone conversations between Mr. Chadwell and Mr. Kelley which finally culminated in a letter under date of May 31, 1944 written by Mr. Chadwell and addressed to Mr. Kelley. I will not read that whole letter but I will read into the record the pertinent part of it with reference to the interpretation of the subpoena.

It is addressed to "Mr. William T. Kelley, Chief Counsel, Federal Trade Commission, Washington, D. C.," under date of May 31, 1944. After reciting the history, a very brief history of the case, there is this paragraph which contains, as I am informed, the agreement as to the interpretation of the scope of the petition:

"Therefore, this is to advise you that if you will
2083 dismiss the above mentioned petition which you filed on behalf of the Commission in the United States District Court at Chicago, my client, Mr. Owens, will produce the documents called for by the subpoena when requested at the next hearing of the proceeding before the Federal Trade Commission, which I understand will be

some time in July. In order that there may be no misunderstanding about our interpretation of the subpoena, we wish to inform you that at that time we will produce all written contracts for the sale of automatic temperature controls for domestic oil burners entered into by The Mercoid Corporation for the years 1937 through 1941, inclusive, with the oil burner manufacturers listed in paragraph 1 of the subpoena. We will also produce all correspondence or other data showing prices at which Mercoid offered and sold such controls to said oil burner manufacturers during such years in cases where there were sales to oil burner manufacturers listed in paragraph 1 of the subpoena not covered by the above mentioned written contracts.

"Mr. Owens, of course, will also appear for the purpose of testifying at the time the documents are produced, as required by the subpoena."

Now, Mr. Owens is here and tendered in accordance with this interpretation of the subpoena agreed upon between Mr. Chadwell and Mr. Kelley. Incidentally, if there are certain original documents here which are introduced
2084 into evidence, we will ask the Examiner for permission to withdraw them after they have been photostated and photostatic copies have been substituted.

Trial Examiner Sheppard: That can be satisfactorily arranged.

Mr. Hamilton: That is all I have to say.

Trial Examiner Sheppard: All right. Mr. Freeman, do you want to say anything in reply?

Mr. Freeman: I want to wait until my file gets here with respect to a letter that I have from Mr. Kelley, where he advised me that no agreement was made and as far as any agreement between the Mercoid Corporation and the Commission is concerned, we are not going to be bound by it and we are not going to operate under it.

This subpoena was issued by the Commission and as far as any interpretation of that subpoena is given anywhere's, if there is to be an interpretation of that subpoena, the interpretation is going to be rendered by Judge Barnes or some Federal Court.

We had a petition filed in the court. We are a party to that particular suit and I think it is absolutely improper for the Commission to make any deal or bargain with any witness who is to be produced on our behalf and we are not going to bargain with anyone with respect to that and we

have never bargained with anyone with respect to factual testimony.

2085 Now, I want to read a letter in a few minutes that we have from Mr. Kelley, because I cautioned Mr. Kelley at the time I put in a long distance call to Mr. Kelley, that certain things were happening unbeknown to me, although we were a party to that particular proceedings before Judge Barnes. I couldn't get a copy of the letter that Mr. Chadwell sent to Mr. Kelley although your Chicago man here said he would give it to me, Mr. McKeag, and then later he wrote, or at least felt that he should not give us a copy until after Mr. Kelley had had a chance to look it over.

Now, we want to be treated as a party litigant in this case. This is not a one-sided case at all. As far as we are concerned, all we want from Mr. Owens are the facts, whatever they are, we don't know, but we are not going to bargain as to any particular interpretation as between Mr. Kelley and Mr. Chadwell. And it is rather unfortunate that Mr. Chadwell is not here present, because I personally told Mr. Chadwell that we would not bargain with him with respect to any interpretation of the subpoena and he walked out of the office and he said, "We will leave it for the court" and instead of leaving it for the court he comes on over and makes some deal with the Commission.

Trial Examiner Sheppard: Well, of course, this is all news to me, gentlemen, I don't know anything about it on one side or the other. We will let the matter go then

2086 and when your file comes you will be able to put in your side of the matter. Probably we can all clear this matter up.

Mr. Freeman: I am going to wait until my letter comes from Mr. Kelley. We are in no hurry at all.

Trial Examiner Sheppard: I will let you do that later if you want to and you can go on.

Mr. Freeman: I want to know whether or not there is a deal with the Commission before we proceed. I want to know if the Commission bargained with Mr. Owens as to what that subpoena meant, in the face of the petition pending before Judge Barnes.

Trial Examiner Sheppard: Those things I cannot answer, Mr. Freeman.

Mr. Freeman: I cannot either.

Trial Examiner Sheppard: I know nothing about what took place at all. Mr. Haycraft, can you furnish any light?

Mr. Haycraft: I cannot; I don't know. I knew there was some correspondence but I didn't see it.

Trial Examiner Sheppard: Well, now, we have the letter, a portion of it.

Mr. Freeman: Have you got the answer to that letter, Mr.—what was your name?

Mr. Hamilton: Hamilton.

Mr. Freeman: Have you the answer to that letter?

Mr. Hamilton: No.

2087 Mr. Freeman: Well, it is a good self-serving declaration as far as I am concerned. I would like to know what Mr. Kelley said to that.

Mr. Hamilton: There is a paragraph here, the concluding paragraph that I did not think was material; maybe you think it is. I will be glad to have you know what it is?

"Will you please let me know at your early convenience whether the offer contained in this letter is acceptable. Pending your reply, in accordance with my agreement today with Mr. McKeag, we will withhold filing our answer to your petition."

So there was some sort of an arrangement with reference to that or otherwise we, of course, would have had to answer the petition.

Mr. Freeman: That letter asks for an acceptance on the part of the Commission of your understanding. Now, have they accepted it? You know what an agreement is, you are a lawyer.

Mr. Hamilton: Yes, I have an idea what an agreement is.

Mr. Freeman: A mutual meeting of the minds. Now, all I want to know is whether the Commission has actually—

Mr. Hamilton: I have no letter. Now, what the agreement was or what the agreement was that was reached over long distance other than this letter I have no way of knowing.

2088 Mr. Freeman: As a matter of fact,—and I don't want to cross examine you, Mr. Hamilton,—as a matter of fact you don't know whether an agreement was reached or not.

Mr. Hamilton: Other than what is here.

Mr. Freeman: I will concede that; I have a copy of that letter.

Trial Examiner Sheppard: Let me get it straight. That letter you have just read was from Mr. Chadwell to Mr. Kelley?

Mr. Hamilton: That is right.

Trial Examiner Sheppard: And you haven't any letter from Mr. Kelley in reply to that?

Mr. Hamilton: No.

Mr. Freeman: But I have, Mr. Examiner, and I will produce it in just a few minutes.

Trial Examiner Sheppard: All right. Can't we go ahead?

Mr. Freeman: But if we go ahead we go ahead on the basis that Mr. Owens is responding to the subpoena. We may differ as to the interpretation of the subpoena.

The Witness: That is the only thing, Major, that was agreed upon, or the only arrangement that was made. The only time I have heard deals or bargain or arrangement made was Mr. Freeman's own words and there is a story connected with that that I would rather not bring up here, it won't serve any good purpose and I don't think
2089 Mr. Freeman told all the facts in his statement. He used certain parts, he made half statements and used them for his own purposes. Now, I don't think he wants to do that. We can go ahead with this thing and get through with it.

Trial Examiner Sheppard: Now, I will tell you gentlemen what I want. I want to keep the court proceeding, the pro and con of the court proceeding as far as possible extraneous from our proceeding here, because I have got nothing to do with the court proceeding and possibly the determination of this case will not have. It is a mere matter of whether or not Mr. Owens will testify or not and what testimony he will give and he is here and we are ready to go and the matter leading up to today really we are not interested in. He is here in response to this subpoena and ready to testify and I think we had better go on and make as much progress as we can and whatever you want to put in afterwards you can.

Mr. Hamilton: Of course, as far as my instructions on this thing, as I have stated I know nothing about the merits of this thing because in a general way Mr. Chadwell is handling it throughout; but if there is any question or any difference here as to the interpretation of the scope of this subpoena then, of course, we will simply have to advise Mr. Owens not to testify and thresh this out before Judge Barnes, as he says.

2090 Mr. Freeman: That is perfectly agreeable, but I don't want to start out here on the basis that there

has been any agreement with respect to the interpretation of that subpoena. If we disagree, I mean if Mr. Owens refuses to answer, we can thresh that out in the proper place, but he is here in answer to the subpoena, without any strings tied to it.

Mr. Hamilton: No, he is not here in answer to the subpoena without any strings tied to it. He is here to testify in accordance with this, otherwise he refuses to testify.

Trial Examiner Sheppard: Well, now, don't I gather from this letter that they read into the record there that Mr. Owens is ready to testify?

Mr. Hamilton: He is ready to testify in accordance with the interpretation contained in this letter.

Mr. Freeman: Not in accordance with the subpoena, though, your Honor.

Trial Examiner Sheppard: Well, I think that is a matter for the court, gentlemen, and not for me.

Mr. Freeman: Well, then, maybe we ought to go there.

Mr. Haycraft: I think we ought to go ahead and take his testimony and see whether or not it complies with the subpoena.

Trial Examiner Sheppard: I think we ought to do that, yes, and if there is any difference of opinion I will adjourn the hearing and let you thresh it out in court, 2091 but as long as Mr. Owens is here willingly and said that he will testify along certain lines, you had better go on.

Mr. Freeman: I move that that word "willingly" just stated by yourself be stricken.

Trial Examiner Sheppard: Well, if it is not in the proper form, why, I will strike it with pleasure. Go ahead, Mr. Freeman. Wait a minute, Mr. Freeman. I don't believe I informed the reporter that this is Mr. J. W. Owens of Chicago and he has been previously sworn in this case and he is here upon the witness stand in response to the respondent's subpoena.

By Mr. Freeman:

Q. Mr. Owens, you are the same Owens who testified for the Commission last summer in this case?

A. Last when?

Q. Last summer?

A. Yes.

Q. And you have been served with a subpoena duces

tecum by the Commission in November of 1943, is that correct?

A. That is right.

Q. And you are here in response to that subpoena?

A. That is correct.

Q. Have you the documents, data, price lists, and so forth, called for in that subpoena here with you?

A. I have taken out of our files all the information
2092 that I could obtain readily and I will say I believe will be sufficient for your purposes and should there be anything that you might think or feel is missing in here that you might want us to add, I am ready to go ahead and make further search and get that out of the files to fill in anything that might be missing in here.

Q. That is very fine and as to any originals, of course, we will have photostatic copies so that the originals will be retained by you.

A. As per the arrangements, yes.

Q. Now, I think we can make progress if you will give us a list of the companies enumerated in the subpoena that your company had contracts with for the year 1937.

A. In order to clarify this I will first give you the price and bracket setup and then I will read off the list copied from the names on the subpoena and I will name the bracket in which we quoted that customer. Is that made clear? Is that O.K. with you?

Q. That is very fine.

A. Acme Tool & Gauge Co., No. 3. You don't need the town, do you? You have got that.

Alida Mfg. Co. or Lida Mfg. Co., I don't know which it is, No. 2.

Arcweld Mfg. Co., no record.

Automatic Burner Corp., KMI and type H sensa-
2093 therm, $14.90 net per set.

Bedard Johnson Co., no record.

Berggren Engineering Company, now John Edwards, Inc., No. 2. Bock Corporation—

Q. All those names are on the subpoena.

A. Yes. Bock Corporation, no price.

Braden Engineering, Inc., No. 5.

Brown Oil Burner Eq. Co., no record.

Buck Engineering Co., Inc., No. 1.

Burner Parts & Service, now Penn Boiler & Burner Co., No. 3.

Campbell Machinery Co., no price.
Century Engineering Company, No. 6.
Cleveland Steel Products Corp., No. 6 Special.
Citro Oil Burner Corp., No. 2.
Concord Oil Burner Corp., No. 3. Cancelled June 6, 1937.
D'Elia Oil Burner Co., no record.
DeSoto Oil Burner Corp., no record.
Diesel Burners, Inc., Moosup, Connecticut. There were two companies down there and there was a mixup on that. That is No. 3. On July 1st changed to No. 1.
Mr. Haycraft: What year?
The Witness: 1937.
Mr. Freeman: We are talking about 1937.
A. July 1st, 1937. David Duff & Sons, No. 2.
2094 Eisler Engineering Co., No. 2. On July 1st, 1937, changed to No. 1.
Electrol, Inc., no record.
Enterprise Oil Burner Corp., manufacturers' discount.
Q. Mr. Owens, did you intend to omit Electromatic?
A. No, it just wasn't on here.
Mr. Gilpatric: It is on the subpoena.
Mr. Freeman: It is on our list.
Mr. Haycraft: It is on the subpoena.
The Witness: Where are Electromatic? Just a minute, I might check it. I have another list here. I am sorry. Will you see if it is on our subpoena, please?
Mr. Haycraft: Yes.
The Witness: It is on the list, Electromatic?
Mr. Haycraft: Yes.
The Witness: Where are they located?
Mr. Freeman: San Francisco, California.
Mr. Haycraft: No, Malvern, New York.
Mr. Freeman: Oh, Malvern, New York, that is correct.
The Witness: I don't believe we did any business with them.
Mr. Freeman: Well, you can check and let us know.
The Witness: I will make a memorandum and endeavor to check it.
Fairfield Oil Heating Co., No. 3. On July 1st
2095 changed to No. 1.
Fargo Foundry Co.; manufacturers' discount.
Gar Wood Industries, Inc., no record.
General Oil Burner Corporation, Baltimore, Maryland, No. 3.

General Oil Heating Corporation, West New York, No. 4.
Capitol Oil Burner Co., dealer's price.
Carlson Bros. Tool & Machine Co., no record.
Korth Oil Burner Corporation, No. 3.
Mr. Haycraft: Is that the same as Carter-Korth?
The Witness: Yes, I believe it was formerly Carter-Korth.
Mr. Freeman: Yes.
A. Gold Star Oil Burner Mfg. Co., on September 24, 1937 quoted for the balance of 1937 set consisting of KMI pyretherm, sensatherm and DA-31 pressure control O-14 or Figure 35 sensatherm, in lots of less than 10 sets $20.05 each per set; 10 to 23 sets $18.60 per set; 24 or more sets $18.20 per set. When these sets were furnished with M-51 warm air furnace control add $1.00 to the foregoing prices. Other controls manufacturers' discount.
Hall-Neal Furnace Co., no record.
Harrison Sales Co., No. 3.
Hart Oil Burner Corp., No. 4.
Harvey-Whipple, Inc., No. 5.
Hayward Mfg. Co., Inc., No. 3.
2096 The Heil Co., No. 5.
Herco Oil Burner Corp., No. 5.
Hi-Point Corp., No. 3.
Hoben Mfg. Co., No. 2. On July 1st, 1937 changed to No. 1.
Holtum Mfg. Co., No. 2.
Homestead Engineering Corp., No. 2.
Hubbard Oil Burner Co., No. 4.
Hupp Oil Burner Co., No. 3. On July 1st, 1937, changed to No. 1.
Hyle Oil Burner Co., No. 1.
Jacobson Mfg. Co., No. 2.
Kelly Oil Sales Corp., marked "special." Is there a copy of their contract attached to those papers, the Kelly Oil Sales? Is there a "special" shown in that list which would indicate that price? Will you take a memorandum, please, for me to get that Kelly Oil Sales 1937 contract?
La Grace Oil Burner Co., no record.
Liberty Research Lab. Inc., no record.
Lynn Products, Inc., No. 4.
Malleable Iron Fittings Co., No. 2 and No. 3 but no date shown here as to when the change was made.
Master Oil Burner Co., no record.
Messer Co., No. 2.

Micro-Westco, Inc., no record.

Now, on here I have got Mohawk Oil Burner Manu-
2097 facturing Co., who also, apparently, have gone under the name of Joseph Toker Corporation and American Mohawk Corporation and one other name that I can't make out; No. 3.

Montag Stove & Furnace Works, No. 3.

G. T. Muehlbach, no record.

National Devices Company; the name also shows here as Liberty Airflow Burners; no record.

Neis & Brechtl, no record.

Oil Equipment Laboratories, No. 4.

Old Colony Machine Works Co., No. 3.

Osher & Reiss, Inc., No. 2. On July 1st changed to No. 1.

Packard Oil Burner Mfg. Co., No. 2 and No. 3. The date of the change I do not show here.

Pan-American Engineering Corp., No. 2.

Penn Petroleum Products Co., No. 3.

Petroleum Heat & Power Co., manufacturers' discount.

Quiet Heat Mfg. Corp., of Newark, New Jersey, No. 5.

Quiet Heet Oil Burner Co., Brooklyn, New York, No. 2.

Reliable Oil Burner Corp., No. 1.

Reif-Rexoil, Inc., No. 4.

Rossoe Mfg. Co., no record.

Silent Flash Oil Burner Corporation, No. 2. Cancelled June 7, 1937.

S-K Company, No. 3; cancelled June 3rd.

2098 Simplex Oil Heating Corp., the same as Gold Star.

Do you want me to repeat all that?

Q. No.

A. Standard Products Co., No. 3.

Scott-Newcomb, Inc., No. 4.

Sunray Oil Burner Corp., No. 2.

Todd Combustion Equipment, Inc., manufacturers.

Timken-Detroit Axle Co., (Timken Silent Automatic Division), No. 6.

Volcano Burner Corp., No. 3; changed July 1st to No. 1.

Wayne Oil Burner Corp., No. 5.

Harry C. Weiskittle Co., No. 2.

Westchester Home Equipment Co., No. 2.

Williams Oil-O-Matic, No. 6.

Wisconsin Oil Burner Co., No. 3; changed July 1st, 1937 to No. 1.

York Oil Burner Co., Inc., No. 5.

Q. Mr. Owens, I notice you omitted Goodrich Oil Burner Manufacturing Corporation and the Greenwood Engineering Co., which were on the list. Do you have anything to say with respect to those companies?

A. Is that on there, too, Goodrich and who else?

Q. Greenwood Engineering of Glenarm, Maryland.

Mr. Haycraft: They are on here, right after Gold Star.

2099 The Witness: Oh, I didn't omit Goodrich, did I? Oh, I must have skipped over after Gold Star. You did not call my attention to it.

By Mr. Freeman:

Q. Will you go back now and give us Goodrich and Greenwood so that we have the record straight?

A. Goodrich Oil Burner Manufacturing Corp., now Walter H. Goodrich & Co., No. 2; on July 1st, 1937 changed to No. 1.

Greenwood Engineering Company, no record.

Trial Examiner Sheppard: I suppose those numbers you have been giving there, 1, and 3 and 5, are bracket numbers?

The Witness: He has the key here.

Trial Examiner Sheppard: I see.

Mr. Freeman: I was just going to ask you, Mr. Owens, with respect to brackets.

Mr. Haycraft: I propose that that be marked and put in evidence, Mr. Examiner, if we are going to discuss it.

Mr. Freeman: Well, I can ask him about brackets without necessarily referring to the document, can't I?

Trial Examiner Sheppard: Go ahead.

By Mr. Freeman:

Q. Mr. Owens, you had how many brackets in 1937?

A. Six—no, there is six. There are five shown here. There are apparently six because this one is No. 6.

2100 That probably would be referred to as "special."

Mr. Freeman: I would like to offer in evidence as respondent's exhibit 147 the sheet marked, "1937 Manufacturers' prices," dated December 22, 1936 and as respondent's exhibit 148 the manufacturers' purchase contract, marked 1937 bracket 6 prices."

Trial Examiner Sheppard: Any objection, Mr. Haycraft?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let them be marked the numbers suggested, 147 and 148, and let them be accepted into the record.

(The papers referred to were marked RESPONDENT'S EXHIBITS 147 and 148 and received in evidence.)

Mr. Freeman: We also ask that the pages dated 6/8/37 and entitled "1937 Manufacturers' prices," continued page 2-A and page entitled, "1937 manufacturers' prices continued, page 3," be marked respondent's exhibit 149-A, B and C.

Trial Examiner Sheppard: Any objection to that?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let them be accepted and be so marked.

(The papers referred to were marked RESPONDENT'S EXHIBIT 149-A, B and C and received in evidence.)

2101 By Mr. Freeman:

Q. Now, Mr. Owens, in connection with one of the companies that you mentioned, particularly the Cleveland Steel Products Corporation, you gave me bracket 6 and then added the word "special."

A. Yes.

Q. Was that something better than bracket 6 or will you please explain what is meant by bracket 6, special?

A. Frankly, I cannot unless I have got a letter here which might show that. We included another control in there that was not on the original contract, the No. 6 with recycling control added which, by the way, they never purchased but that explains the "special." You may have that for your records also.

Q. Well, then, Mr. Owens, just so that I understand fully, the price for the KMI or the KMW and sensatherm on the agreements marked "6 special" and the other companies that you sold under bracket 6, like Century Engineering, Williams Oil-O-Matic and Timken, were the prices all the same then?

A. I believe so. You have got the record there. They were all the same except as in the unit here we added—here was your original contract, Mr. Freeman, as submitted to Cleveland Steel, so those prices remained exactly the same when we made up the new contract except that we added another control on there that was not on the original contract and we made it a special apart from the standard No. 6 bracket.

Mr. Haycraft: You had better offer that in evi-
2102 dence so that we know what you are talking about.

Mr. Freeman: The witness has referred to the manufacturers' purchase contract dated December 11, 1935.

The Witness: 1935 is that?

Mr. Freeman: Yes.

The Witness: Yes, I see.

Mr. Freeman: Which is here offered in evidence as respondent's exhibit No. 150 and the later manufacturers' purchase contract just referred to by the witness Owens, dated January 27, 1937, which is being offered in evidence as respondent's exhibit 151.

Trial Examiner Sheppard: Any objection to those?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let them be accepted and marked.

(The papers referred to were marked RESPONDENT'S EXHIBITS NOS. 150 and 151 and were received in evidence.)

Mr. Haycraft: Does that have more than one page, any of those exhibits?

Mr. Gilpatric: No.

By Mr. Freeman:

Q. Mr. Owens, do you have here any record to show the quantities that you required in order to enable a com-
pany to obtain purchases in bracket 6 or do you re-
2103 call the number? If so, give it to us.

A. Well, that is in the other papers that you have there. The whole thing is right there.

Q. Well, the other papers that you referred to are exhibits 147 and 148 and 149 and I am now handing them to you and perhaps you might pick out the information with respect to quantity for bracket 6.

A. O. K.

Q. It will be helpful.

A. No, there is no record here on that.

Q. Do you recall, Mr. Owens, what the quantity was in order for a company to get the benefit of the price in bracket 6 in the year 1937?

A. Well, I would have to make a kind of broad statement on that. In other words, it would be a major oil burner manufacturer.

Q. Well, I note that on respondent's exhibit 147 bracket 5 says, "7500 controls or more" and I am just wonder-

ing where you walked out of bracket 5 and walked into bracket 6 in connection with purchases?

A. Well, I can't recall that at this time.

Q. And also, so that the record is clear, the quantities specified are single units as distinguished from sets, is that correct?

A. That is right.

2104 Q. Now, when you gave Timken the prices therein specified on respondent's exhibit 148 for the year 1937, obviously you expected to get more business than what would be called for if you gave them bracket 5, is that correct?

A. We expected to.

Q. And the amount in the agreement with respect to the number of units is specified as, "Their requirements of the company's automatic controls," is that correct?

A. Yes.

Q. Do you recall whether or not in any of these other No. 6 bracket contracts that you had with Williams, Century or Cleveland Steel, whether any amount was specified?

A. I have Cleveland Steel here. No, there is no amount specified.

Q. And does that go for the other two companies, Century and Williams as well as the Cleveland Steel?

A. I guess "Yes" on that.

Q. Now, Mr. Owens, do you have here the agreements that you had with Williams and Century for the year 1937?

A. It would be the same as either one of these number sixes.

Q. Well, first answer my question, Mr. Owens.

A. No.

Q. You do not have them?

A. No.

Q. Are they available at the company's plant?

A. Yes.

2105 Q. I don't know whether we want them in evidence or not, Mr. Owens, but for convenience, if we could have an opportunity to at least take a look at them.

A. You may have them.

Q. Mr. Owens, in connection with the Petroleum Heat & Power you stated that in 1937 your company extended to Petroleum Heat & Power the manufacturers' discount. Will you refer to exhibit 149-A and point out just what you mean by manufacturers' discount?

A. Manufacturers' discount, 1 to 9 assorted, 33⅓ and 15 per cent; 10 to 23, 33⅓ and 20 per cent; 24 and up assorted, 33⅓ and 25 per cent.

Q. And the same would apply to those other companies where you mentioned "manufacturers' discount"?

A. That is right.

Q. And I take it that the manufacturers' discount is a price a little higher than bracket No. 1?

A. On the control shown in bracket No. 1; that is the standard oil burner controls, yes.

Q. So that in order that we fully understand you first effect some manufacturers' discount and thereafter in order to get a better price you find yourself in bracket 1 and on up, is that correct?

A. That is for a certain amount of controls that
2106 are sold at a net price to the oil burner trade.

Q. We are talking, Mr. Owens, about oil burner controls sold to the oil burner people. That is your KM and your KMI and your sensatherm.

A. Could I tell you what you are driving at, is that permissible?

Q. Sure, just so you steer me on the right course.

A. First of all, Petroleum Heat & Power Company, to whom I imagine you are referring, buy or did buy at that time special controls. For instance, they burn heavy oil. They would buy a special temperature control to mount on their oil heater. That control was sold to all manufacturers at the manufacturers' discount and the only thing that you can get at by running around or going around the bush is the fact that we did not submit Petroleum Heat & Power Company a bracket contract, if you want to refer to that. We merely sold that special control that they bought at a less than discount basis without having submitted any contract to them.

Q. That is clear and thank you. And those controls, then, that you sold Petroleum Heat & Power were in fact, non-competitive with the so-called standard controls that went on domestic oil burners?

A. I am afraid I don't quite understand.

Q. Were they the same controls?

A. No, they were special controls.

2107 Q. So that they were non-competitive to the so-called standard control that you sold?

A. Well, they were a different control, Mr. Freeman.

Q. And thus non-competitive?

A. That is right.

Q. Mr. Owens, I asked in the subpoena that we get copies of the contracts with the oil burner companies mentioned in this list and I take it wherever you gave us a bracket number that your company had a contract with that company?

A. A contract was submitted, yes.

Q. And your company did business with that company on the basis of the contract for the year 1937?

A. That is right.

Q. Now, did you produce the contracts?

A. Did I what?

Q. Do you have those contracts with you?

A. No. I brought the prices. I figured that is what you were interested in securing, was the prices at which we sold them and I did not go to the records to get out each and every contract because I couldn't see any sense to going to all that expense and trouble; if I could inform you,—if I could give you what you wanted in the way of information relative to the prices we quoted and the method we used, that that would suffice. Now, if we have to go through all the records to get out every contract it would mean a lot of work.

2108 Q. Mr. Owens, do you ever change any of the prices which are bracket prices in the agreements, by letters, that is, modify the selling price of the thermostateor KMI by letter?

A. Occasionally, yes.

Q. And would the agreements then reflect the modification?

A. According to what I have testified to here and the markings I got. Of course, I had one of the clerks draw this thing up. Where they marked "No. 6 special" that indicated that it was something outside of the prices you have there and in each of those cases I attempted to show you just what that change was.

Trial Examiner Sheppard: I noticed that and you have given us the date upon which the change was made, haven't you?

The Witness: That is right, when we changed from one bracket to another, but what Mr. Freeman refers to, Major is the fact that we might have reduced the price or changed the price on some one item rather than change the whole contract.

Trial Examiner Sheppard: I see.

The Witness: And where that happened, that they put a mark down here showing "special", which would indicate some change had been made other than shown in this setup of bracket prices on the exhibit, so I brought along those different contracts to show those changes.

Trial Examiner Sheppard: That is very good.

2109 By Mr. Freeman:

Q. Then when you gave us a bracket number for a given company we can assume that that company then received the price referred to in the price list applicable for the year 1937?

A. That would be my interpretation.

Trial Examiner Sheppard: What was that exhibit number?

Mr. Freeman: Respondent's exhibit Nos. 147 to 149, inclusive.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Now, will you turn to the year 1938 and tell us with respect to your bracket setup for that year, the prices and what you did with respect to each of these companies for that year?

A. Acme Tool & Gauge Company, No. 33.

Q. It might be well, Mr. Owens, since you are deviating now from the bracket numbers 1, 2, 3, 4, 5 and 6 for the year 1938, that you explain your bracket structure for the year 1938.

Trial Examiner Sheppard: If there was any change.

The Witness: Do you want that first?

Mr. Freeman: Well, there have been some changes and he started out on that basis.

The Witness: The 1938 contract prices. Contract
2110 No. 11, minimum order requirements 25 units; No. 22, 50 units; No. 33, 75 units; No. 44, a hundred units; No. 55, 250 units; and the others are stoker.

Mr. Freeman: We are not interested in the stoker. We offer in evidence as respondent's exhibit 78 sales bulletin No. 41 dated January 14, 1938; as respondent's exhibit 73, form No. 11; as respondent's exhibit 74, form No. 22; as respondent's exhibit 75, form No. 33; as respondent's exhibit No. 76, form No. 44; and as respondent's exhibit 77, form No. 55.

Trial Examiner Sheppard: Have they been marked for identification before now?

Mr. Freeman: Yes.

Trial Examiner Sheppard: Is there any objections?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let them be accepted and marked.

(The papers heretofore marked RESPONDENT'S EXHIBITS 73 to 78, inclusive, were received in evidence.)

By Mr. Freeman:

Q. Now, Mr. Owens, the documents that I have just offered in evidence as respondent's exhibits 73 to 78, inclusive, illustrate or comprise the bracket structure and pricing structure as used by your company for the year 1938, is that correct?

2111 A. That is correct.

Q. Now, Mr. Owens, will you proceed with the list of companies called for in the subpoena and give us the names of the companies that your company had contracts with, the bracket that the company was in, and so forth?

A. Acme Tool & Gauge Co., No. 33; Alida Mfg. Co., no record, or no price, I should say.

Arcweld Mfg. Co., no record.

Automatic Burner Corp., No. 55.

Bedard Johnson Co., no record.

Berggren Engineering Co., No. 22.

Book Corporation, No. 11; cancelled April 13th.

Braden Engineering, Inc., No. 44.

Brown Oil Burner Eq. Co., no record.

Buch Engineering Co., Inc., No. 11.

Mr. Haycraft: Mr. Examiner, I submit that that paper that the witness is reading from could very well be received in evidence.

Trial Examiner Sheppard: I am perfectly willing to do that.

Mr. Haycraft: I think with the introduction we have the explanation of it, if it is all right with the witness to save time.

The Witness: What was that?

Mr. Haycraft: To offer in evidence the exhibit 2112 you are reading from.

The Witness: Oh, you mean this exhibit here?

Trial Examiner Sheppard: Yes. It will save you from calling out all those names.

The Witness: Mr. Freeman wanted to ask questions about these different ones. I will be glad to offer this in evidence if that will suit you folks. The whole thing is over there.

Mr. Freeman: Could I look at it?

The Witness: Sure, take it away.

Trial Examiner Sheppard: It will just save you a whole lot of talk.

Mr. Freeman: We offer in evidence a paper entitled, "Prices extended 1937 to 1941, inclusive", furnished by the witness Owens, as respondent's exhibit 152-A, B, C, D and E.

Trial Examiner Sheppard: All right. Any objection, Mr. Haycraft?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let it be accepted and marked.

(The document referred to was marked RESPONDENT'S EXHIBIT 152-A, B AND C, D AND E and received in evidence.)

By Mr. Freeman:

Q. For the year 1938 I note that you have some of the companies in brackets 3, 4 and 5 and others you used
2113 the form number 22. Do I understand that as to those in 1938 where you had numbers 1, 2, 3, 4 and 5 it was merely a carryover from the year 1937?

A. I think the only thing we can do on this, Mr. Freeman, is to agree to get those contracts out marked with numbers that do not agree with the information that I have turned over to you, for the brackets for that year.

Q. So that, then, for the purpose of our record you will get the contracts with Lynn Products, Malleable Iron, Oil Equipment, Old Colony, Osher & Reiss, Packard Oil Burner, Pan-American, Petroleum Heat & Power, Quiet Heet of Brooklyn, New York, for the year 1938?

A. That is the only thing I can do.

Q. Now, turning to the year 1939 you followed substantially the same form numbers prefixed by a letter "B", is that correct?

A. Is that 1939?

Q. 1939.

A. That is correct.

Q. Do you happen to have with you, Mr. Owens, the bracket structure or pricing sheets for the year 1939 of

substantially the same kind that you used in connection with the year 1938?

A. I do.

Q. Will you produce them?

2114 A. Here they are.

Mr. Freeman: We offer in evidence manufacturers' purchase agreements for the year 1939, which agreements are in blank but which disclose the prices at which Mercoid sold controls to manufacturers during the year 1939, the form numbers there being referred to as B-11, B-22, B-33, B-44 and B-55, as respondent's exhibits 153-A, B, C, D, E and F.

Trial Examiner Sheppard: Any objection, Mr. Haycraft?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let it be marked and accepted.

(The documents referred to were marked RESPONDENT'S EXHIBIT 153-A, B, C, D, E and F and were received in evidence.)

By Mr. Freeman:

Q. I note, Mr. Owens, that on one of the agreements the letter instead of being "B" is "F-22" and another one "F-33." Will you please explain that?

A. The "B" designates prices submitted oil burner manufacturers. "F" for furnace manufacturers." There is only one in the list and that is Hall-Neal, there is only one "F" in that list. That was a 33, so there isn't a single one in there of the 22. That is the whole set of prices.

Q. Now, with respect to the Cleveland Steel Com-
2115 pany for the year 1939, I note that the form number is B-44X. Will you please make whatever explanation you can with respect to that particular bracket structure?

A. B-44X refers to a change in the B-44 bracket where a thousand sets of KMW and type H sensatherms are ordered, the price would be $7.75 each net for the KMW and $2.50 each net for the type H sensatherm instead of prices of $8 and $2.70, respectively, shown on the B-44 price schedule.

Mr. Haycraft: What is the date of that?

Mr. Freeman: We are talking 1939.

Mr. Haycraft: Is there any date on that? Is it dated at all?

Mr. Freeman: No.

Q. I note also for the year 1939 that Herco Oil Burner likewise has B-44X.

A. Which would indicate that they were offered that same proposition.

Q. That is the $2.50 price?

A. One thousand set price on KMW and type H sensatherm.

Q. Now, I notice under the Quiet Heet Manufacturing Company for the year 1939 the letters "Spec.", indicating the word "special". Will you please explain the pricing or bracket structure for that company for the year 1939?

A. I find a letter here dated May 16, 1939 addressed to Mr. LaPidus:

2116 "We are returning herewith, signed acceptance of our contract proposal of May 5.

"You will note that we have changed the price of the Type KMW Pyratherm, constant ignition type, to $7.75 each net instead of $8.00 each net. This is in accordance with out conversation at the time of the writer's last visit to New York."

And this "special", I suppose it should be "X" instead of "special", apparently.

Q. Well, now, Mr. Owens—

A. You may have that if you wish.

Q. I understood that the "X" had to do with both thermostat prices and pyrotherms, whereas the letter of May 16, 1939 to Quiet Heet has only to do with the KMW pyrotherm.

Mr. Freeman: Let the record show that Mr. Owens is going to check to determine whether or not "special" in connection with Quiet Heet has to do with the same prices given to Cleveland Steel and Herco.

The Witness: That is right.

Mr. Freeman: Both as to thermostats and pyrotherms.

The Witness: Yes.

Mr. Freeman: We offer in evidence as respondent's exhibit 154 carbon copy of letter to Quiet Heet Manufacturing Corporation dated May 16, 1939.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

2117 Trial Examiner Sheppard: Let the exhibit be marked and accepted.

(The document referred to was marked RESPONDENT'S EXHIBIT 154 and was received in evidence.)

Trial Examiner Sheppard: We will take a little recess, gentlemen.

(Whereupon a short recess was had.)

Trial Examiner Sheppard: All right, on the record, gentlemen.

By Mr. Freeman:

Q. Now, Mr. Owens, do you have your pricing structure, that is, brackets, prices, quantities, and so forth, for the year 1940 and, if so, will you produce them?

A. The bracket structure runs SB-1, which states: "On a blanket order covering 100 or more sets of primary controls and thermostats, with definite dates for shipment throughout the year, specified on the order, we will extend the following special net prices:

"Type JM Pyratherm.....$8.70 Ea. Net
Type JMI Pyratherm..... 9.20 Ea. Net
Type H Sensatherm..... 2.85 Ea. Net."

Q. And, Mr. Owens, attached to the letter dated January 10, 1940 that you just referred to is a manufacturers' purchase contract likewise marked "SB-1", is that correct?

A. Yes.

2118 Mr. Freeman: We offer in evidence as respondent's exhibit 155 the letter dated January 10, 1940 and as respondent's exhibit 156 the form contract attached thereto.

Trial Examiner Sheppard: Any objection to exhibits 155 and 156, Mr. Haycraft?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let those two exhibits be marked and accepted into evidence.

(The documents referred to were marked RESPONDENT'S EXHIBITS 155 and 156 and were received in evidence.)

The Witness: The No. 2 oil burner contract, the No. 2 bracket is entitled, "MB-2" covering 300 or more sets of primary controls and thermostats, with definite dates for shipment throughout the year specified on the order, we will extend the following special net prices:

"Type JM Pyratherm.....$8.25 Ea. Net.
Type JMI Pyratherm..... 8.75 Ea. Net
Type H. Sensatherm..... 2.70 Ea. Net."

And attached herewith is the form of contract used for the MB-2 bracket.

Mr. Freeman: We offer in evidence as respondent's exhibit 157 the letter dated January 10, 1940 referred to by the witness as MB-2 and as respondent's exhibit 158 the contract dated January 10, 1940, which contract, incidentally, is an executed agreement dated January 10,
2119 1940 with the Acme Tool & Gauge Company of Providence, Rhode Island.

Trial Examiner Sheppard: All right. Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let the exhibits be marked and accepted.

(The documents referred to were marked RESPONDENT'S EXHIBITS 157 and 158 and were received in evidence.)

The Witness: Oil burner contract No. 3, referred to as LB-3, "with blanket order covering 1000 or more sets of primary controls and thermostats, with definite dates for shipment throughout the year, specified on the order, we will extend the following special net prices:

"Type JM Pyratherm.....$7.75 Ea. Net
Type JMI Pyratherm..... 8.25 Ea. Net
Type H Sensatherm..... 2.50 Ea. Net."

The standard form of LB-3 contract is attached herewith, showing the existing prices where blanket order is not placed at the time of signing contract.

Mr. Freeman: We offer in evidence as respondent's exhibit 159 the letter dated January 10, 1940 referred to by the witness as LB-3 and the agreement attached thereto as respondent's exhibit 160 for the year 1940, disclosing price list of form No. LB-3.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

2120 (The documents referred to were marked RESPONDENT'S EXHIBITS 159 and 160 and were received in evidence.)

By Mr. Freeman:

Q. Before we get too far, Mr. Owens, I note that these letters that you have here given me, particularly respondent's exhibits 157 and 159, that the numeral "100" in typing or mimeograph has been changed to "300" on respondent's exhibit 157 and to "1000" in lieu of "100" on

respondent's exhibit 159. Now, I would like to get the facts with respect to what was necessary in order to get the particular prices specified on respondent's exhibits 157 and 159.

A. The contract as submitted on LB-3 showed net prices of $8.25 on the JM pyratherm, $8.75 on the type JMI and $2.70 on the sensatherm. If at the time the contract was signed and returned that was accompanied with a blanket order covering a thousand or more sets of primary controls, the special net prices referred to before would then apply.

Mr. Haycraft: Referred to in exhibit 159?

The Witness: Yes.

By Mr. Freeman:

Q. And I take it your explanation with respect to the thousand or more sets on LB-3 applies equally as well to MB-1, respondent's exhibit 157, where the printed number "100" has been changed to a number "300"?

A. That was a stenographic error in both cases, where the numbers have been changed.

2121 Q. Then you are stating as a fact that as a condition for the prices scheduled in respondent's exhibits 157 and 159 it was 300 for 157 and 1,000 for 159?

A. That is correct.

Q. Now, will you proceed with the other forms?

A. In the list where we refer to LB-3 special, the only difference between that and the LB-3 letter is that there was no letter sent out and the prices were offered without asking for the blanket order. A, B, C is one there and there is the contract.

Mr. Freeman: We will offer in evidence as respondent's exhibit 161 an agreement referred to by the witness as LB-3 special for the year 1940, the particular exhibit being an executed contract with the Automatic Burner Corporation of Chicago, Illinois.

Trial Examiner Sheppard: Any objection to that?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted and marked.

(The document referred to was marked RESPONDENT'S EXHIBIT 161 and received in evidence.)

By Mr. Freeman:

Q. Now, Mr. Owens, have you given me all of the pricing structures for the year 1940?

A. I have one more here that we submitted to 2122 furnace manufacturers, referred to as FR-1.

Mr. Haycraft: May I ask a question on that?

Trial Examiner Sheppard: Yes.

Mr. Haycraft: Was that furnished to any of the people on this list?

The Witness: Hall-Neal I believe are on that list, Mr. Haycraft.

Mr. Freeman: We offer in evidence as respondent's exhibit 162 Mercoid's manufacturers' purchase contract form FR-1.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted and marked.

(The document above referred to was marked RESPONDENT'S EXHIBIT 162 and was received in evidence.)

By Mr. Freeman:

Q. Might I ask, Mr. Owens, if in connection with furnace manufacturers you had any forms 2 and 3, that is, bracket structures or price structures?

A. No.

Q. Then so far as furnace manufacturers, the prices set forth in respondent's exhibit 162 are as shown on form 1?

A. Fr-1.

Q. Now, does that conclude your pricing structure 2123 information that you have produced with respect to the year 1940?

A. To the best of my knowledge.

Q. All right. Now, Mr. Owens, will you turn to the year 1941 and give us all the information you have with respect to brackets, pricing structure and contracts for that year, with any explanations that you want to make as to any special accounts or special circumstances?

A. Well, to start with, in 1941 we discontinued contracts but we did send out price schedules and they required no acceptance signature either on the part of the customer or on our part. We merely sent them the prices designated in their brackets and I have here SB-1 and in 1941 you will find on the list of the various companies the prices that we submitted shown here. SB-1, MB-2, LB-X, Special-2 and LB-XX. There were several letter changes made that year.

that you will probably come to as you go down the line in checking your 1941 prices.

Mr. Freeman: We offer in evidence as respondent's exhibit 163 SB-1 for the year 1941; as respondent's exhibit 164 MB-2 for the year 1941; as respondent's exhibit 165 LB-X for the year 1941; as respondent's exhibit 166 Special-2 for the year 1941; and as respondent's exhibit 167 LB-XX for the year 1941.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: As I understand it, these were not contracts. What are they? What do you call them, Mr.
2124 Owens,—letters?

The Witness: Well, they would be quotations.

Mr. Haycraft: Quotation letters?

The Witness: Or price schedules.

By Mr. Freeman:

Q. With the terms and conditions under which sales were to be made?

A. That is right.

Q. And the prices at which the company was to purchase the product?

A. That is correct.

Mr. Haycraft: That is my understanding.

Trial Examiner Sheppard: All right. We will accept the exhibits offered into evidence, Nos. 163 to 167, inclusive.

(The documents referred to were marked RESPONDENT'S EXHIBITS NOS. 163 to 167, inclusive and were received in evidence.)

By Mr. Freeman:

Q. Now, Mr. Owens, I note that exhibits 163 to 167, inclusive, which you have referred to by various designations do not of themselves specify quantities and yet you said you sent out the particular one to a particular customer. Will you please explain so that we may know who was entitled to SB-1 and who was entitled to LB-X or LB-XX or what basis Mercoid used in the pricing structure?

2125 Mr. Haycraft: May I inquire, Mr. Examiner, of counsel, whether exhibit 152, does that set forth the various designations? Is that exhibit 152 that long list?

Mr. Freeman: Yes; this is off the record.

Mr. Haycraft: All right.

(Discussion outside the record.)

Trial Examiner Sheppard: On the record.

The Witness: I will answer it to this extent, that where we have given this information before in connection with contracts submitted I have prefaced "1941" with the remark that we were not submitting contracts in that year but, we were sending out price schedules or quotations and I don't believe that there is anything in the subpoena that asked us to say how we set up the price that we quoted any particular customer. Now, that might be one of the things that we argued about and while we have volunteered the information in connection with contracts submitted, I don't believe that it is going to be necessary for me to sit here and say how we determined so and so's price or so and so's prices. We have told you what prices we have quoted to the different companies.

Mr. Haycraft: Isn't all that they are entitled to, Mr. Examiner, under the subpoena or even under the issue in this case what the price was, not how they arrived at it? If he has fully disclosed what the prices were to these various accounts it seems to me that is all they are

2126 entitled to.

Mr. Freeman: I want to know what the prices were to these various accounts.

Mr. Haycraft: Well, he has told you that.

Trial Examiner Sheppard: Isn't that on that exhibit 152?

Mr. Haycraft: That is shown there.

Mr. Freeman: And I think we are entitled to know the quantity which entitled the customer to that particular price. Price doesn't mean anything of itself unless you know how many you had to buy in order to get that price.

Trial Examiner Sheppard: Well, whatever that price was,—I mean whatever the quantity was it was based upon the price that appears in that respondent's exhibit 152.

Mr. Freeman: Well, if Mr. Owens will tell us what the quantities were, that is all we want to know.

Trial Examiner Sheppard: Well, Mr. Owens, can you help us out on that in any way?

Mr. Haycraft: I am objecting to it as irrelevant and immaterial. I don't think it amounts to anything.

Trial Examiner Sheppard: I agree with you that it doesn't amount to anything, but if Mr. Freeman wants it and Mr. Owens can give it to us, maybe it will be important and maybe it will not be.

Mr. Freeman: Mr. Examiner, when you talk about
2127 like quantity or like price, and so forth, as called for in the Robinson-Patman Act, how do you expect us to meet competition if competition may sell one control at a low price when we may have to sell half controls in order to get that price? Don't you think it is important that we know how many you have to buy in order to entitle you to that price? And, obviously, the very fact that they have these various forms, LB-X and LB-XX and MB-Special, there is some place where there is a breaking point or where the company goes out of one price into another price.

We would like to know those prices and prices by themselves, in the absence of quantity, is just knowing half of the answer.

Trial Examiner Sheppard: Well, will Mr. Owens give us that if he has it at hand and if it is important, as you seem to think it is, why, we can have it with us.

The Witness: Mr. Freeman's opening remarks indicated that we were going to live up to the terms of that subpoena. We have tried to do that. Now, we have gone beyond it voluntarily, as I remarked before, but I believe that a study of the bracket, of the various quotations here made to different oil burner companies would really show the method used in extending these prices without trying to bring it down to any hard and fast rule. The previous years for the same companies would pretty clearly
2128 indicate why each one received the quotation he has for that particular year. Now, I don't believe that I care to go further than that, Mr. Examiner.

Trial Examiner Sheppard: In other words, the comparison with 1941 is about the same as the others?

The Witness: With 1940, yes, sir.

Trial Examiner Sheppard: I think that would be sufficient.

Mr. Freeman: Well, now, Mr. Owens, you prefaced your remarks by saying that during 1941 your company did not enter into any contracts and, therefore, that was not called for in the subpoena.

The Witness: No, I didn't say that.

Mr. Freeman: Well, I understood that—

The Witness: No, I didn't say that. Read back, will you please, what I said?

Mr. Freeman: All right.

(Record read.)

Q. Now, will you give me the bracket structure in quantities for the year 1939 and 1940 where you did have contracts with companies? Will you give us the quantities there?

A. Where?

Q. For the years 1939 and 1940.

Mr. Haycraft: He has already done that.

Mr. Freeman: No, he has not.

2129 Mr. Gilpatric: We have got it for 1938 and 1937; nothing for 1939 and 1940.

Mr. Haycraft: I thought you put that in there, if you took a thousand you got so many.

Mr. Gilpatric: Those were only minimum order requirements.

The Witness: That is the way the price was set up, on the basis of the size of the order. If they did not place a minimum order they got one price. Maybe you didn't look in here. Now, here: There is your price if they placed an order for a hundred. Your price is higher if there is no order placed at the time they sent in the contract.

Mr. Freeman: That is SB-1.

The Witness: Well, the quantities are filled in there. Now, we had no particular setup, I don't believe, in 1941, but as I remarked before, you can get a pretty good guide as to the price schedules, the different price schedules.

Trial Examiner Sheppard: By comparing 1940 with preceding years?

The Witness: By comparing 1941 with 1939 and 1940. I think you have got it all there.

Mr. Freeman: So that the record is straight, let us take 1939, when there wasn't any condition as to the quantity originally purchased, or at least no testimony in

2130 the record so far and I find that the prices for the KMW on B-11 is $9.00.

Mr. Haycraft: What exhibit, Mr. Freeman?

Mr. Freeman: Respondent's exhibit 153.

Q. And on the form B-22, respondent's exhibit 153-B, the prices for the same instrument, KMW, is $8.50 and on respondent's exhibit 153-C the price for the same instrument is $8.25; on respondent's exhibit 153-D the price for the same instrument is $8.00.

Now, what I would like to get from you, what quantities were necessary in order to get all the variable prices? There has been nothing in the record as yet with respect

to any quantities or any conditions imposed by Mercoid upon customers in order to obtain those prices.

A. You mean for 1939?

Q. I am speaking for 1939. I am referring specifically to respondent's exhibits 153-A to 153-D, inclusive.

A. I don't have that information.

Trial Examiner Sheppard: Could you get that for us, Mr. Owens? Write me about it. It will save you a trip.

The Witness: If Mr. Freeman will include that in his memorandum of things to get, I will see if I can locate that.

Trial Examiner Sheppard: Just get me a memorandum.

Mr. Freeman: Let the record show that the wit-
2131 ness will obtain with respect to the year 1939 the quantities for the various brackets referred to in forms B-11, B-22, B-33 and B-44.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Mr. Owens, I note that your year 1939 with respect to 11, 22, 33 and 44 follows the year 1938. Did you happen to have a 55 form in the year 1939, or do you know?

A. Is there any on this list here where we quoted 55?

Mr. Gilpatric: Yes, Williams.

The Witness: How was that?

Mr. Gilpatric: Williams.

The Witness: Williams Oil-O-Matic?

Mr. Gilpatric: Yes.

Mr. Freeman: Yes.

The Witness: What year is that,—1939?

Mr. Gilpatric: Yes, 1939.

The Witness: You will have to add that to the other memoranda.

Mr. Freeman: All right, let the record show that the witness will produce form B-55 for the year 1939 and the preceding request with respect to quantities for that particular B-55 will also apply.

Trial Examiner Sheppard: All right.

Mr. Freeman: Now, can we have the same under-
2132 standing with you, Mr. Owens, with respect to the year 1940, where you actually had contracts, as to the quantity necessary in order to obtain a contract SB-1 or a contract MB-2 and the others which you have furnished in connection with the year 1940,—quantities? You see, Mr. Owens, you first explained that the letters and the quantities initially ordered determined the price.

A. Yes.

Q. Now, that determines a special price different from the contract price, whereas the contracts themselves for the year 1940, such as form SB-2, specifies $9.20 for the JM pyratherm, whereas the form MB-2 specifies a price of $8.70 and form LB-3 specifies a price of $8.25 and LB-3 special specifies a price of $7.75.

A. Well, these contracts all have—that are attached, I believe they all have the quantity filled in.

Q. No.

A. This one is filled in and this one, so evidently that is for a thousand.

Q. When you say "evidently that is for a thousand"—

A. Here we are.

Q. Just a minute, just so the record is clear. When you say "evidently that is for a thousand", you were referring to respondent's exhibit 156, which is the agreement with Citro Oil Burner Corporation, is that correct?

2133 A. That is correct, or SB-1.

Q. And under MB-2 the agreement is with Acme Tool & Gauge Corporation?

A. Yes.

Q. And the quantity therein specified is 5,000 units, is that correct?

A. That is correct.

Q. Respondent's exhibit 158. Now, with respect to LB-3 and particularly respondent's exhibit 160, the number of units is left in blank?

A. That is no particular contract. It is a sample of a contract.

Q. Well, what I would still like to know then is the quantity that is necessary for the purchaser to entitle the prices therein specified?

A. Well, there it is.

Trial Examiner Sheppard: Mr. Owens will get that if he can furnish it.

By Mr. Freeman:

Q. And I notice on the LB-3 special, the Automatic Burner Corporation contract for the year 1940, respondent's exhibit 161, the quantity is specified as 15,000.

A. I believe that takes care of the various brackets.

Q. Well, it still does not take care of LB-3.

A. LB-3 and that special, didn't we explain the 2134 difference there before?

Q. No. Mr. Owens—

A. The difference between the LB-3 and the LB-3 special is that we did not send a letter out with the special. They are both the same except that a letter did not accompany the LB-3 special, but where an LB-3 was sent out a letter accompanied that price schedule offering those the LB-3 special price, but they had to place an order for a thousand sets of controls in order to obtain it. We explained all that before and it is in the record.

Q. Well, then, Mr. Owens, am I to understand, so that the record is clear, that in order to obtain the prices of SB-1 you had to enter into a contract for a thousand units?

A. You had to place an order for a thousand units in order to get that price.

Trial Examiner Sheppard: That is my understanding of that.

Mr. Freeman: Well, if it is your understanding, Major, it does not reconcile with the statement here because they could have received a price of $8.70 if they only ordered 100 sets, whereas the price for a thousand, if your understanding is correct, the price would be $9.20. Now, that doesn't make good sense and I would like to get an explanation as to what entitled the man to a $9.20 price. Obviously, he wouldn't have to buy ten times more to pay fifty cents more per control.

2135 Trial Examiner Sheppard: My understanding is that he would have to buy at least a thousand to get that particular price on that particular date.

The Witness: And only a hundred; to place an order for a hundred or more sets to secure the other price referred to.

By Mr. Freeman:

Q. And the other price referred to is fifty cents less than the other price, correct?

A. I will have to check that.

Q. For the JM pyratherm.

A. It is 95 cents difference in price.

Q. Well, Mr. Owens, I am going to limit my question to respondent's exhibit 155 and respondent's exhibit 156. You have said that a blanket order covering 100 or more sets of primary controls and thermostats, the price for the pyratherm would be $8.70, is that correct?

A. That is correct.

Q. Now, the contract which is attached there to, SB-1, which specifies a thousand units—

A. May I read that, please?

Q. —specifies a price of $9.20, does it not?

A. May I read that, please?

Q. Certainly, but you can answer my question.

A. It reads: "The special net prices extended herewith by the company are based on the purchaser's 1940 control requirements, estimated to be 1,000 units."

2136

This other price covering a hundred sets covers an actual order and it is sort of a bonus for placing an order for that n...ty sets. On the other hand, if we submit these prices to a customer and he signs a contract, it becomes binding. If he only buys one control from us, then the prices shown here are 50 cents higher.

Q. And "by the prices shown here" you refer to respondent's exhibit 156?

A. And this one thousand that you are harping on or keep talking about is, as it says here, based on the purchaser's 1940 control requirements, estimated to be 1,000.

Q. So that the purchaser's requirements of 1,000 or more in the year 1940 entitled the customer to a respondent's exhibit 156 type of contract, is that correct?

A. Yes.

Q. And if that same customer, however, gave you an order for shipment of a hundred or more he received a better price than—

A. He automatically would get a better price.

Q. Now, in connection with respondent's exhibit 158, then, if the customer's requirements of all controls or potential, as we sometimes refer to it, for the year 1940 was 5,000 or more, he paid for controls at the prices specified on the form MB-2, is that correct?

2137

A. That is correct.

Q. However, if that same customer bought 300 or more sets of controls, that is, bought sets of primary and the thermostat, he then obtained the preferential or better price?

A. Fifty cents better price.

Q. As specified on the letter?

A. Yes.

Q. And, likewise, for form LB-3 you have said the quantity was the same as LB-3 special and that amount would be 15,000 units?

A. That is right.

Q. Thereupon that company would receive the price specified on form LB-3, is that correct?

A. That is correct.

Trial Examiner Sheppard: What is that exhibit number?

Mr. Freeman: Referring specifically to respondent's exhibit 160.

Q. And I take it if the same customer who signed the contract of the kind illustrated in respondent's exhibit 160 had placed an order for a thousand or more sets with definite dates for shipment he would then receive the better prices disclosed on respondent's exhibit 159, is that correct?

A. That is correct.

2138 Q. So that in connection with the year 1940 the bracket structure with respect to requirements or potential of a customer was set at 1,000 units on bracket 1 or SB-1, 5,000 units bracket 2 and 15,000 units bracket 3; is that correct?

A. That is correct.

Q. Now, can you tell me whether or not during the year 1940 you had any other contracts,—or, rather, whether or not during the year 1940 you had any other brackets according to potential, that is, other than the thousand, 5,000 and 15,000 units?

A. I couldn't tell you that, but how about referring you to the names of the customers?

Trial Examiner Sheppard: That is on exhibit number?

The Witness: On exhibit R-152-A, to determine if there are any listed that are not included in this bunch here and I will try to explain them as you pick them out.

Mr. Freeman: No, I was asking as a question whether or not you had any other bracket price structure based upon the company's requirements, other than these three that you have specified?

Mr. Haycraft: I object to that question unless it is confined to those concerns listed on exhibit 152.

Trial Examiner Sheppard: Make your answer with reference to that.

Mr. Freeman: I don't think we are limited to these 88 companies. This man is called as a witness. He
2139 can tell me whether or not,—of course, if he doesn't want to answer he doesn't have to, obviously.

Mr. Haycraft: It is irrelevant and immaterial.

Mr. Freeman: We are not limited only to questions called for by documents.

Trial Examiner Sheppard: I told you gentlemen I was going to let you go into that other if you want to, but it will have to first be established whether Mr. Owens has those customers, because if he did not there is, of course, no materiality.

Mr. Freeman: I would still like to know whether or not he had any other bracket arrangements other than those three that you have here produced for the year 1940.

Mr. Haycraft: Regardless of counsel's curiosity in the matter he is not entitled to have it, Mr. Examiner, and I object to the form of the question.

The Witness: As a matter of fact, I brought along all of the prices that I thought we had for that year without even comparing it to that sheet. Now, if there is something else shown in that list sheet, in that list of names that does not appear here, I will try to dig it out and explain it. I don't know that we have any more. As far as I know we haven't anything else.

By Mr. Freeman:

Q. Now, Mr. Owens, I am wondering if we might
2140 ask you in connection with the year 1941, where you had no contracts in operation, as to whether or not during that year 1941 you used the same quantity potential in determining your brackets or where a customer fell into in order to get a price, and I note that in connection with exhibit 152 that most of the companies for 1941 have the same kind of a notation as for 1940.

A. Well, frankly, I don't know how they were determined other than we followed a similar price setup or quotation setup as we had in previous years but sent out price schedules instead of contracts.

Q. Do you know whether in 1940 you sent out any letters where you gave prices better than those referred to in MB-1 or SB-1, where companies ordered a hundred sets or 300 sets or 500 sets initially?

A. Let us go down the line here and any that are marked "Special" I will be glad to explain what those prices were for.

Trial Examiner Sheppard: 152 ought to show anything special.

By Mr. Freeman:

Q. May I then ask you with respect to Acme Tool & Gauge Company for the year 1941, marked "LB-X", what that "X" refers to?

A. Well, let us get out the 1941 price set up and 2141 look at it.

Mr. Haycraft: LB-X is in an exhibit in evidence,—exhibit 165.

The Witness: There you are, sir.

By Mr. Freeman:

Q. I notice in connection with General Oil Heating Corporation for the year 1940 they had form LB-3 and for the year 1941 they had the form LB-X. Can you tell me the difference?

A. Well, let us get out LB-3 for 1940 and LB-X for 1941 and you can see the difference. That is the same price except the difference in the sensatherm.

Q. When you say "same price" you are now referring to the letter of January 10, 1940?

A. That is right.

Q. Conditioned upon an order for a thousand sets?

A. That is right.

Q. And if the price there for the JM pyratherm was $7.75, on the LB-X for 1941 the price was $7.75 or the same thing?

A. That is correct, except the sensatherm.

Q. Now, will you tell me whether or not a condition of ordering a thousand sets or more at one time was the same on LB-X for 1941 as it was on respondent's exhibit 159, which you have referred to as LB-3 for the year 1940?

A. I could only estimate that. I don't really know.

Q. Well, could we find out and get an answer as 2142 to that? Then we will have the information with respect to the year 1941.

Mr. Haycraft: I object to that, Mr. Examiner, as irrelevant and immaterial.

Mr. Freeman: This witness has already testified that the prices were the same. Now I want to know whether or not the conditions were the same.

Mr. Haycraft: I say it doesn't make any difference whether the conditions were the same or not. The prices were the same.

Trial Examiner Sheppard: If Mr. Freeman wants that

and Mr. Owens can get it, I will let you do it. That will remove all doubt on both sides. You can write me a letter on it and I will put it in with rest of the information that you are going to get.

The Witness: I don't really know how that was set up. I didn't handle the sending out of those prices at the time.

Trial Examiner Sheppard: Well, as I say, I am going to leave it up to you to give us the best information on that that you can.

By Mr. Freeman:

Q. Mr. Owens, you made a remark a minute or two ago that there were a lot of specials or changes made in connection with pricings, I believe, for the year 1941 and I will ask you to refer to any documents that you have
2143 here that are directed to any price changes where there were differences over and above these forms which you have already submitted.

A. Well, wouldn't that show it? You could go down the line here and where you don't have a copy to match up with this here it would indicate what that price setup was.

Trial Examiner Sheppard: That is exhibit 152?

The Witness: I notice that all those price changes are in there and any other change that was made was in the way of an increase during the year.

By Mr. Freeman:

Q. May I ask whether or not in the year 1941 your company gave a combined or set price better than the price made up from the two separate units?

A. I am sure we did not.

Q. How about 1939?

A. If it doesn't show here we didn't do it.

Q. In 1937 your company did follow the practice where a thermostat and a primary were purchased at the same time they got a better price than the individual units, is that correct?

A. I believe that is indicated in some of that early pricing.

Q. Can you tell me whether or not that practice or procedure was discontinued after 1937?

A. I am quite sure that it was. We had a change
2144 in management in 1938 and there were quite a few changes made along the line and I believe that we changed some of our pricing policies at that time.

Q. So that I can take the given price for a KMI and a sensatherm and thus get what is the equivalent of a set price?

A. Dating from 1938 on.

Q. Correct. In accordance with these pricing sheets that you have given me, is that correct?

A. I believe that is right because you have got all the information right here in connection with prices and method of offering for sale the various Mercoid controls to the oil burner trade.

Trial Examiner Sheppard: That is from 1937 to 1941?

The Witness: From 1938 on.

Trial Examiner Sheppard: 1938 on?

The Witness: Or 1939, really, because 1938 prices had gone in before this change took place.

By Mr. Freeman:

Q. Can you tell us whether or not Acme Tool & Gauge Company availed itself of the $8.25 price in 1940 for a JM or the $8.70 price in accordance with the contract, do you know?

A. You mean you are asking me if we sold them that year?

Q. Yes.

A. I don't believe that was included in the arrange-
2145 ment. I have a memorandum, though, that I could tell you approximately, more or less in round figures on that particular account. What year did you ask about?

Q. I was asking about 1940. I will take the same information for 1937, 1938, 1939, 1940 and 1941.

A. You are asking about 1940?

Q. I am asking about 1940, yes, first.

A. Well, in 1940 they did buy about $2100 of controls.

Trial Examiner Sheppard: How much?

The Witness: About $2100 worth. That would be over a thousand sets.

Trial Examiner Sheppard: Yes.

The Witness: No, that would only be about—based on the set prices there what was the total for a set? It would only be about 150 sets, so apparently they did not.

By Mr. Freeman:

Q. When you say "apparently they did not" you mean they never availed themselves of this so-called 300 price that was lower than the contract price where the potential was 5,000 units?

A. That would be my guess on it.

Q. I am wondering if you can give me the low price at which you sold controls in the year 1940 and I am talking about the KMI or the KM with the type H sensatherm for that year.

A. For 1940?

Q. Yes, to the Acme Tool & Gauge Company.

2146 A. Whether we sold them at the special price or the—

Q. No, I don't care whether you billed any of these firms or not. What I would like to know is what was the lowest price at which you sold to that company the KM or the KMI.

A. JM. We didn't have a KM.

Q. JM. They are the same, are they not, the JM and the KM?

A. No, they are not. They do the same. They are different. They do the same but they are different controls. The KM has been discontinued.

Q. And superseded by model JM?

A. Yes.

Q. They are both stack switches, both primaries?

A. Yes. I couldn't tell you, Mr. Freeman, what price they were billed because I don't even know if they placed the order for the 300.

Q. Well, would the Acme agreement for the year 1940 show the price at which controls were sold to that company?

A. The Acme agreement?

Q. Yes.

A. Not any more than given here.

Q. Well, then, how could we find out, and since you have here prefaced this with special, or produced a special letter which provides for a special price and an agreement which provides for still another price, how can we find out what was the low billing of a set of controls to that

2147 company for the year 1940?

A. Well, the only way I could find out would be to check the records and the invoices.

Q. Would you do that and let us have that information with respect to Acme?

A. If there is no objection to it I will.

Trial Examiner Sheppard: Yes, you can include that in your letter.

Mr. Freeman: There may be a few more as we go along,

I don't know right now and we don't want to make Mr. Owens any more work than is absolutely necessary.

Trial Examiner Sheppard: No.

Mr. Freeman: There is certain of this information, obviously, that we should have because we now have an answer saying, "We don't know whether we sold at one price or another price" and obviously they do not buy 300 sets of controls if the total billing was around $2,000.

A. That is right. That is what I said. I assumed they paid the higher price.

Q. Now, could you tell me whether or not Citro received the price of $9.20 for a JM pyrotherm as set forth in respondent's exhibit 156 or availed itself of the price set forth in respondent's exhibit 155, and again the year 1940?

A. The answer is no, they did not avail themselves of it. As a matter of fact, they did not buy any
2148 controls. I think your records indicate that there were no purchases. No investigation necessary on that one. I have got a record here on that. There are no purchases by Citro.

Q. Although you did enter into a contract with them for that year?

A. If it was signed, but we got no business out of it.

Q. By the way, do you know when you signed up that contract on January 10, 1940 whether or not Minneapolis-Honeywell had a contract with the company for the year 1940 prior to the time you signed up your contract?

A. I wouldn't know that.

Q. You personally sign a good many of the contracts with your customers, is that correct, Mr. Owens?

A. Well, at that particular time Mr. Holland acted as sales manager and he did most of it.

Q. Did you solicit contracts? When you called on the trade a good bit did you personally solicit contracts or did they all go out through the mail?

A. Well, it was handled both ways.

Q. You personally handled some of it?

A. I might have, yes.

Q. Well, now, did your company make any effort to determine when you submitted a contract to manufacturers whether or not that manufacturer already had a contract with Minneapolis-Honeywell?

2149 A. There wouldn't be any way, as far as I know, how that could be found out.

Q. You submitted your contracts and you accepted contracts, as you did from Citro Oil Burner in the year 1940, not knowing whether Honeywell had a contract with that company for the year 1940 or not, is that correct?

A. That is correct.

Q. And your company did not make any special investigation to determine whether an oil burner manufacturer had already signed up with one of your competitors, before you submitted your contract?

Mr. Haycraft: I object to that as immaterial.

Mr. Freeman: I think it is very material, your Honor.

Trial Examiner Sheppard: All right, Mr. Owens, can you tell us that?

Mr. Haycraft: He has already answered it once.

Mr. Freeman: He has answered it with respect to one company and I am now asking whether his company made it a practice?

Mr. Haycraft: Mr. Examiner, I would like to have counsel indicate to the Trial Examiner on what basis is that relevant to the issues in this case as to whether or not this witness, who is not a respondent and not on trial in this case, his company is not on trial in this case,

2150 —whether or not he took certain steps to find out whether the Minneapolis-Honeywell Company had a contract with a customer.

Now, the only possible effect it would have would be was he trying to breach a contract of Minneapolis-Honeywell, that is the only possible thing that could be brought out by that question. Minneapolis-Honeywell is on trial for entering into certain types of contracts with certain clauses in them. Where in the world can a question of this kind have any relevancy to the issues in this case?

Trial Examiner Sheppard: I think it is just a question which goes to the entire setup of the whole proposition.

Mr. Freeman: That is true.

Mr. Haycraft: With everybody, the practice of entering into contracts.

Trial Examiner Sheppard: That is the only reason that I can see.

Mr. Freeman: We have been charged with entering into contracts and because of those contracts other people could not get business.

Trial Examiner Sheppard: I don't want to take any time now to argue the question. I want to ask Mr. Owens to give us that information and pass on to something else,

if he remembers it. He says he don't know and I expect that that applies to you clearly because these companies and their customers enter into contracts every year
2151 with each other and sometimes it gets on the grapevine and they know about it and sometimes they do not. What difference does it make one way or the other? But if you gentlemen want that, I am going to let him tell you.

Mr. Freeman: Will you read the question?

(Question read.)

A. I don't believe that we have ever taken any steps in that direction any more than any of our other competitors. We just follow the usual procedure.

Q. And as a matter of fact, Mr. Owens, isn't it rather usual that an oil burner manufacturer may have contracts with two or three of the control manufacturers for the same year or for the same period?

A. I have known of cases where various control contracts were received in the mail maybe about the same time from the same customer and it would not be unusual for him to sign all of them and send them back. The smaller the customer the more apt he is to do that.

Q. And that customer then bought from either one of the control manufacturers or from one of the other control manufacturers in accordance with the contracts that he had with those companies, is that correct?

A. The smaller burner manufacturer would be the one that would do something like that, yes.

Trial Examiner Sheppard: All right, gentlemen,
2152 go ahead.

Mr. Freeman: Just off the record.

(Discussion outside the record.)

Trial Examiner Sheppard: On the record.

Mr. Freeman: I have an exhibit I would like to offer in connection with a statement made by counsel for Mercoid, particularly as to some arrangement or understanding or agreement as between the chief counsel of the Federal Trade Commission and Mercoid Corporation and I should like to offer in evidence as respondent's exhibit 168-A a letter from W. T. Kelley addressed to myself, dated June 9, 1944, and as respondent's exhibit 168-B a copy of a letter from W. T. Kelley to William F. Dinnen, attorney in charge of the Federal Trade Commission here in Chicago, dated June 9, 1944.

Trial Examiner Sheppard: All right, these will be accepted for the information of all concerned.

(The documents referred to were marked RESPONDENT'S EXHIBITS 168-A and 168-B and were received in evidence.)

Mr. Freeman: We would like also to offer as respondent's exhibit 169 a group of soft patents of the Mercoid Corporation having to do with its JM and JMI primary controls, as well as a group of patents having to do with its sensatherm room thermostat.

Trial Examiner Sheppard: Any objection to that?

Mr. Haycraft: I don't know anything about it.

2153 It hasn't been properly identified, it seems to me, Mr. Examiner.

Mr. Freeman: These soft copies, as I told you once before, are accepted in any court in the United States.

Trial Examiner Sheppard: I will take them for what they are worth for both of you to use.

Mr. Freeman: I might also say that these are the patent copies which are referred to in the Mercoid catalogues which the Federal Trade Commission introduced through the witness McCabe.

Trial Examiner Sheppard: I was going to say we have two or three of those catalogues already.

Mr. Haycraft: That may be true but I still say there hasn't been any proper foundation laid for that.

Mr. Freeman: We had the same argument with him once before with the patents owned by General Electric and he lost then on that and he ought to lose now.

Trial Examiner Sheppard: Wait a minute, Mr. Freeman. Was Mr. McCabe on the stand when one of those was mentioned?

Mr. Freeman: Yes.

Trial Examiner Sheppard: And this 169, is that an illustration of what he was speaking of?

Mr. Haycraft: If he stated so that would be a different thing, but he has no witness and he has no way of

2154 identifying this; simply an unsupported statement.

Trial Examiner Sheppard: That is the reason I am asking these questions. I thought that possibly this book of exhibits here, 169, was in reference to what Mr. McCabe was testifying about.

Mr. Haycraft: That may be, I don't know, but I still say they are not properly identified, there is no proper foundation laid.

Trial Examiner Sheppard: It is on that basis I have accepted it. If I am wrong you gentlemen will have to correct me.

Mr. Freeman: Let me explain that Mr. McCabe introduced a group of Mercoid catalogues, if you will recall, and those catalogues referred to certain patent numbers on the back page and I certainly have the right to produce copies of those patents which are referred to where Mercoid says, "We make our controls under the following patents" and I am asking Mr. Owens—you know that your catalogues actually do contain a patent notice stating that Mercoid controls are manufactured and sold under the following patents?

Mr. Haycraft: Let the Patent Office speak for itself on that.

Mr. Freeman: Well, then I can offer the patents and that is all I am doing.

Trial Examiner Sheppard: All right, Mr. Free-
2155 man. In order to expedite this matter I am going to accept that 169 for whatever use you want to make of it.

Mr. Freeman: O. K.

(The document referred to was marked RESPONDENT'S EXHIBIT 169 and was received in evidence.)

Trial Examiner Sheppard: Mr. Reporter, I have a matter here which I want to take up with you just for the record.

Mr. Haycraft: Are we going to let Mr. Owens go now?

Mr. Freeman: Yes, we are going to let him go now. Do you want to cross-examine him?

Mr. Haycraft: No, I will do that later.

Trial Examiner Sheppard: We are going to accept into the record now Commission's Exhibit 207-A and B, which was some information that I asked him to send to you, Mr. Freeman and you sent it on to me, I think, I think that is the way I got it, in reference to the tabulation of Penn Sales & Oil Burner controls, dated December the 2nd, 1943. You gentlemen remember that.

(The documents referred to were marked COMMISSION'S EXHIBITS 207-A and B and were received in evidence.)

Trial Examiner Sheppard: Mr. Owens, I am going to excuse you now and I want to thank you for coming down and I am going to adjourn this hearing today until September 7th.

Mr. Freeman: As far as he is concerned.

Trial Examiner Sheppard: As far as he is concerned.

2156 Mr. Freeman: We are going on Monday with some other witnesses.

Trial Examiner Sheppard: We will reconvene in this room at ten o'clock in the morning of September the 7th. And, Mr. Reporter, adjourn the hearing now at this hour to reconvene in this room at ten o'clock on Monday morning, July 24th.

(Whereupon, at 1:45 o'clock p. m., July 22, 1944, an adjournment was taken in the above-entitled matter until 10 o'clock a. m., Monday, July 24, 1944.)

2157

Room 1123,
New Postoffice Building,
Chicago, Illinois,
July 24, 1944.

Met, at 10 o'clock a. m., pursuant to adjournment.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Attorney for the Federal Trade Commission.

Cravath, Swaine & Moore, by R. L. Gilpatric, 15 Broad Street, New York, New York; and

Bair & Freeman, by Will Freeman, 135 South La Salle Street, Chicago, Illinois; appearing on behalf of respondent.

2158 Proceedings.

Trial Examiner Sheppard: Mr. Reporter, you can convene the hearing pursuant to the adjournment we had here on Saturday.

H. T. McANLY was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Sheppard: Please give us your full name.

A. H. T. McAnly.

Q. And your address, please, sir?

A. Business address?

Q. Yes.

A. 231 South La Salle.

Q. Chicago?

A. Chicago, yes, sir.

Q. You are, I believe, a representative of the firm of Ernst & Ernst?

A. That is right, sir.

By Mr. Gilpatric:

Q. You are a partner in the Ernst & Ernst firm, are you not, Mr. McAnly?

A. Yes, sir. I have been a partner since 1936 and 2159 associated with the firm since 1920.

Q. What, in general, are the types of service which your firm renders?

A. We have three related basic services,—auditing, tax counsel and special services.

Q. In which of these branches has your work fallen?

A. Practically all my time in the last twenty-four years has been devoted to the service we class as special, which is a broad outgrowth of our system and systematizing and cost accounting, covering all types of cost accounting applications, budgeting, production planning and other allied industrial accounting and engineering service.

Q. At the present time what are your particular duties in the firm?

A. Well, at the present time I have direct supervision over all of this special work, cost accounting, and so forth, in our nine mid-western offices, namely, Chicago, Milwaukee, St. Paul, Minneapolis, Indianapolis, Denver, St. Louis, Kansas City and Memphis and with two other partners exercise indirect supervision over the other thirty-six offices in the United States and Canada.

Q. And this supervision relates to the cost work and other special services that you have described?

A. Yes, sir, all of which is an outgrowth, a broad outgrowth of cost accounting.

2160 Q. Are you a certified public accountant, Mr. McAnly?

A. I have been a certified public accountant since 1923 by American Institute examination in the State of Indiana and subsequently have been granted certificates in Illinois, Iowa, Minnesota, Missouri and Wisconsin.

Q. Have you any connection with any accounting bodies or organizations other than your own firm?

A. Well, I am a member of the American Institute of Accountants, a charter member of the National Association of Cost Accountants, a member of the Illinois Society of Certified Public Accountants and a member of the Illinois Manufacturers Cost Association. I am also a member of the advisory committee on accounting at the College of Commerce and Business Administration at the University of Illinois and also a member of the advisory board of the International Accountants Society and co-author of their elective course in standard cost accounting.

Q. Have you written any other articles or made any other publications?

A. I have had a number of articles on cost accounting subjects which have appeared in the Comptroller, the official publication of the Comptrollers' Institute of America, the Journal of Accountancy, the official publication of the American Institute of Accountants, the American Management Association bulletins and other technical publications.

2161 Q. Have you ever addressed any of these bodies to which you have referred?

A. I have addressed various technical groups on various cost accounting subjects, including national and regional conventions of the Comptrollers' Institute of America, the American Institute of Accountants and the National Association of Cost Accountants and have also appeared before twenty-four meetings of local chapters of the National Association of Cost Accountants in various cities in the country.

Q. Has your firm served as the regular auditors for Minneapolis-Honeywell Regulator Company?

A. No, sir. Our firm is not the regular auditors of this company. However, in our special work we serve many companies that are not our own audit clients.

Q. Have you done any such special work for Minneapolis-Honeywell?

A. Well, about a year prior to this assignment we were called in to consult with the comptroller of the company on many of his accounting problems, particularly cost accounting, arising from the introduction of the war program in their plants.

Q. You referred to "this assignment". Do you mean the work that Minneapolis-Honeywell asked you to do in connection with the charges in this proceeding that Minneapolis-Honeywell has violated the Robinson-Patman Act?

2162 A. Yes, sir.

Q. And when did that assignment take place?

A. We were asked to conduct this investigation in May, 1943. So that this other work for this company dealing in cost problems started just about a year prior to that. I might add that more than twenty years ago I personally, as a representative of Ernst & Ernst, did install the accounting and cost system at the Honeywell Heating Specialties Company, which later became a part of this company.

Q. Well, other than the connections which you have just described, have you or your firm had any other relationships with the Minneapolis-Honeywell Regulator Company?

A. None except that I have continued and am today working with the company executives on many of their pricing problems in connection with the war effort as far as cost accounting is concerned.

Q. Now, will you describe in a general and brief way the nature of your engagement by Minneapolis-Honeywell for the investigation you made in connection with this proceeding?

A. Well, I believe that we covered that rather briefly and clearly in the introduction of our letter. We were asked during the month I mentioned to conduct an investigation for the purpose of developing factual data as to the cost differentials applying to the various brackets, price classification brackets of the oil burner manufacturers. At

2163 the same time we were requested to discuss this informally with a representative of the Commission, Mr. Warmack. This was done and in substance Mr. Warmack explained that they were only interested in developing facts and that by working with him as we proceeded in

this engagement, in discussions of principles we would probably save a lot of subsequent argument that so often results where two accounting minds attempt to get together.

We had the privilege of these informal discussions over an extended period and I am sure they were helpful to both sides. I believe the contents of this report as a result of these discussions represents, in general, a meeting of the minds of both parties. There may be some details that would have been approached differently but I think I am correct, if I understand the reactions of Mr. Warmack in some of these meetings with me or with my associates who did the detail work. I think I am correct.

Mr. Haycraft: I will object and move to strike the last part of the answer that indicates whether it was agreeable to Mr. Warmack or the Commission. That can be brought out later. Of course, the statement that they have attempted to comply is proper but I think the statement that he believes that he did is not proper.

Mr. Gilpatric: We are not offering this testimony to show that the Commission has accepted or is in agree-
2164 ment with this report.

Mr. Haycraft: I just want to protect myself on that.

Mr. Gilpatric: Surely, we understand that.

The Witness: My only thought, if I may say so, in mentioning this is to show you that we have tried to work out and get into agreement on many points that might be controversial at a later date.

Mr. Haycraft: That is my understanding also, Mr. Examiner.

Mr. Gilpatric: You are speaking principally of procedure?

The Witness: Procedure and method of approach, not figures. Mr. Warmack has not verified the figures.

Trial Examiner Sheppard: I think I will strike from the record any reference to Warmack being in agreement. Let him speak for himself on that and then let me and the Commission decide between the two.

Mr. Gilpatric: Mr. McAnly—

Trial Examiner Sheppard: By the way, Mr. McAnly, did you say you started that study in 1943 with reference to this matter?

The Witness: Yes, 1943 and I think our report is dated February 7th.

Trial Examiner Sheppard: Was that before the 2165 Commission's complaint?

Mr. Gilpatric: Oh, that was after. The Commission's complaint, I believe, was in February and their engagement began with Mr. McAnly in May.

Trial Examiner Sheppard: I just wanted to get the locale.

By Mr. Gilpatric:

Q. Mr. McAnly, was this work under your charge?

A. This work was conducted under my direction and my participation was much greater, relatively, than normally a partner of the firm would participate in a detailed study of this character; because of its special nature. As explained in the report, we used from four to eight field men who would gather this data, together with employes of the Minneapolis-Honeywell Company and then we would get together for a final review and discussion of principles and tabulations and so on. I, of course, did not do all the detail work; that is obvious.

Q. Will you tell us whether or not any restrictions or limitations were put upon you in this work by Minneapolis-Honeywell?

A. No. As in all cases where we are called upon to conduct an investigation and render an opinion, the scope of the examination must be left to our discretion. Of course, the scope may be modified, that is, the objectives may 2166 be modified but it is up to us to conduct a sufficient scope of examination to render our opinion and accept figures as factual.

Q. What about the methods and procedures which you used in your apportionment of costs in this case? Were they your own decisions or not?

A. Oh, all of the procedures that were developed to apportion operating costs are our own and, of course, they coincided with similar procedures that have been used for years in cost accounting.

Mr. Gilpatric: Will you mark this, please?

(The document referred to was marked Respondent's Exhibit 170 for identification.)

Q. Mr. McAnly, is this document, respondent's exhibit 170 for identification, which I hand you, the report which you made in the manner you have just described?

A. That is correct, yes, sir.

Mr. Gilpatric: Mr. Examiner, before offering this I

would like to make this brief statement, not as evidence but as simply showing the purpose of the offer.

Our position in this case is that in so far as Count 3 alleges a violation of the Robinson-Patman Act in that the price brackets constitutes discrimination, that that discrimination has not been shown to have any substantial effect or the likelihood of substantial effect on competition, either among oil burner manufacturers or between respond-
2167 ent and other control manufacturers. That is our first defense.

Our second defense is that even if these discriminations would otherwise exist, that to the extent the price brackets represent reductions in price they were made in good faith to meet competition. But in addition to those two grounds of defense the statute, of course, offers this third ground, namely, justification of differentials in price by differentials in cost, so that with that defense in mind respondent had made the study to which Mr. McAnly has referred and which I am about to offer.

Now, according to this report the overall difference between the highest price which Minneapolis-Honeywell charged to oil burner manufacturers and the lowest price is justified by differentials in cost. The report also apportions between brackets these costs up through bracket 3-A, so that out of the eight price brackets there is an apportionment between brackets in five of the eight cases.

As to the last three brackets, 4, 4-A and 5, the report does not apportion costs because, as it shows, when you use an inter-bracket apportionment you do not have enough costs when you get to bracket 4 to cover the difference in price between 4, 4-A and 5.

Now, as Mr. McAnly has pointed out, in approaching this study he attempted,—his firm attempted to follow in gen-
eral procedures and methods which would prove to be
2168 acceptable to the Commission. Whether they are or not we will hear. But in doing so there was excluded a number of costs which are not readily apportionable.

For example, there are manufacturing costs amounting to in this particular year,—1941 was selected because it was the most recent normal pre-war year of the company,—manufacturing costs of $7,665,000 were left out completely. There is no attempt made to treat those as variable costs whatever, in accordance with the different quantities purchased by different customers; and other costs, advertising

and general administrative and selling expense, amounting to over a million dollars, were excluded.

Now, in submitting a report on this basis we do not want to be taken as conceding that those costs cannot be apportioned. We admit that if we tried to apportion them we would probably run into differences of view with the Commission's accounting staff and we would also have considerable difficulty in arriving at a basis of apportionment that would perhaps be acceptable generally in the accounting profession, although our position is that many of these items of costs which were excluded do affect the price, the costs at which products, oil burner controls, are manufactured for sale to customers in different quantity brackets.

I just wanted to make it clear that while only a part of the costs in the particular year selected have been ap-
2169 portioned for this report, we do not admit, and neither do Ernst & Ernst, that these expenses are not affected by customer quantity differences.

We, therefore, offer in evidence Respondent's Exhibit 170.

Mr. Haycraft: May I ask a question of counsel as to his statement?

Trial Examiner Sheppard: Yes.

Mr. Haycraft: Do I take it, then, that there is no contention on your part that the differences in the lower brackets, that is, 4, 4-A and 5, are justified?

Mr. Gilpatric: Our position is that in so far as this report is concerned we do not establish or attempt to establish cost differentials between those brackets. We do say that the overall price difference between the discount bracket and bracket 5,—those are the top and bottom brackets—

Trial Examiner Sheppard: 4 and 5, between 4 and 5?

Mr. Gilpatric: No.

Mr. Haycraft: Between 1 and 5.

Mr. Gilpatric: Between 1 and 5. I say the overall, the price difference is justified by cost differentials, but by this report we do not try to establish and we do not establish that between brackets 4, 4-A and 5 there are cost differentials equal to the price differentials for the reasons that I have given, namely, we have excluded certain items of cost and we do not push the inquiry that far.

2170 Mr. Haycraft: I take it, then, from what you have said that you do not intend to go into any further discussion on the study of these costs which have been excluded, like manufacturing costs on products sold, and so on.

Mr. Gilpatric: No. As I have indicated, we are not relying solely, by any means, on this particular defense in answering the charges of this complaint.

Mr. Haycraft: Are you relying on this report?

Mr. Gilpatric: We are relying on this report in so far as it goes and we think it indicates within its four corners what we want to show in this case so far as cost differentials are concerned.

Mr. Haycraft: Is this report to supplement or to replace the one that you put in previously?

Mr. Gilpatric: Well, the report that we put in previously, the 1938 report so-called, about which Mr. Lockrae testified, was not offered by us to justify price differences in that year or in any other year.

Trial Examiner Sheppard: Was that exhibit 2?

Mr. Gilpatric: No, that is exhibit 124. We made clear at the time,—in fact, respondent did not want to offer that at all. We only offered certain conclusions from that to show the fact that we had attempted in good faith after the passage of the Robinson-Patman Act to check our price differences against the cost differences, but we never
2171 offered that as a defense in this case under Section 2(a) of the Act.

Trial Examiner Sheppard: Well, I take this proposed exhibit here to be a further study along that same line in greater detail, but rather supplementary, is that correct?

Mr. Gilpatric: No, the two are not the same thing at all.

Trial Examiner Sheppard: Aren't they?

Mr. Gilpatric: This is a report prepared by an independent firm of public accountants who, we think Mr. McAnly's testimony shows, are expert in this work, whereas the other report was prepared by Mr. Lockrae, who is a representative of the company and who is simply trying to find out for his own information and for that of the company in determining his future pricing policy what the—

Trial Examiner Sheppard: All right. That is what has been referred to heretofore as the cost study that you made, I understand.

Mr. Haycraft: What I am trying to find out, Mr. Examiner, is whether this is the report that they are going to use in defense, or are they going to use the other report to supplement this?

Mr. Gilpatric: No, this report and this is as far as we propose to go on this line.

Trial Examiner Sheppard: All right. Now, there
2172 is one question I want to ask you, Mr. McAnly. While you were making this study and investigation why weren't the matters of the cost that Mr. Gilpatric referred to,—why weren't they taken into consideration at that time,—advertising, and so forth? He said it represents approximately a million dollars.

The Witness: Well, let me explain this. To go back retroactively,—let us take the fixed item of those manufacturing costs: Due to the method of manufacture, to go back retroactively would require the existence of certain types of records which do not exist at the present time. Now, on page 5, if I may refer to the report, where we mentioned that, "No attempt has been made to measure the effect of these items," we make the statement which I think anyone would recognize, that:

"It is obvious that purchases made by large volume customers materially affect the manufacturing cost of products sold because of the economies possible in the purchase of increased quantities of raw materials and parts and the decrease in manufacturing labor and overhead costs due to increased efficiency resulting from larger production lots attendant with the leveling out of seasonal fluctuations in production. The relative size of production orders for stock is directly affected by the quantity contribution of the individual customer for whom the production is planned."

2173 If I may again refer to conversations, I mentioned previously that we tried to work together and cooperate and have an understanding of the principles used and I recall discussing this point with you—

Mr. Gilpatric: By "you" the witness means Mr. Warmack.

The Witness: Mr. Warmack, where the statement was made that where quantities are made for stock it is difficult and not acceptable from the standpoint of the views of the Commission to attempt to show the relative effect of the quantity contribution on the various customers and in the absence of detailed production records which would specifically show that this particular lot of production, made in a big quantity at a greatly reduced cost, were laid up on the shelves of this particular large customer, we felt that we had nothing in the way of detailed records behind us that we can use to approach the problem; but we do feel that this report is not complete, but as far as it goes it is factual.

Trial Examiner Sheppard: Now, would there have been any difference in the results that you show in that report, presumably,—I haven't looked over it,—would there have been any differences in the picture and the results had consideration been given to these things you say you have eliminated?

The Witness: We have eliminated—

2174 Mr. Haycraft: I am going to object to that question, Mr. Examiner.

The Witness: I would love to answer that question.

Trial Examiner Sheppard: Why?

Mr. Haycraft: On the grounds it is too problematical.

Trial Examiner Sheppard: Well, I don't know.

Mr. Haycraft: We can't tell unless we have the facts.

Trial Examiner Sheppard: That may be, but I just wanted to know if there would have been any difference in your results.

The Witness: May I just say this, that anyone will recognize that they would make a difference. The thing that I am not in possession of is what difference, the extent of the difference.

Trial Examiner Sheppard: That covers it, then.

The Witness: But it is certainly obvious that if you operate at a certain production level and then introduce a large volume from certain customers, that you decrease the cost of operations per unit, lessen the fixed expense on the greater quantity of production. The only point I want to make is that the report should not be accepted as a complete study of all items of operating. I think that is all covered in the contents.

2175 Trial Examiner Sheppard: It is?

The Witness: Yes.

Trial Examiner Sheppard: All right. Do you have any objection, Mr. Haycraft, to this particular exhibit?

Mr. Haycraft: Of course, I will have to have it examined by our accounting expert. I don't think there is any question but what it is admissible and we can, probably, subject to a motion to strike or maybe a portion thereof, later, I have no objection at the present time.

Mr. Gilpatric: Probably most of Mr. Haycraft's objections, which I hope will be few, will go to the weight of it rather than the admissibility of it.

Trial Examiner Sheppard: I am going to accept it, gentlemen, just like it is now and if there is anything that occurs to Mr. Haycraft afterwards that you want to sub-

mit any motion on, I will consider it at that time. So you can mark this exhibit 170 and accept it in the record.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 170, was received in evidence.)

Mr. Haycraft: Now, I would like, Mr. Examiner, to defer cross-examination of this witness until Mr. Warmack has a chance to study it. I may have some questions of my own that may be good or bad, I don't know, I want to consult with my associates, but I would like to have until 2176 tomorrow morning to study it.

Trial Examiner Sheppard: I think in the matter of a report of this kind time ought to be allowed to counsel to look into the matter and I will grant that motion.

Off the record a minute.

(Discussion outside the record.)

Trial Examiner Sheppard: On the record. I will just defer cross-examination until September 8th, when we come back.

Mr. Gilpatric: September 8th, as far as you know can you be back?

The Witness: Yes.

Trial Examiner Sheppard: Let the record show the Examiner excuses the witness and we will defer his further examination to allow the accountant for the Commission and counsel for the Commission time to study exhibit 170 and I am going to have you come back again on September the 8th, at 10 o'clock in the morning, for further examination. Until that time we will excuse you.

Mr. Reporter, take an adjournment until 2 o'clock.

(Whereupon, at 10:40 o'clock a. m., July 24, 1944, a recess was taken until 2 o'clock p. m. of the same day.)

2177 Afternoon Session.

2:00 p. m.

Trial Examiner Sheppard: Come to order. You may proceed, gentlemen.

DONALD J. GOULD, was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Sheppard: Please state your full name.

A. Donald J. Gould.

Q. Mr. Gould, give us your business address, please, sir.

A. 858 Book Building, Detroit, Michigan.

Trial Examiner Sheppard: Go ahead, Mr. Gilpatric.

By Mr. Gilpatric:

Q. Mr. Gould, will you state your occupation and the organization with which you are connected?

A. I am the Detroit area manager for the Ross Federal Research Corporation.

Q. How long have you been with that corporation?

A. About ten years.

Q. And what other work have you done for them besides direct research?

A. Well, as is customary in our organization, why,
2178 I spent about two years out in the field as a research interviewer and research supervisor and then I spent about two years in the office as production manager and then I was promoted to the position of research director, which I now hold.

Q. How old an organization is the Ross Federal Research Corporation?

A. The Ross Federal Research Division of Ross Federal Service, Inc., is about twelve years old.

Q. How many offices has that corporation?

A. 32 offices.

Q. And what is the nature of the service it performs?

A. We do general business surveys for manufacturers and radio stations and publications, distributors, department stores and general types of business, automobile manufacturers.

Q. Can you give us any idea of the scope of the business carried on by Ross Federal?

A. Well, in the years prior to the war we made an average of about 1700 surveys a year.

Trial Examiner Sheppard: How many?

The Witness: 1700.

By Mr. Gilpatric:

Q. To your knowledge have any of the results of surveys conducted by Ross Federal been accepted by governmental agencies or commissions?

2179 Mr. Hayeraft: That is objected to as irrelevant and immaterial.

Trial Examiner Sheppard: This is put in in connection with his experience. I will let it go in. Give it briefly.

The Witness: I can't tell you without consulting the records. I know that we have had some studies made which have been submitted as evidence before the Federal Communications Commission in Washington in radio station hearings for granting of licenses. I don't recall any others offhand.

By Mr. Gilpatric:

Q. Mr. Gould, was your company asked by Minneapolis-Honeywell Regulator Company to make any survey or analysis in connection with this Federal Trade Commission proceeding?

A. Well, not as such at the time the request was made. We were requested to make a study of the price structure of dealer, wholesaler and manufacturer on household burners of two and a half gallon capacity or less as those prices existed in 1941. At the time the request was made we were not told what the information was to be used for. We were just merely asked to make the survey in the routine manner just as we do most surveys.

Trial Examiner Sheppard: When was it made, the beginning and ending?

The Witness: The field work was started in June, 1943 and ended in September, 1943. The tabulations or 2180 analysis of the study was carried on through to the 15th of January, as I recall it, this year.

Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. Will you outline generally the manner in which you proceeded to make this survey?

A. Well, I met with Mr. C. B. Swett and Mr. Lockrae at the time they said they wanted this work done and they outlined to me, as I previously stated, that they wanted an analysis of the price structure, after which we prepared a questionnaire. We took that questionnaire out in Minneapolis to test it, to be sure that the answers we got were unbiased and then we asked them what areas they operated in so we could make a typical cross-section and get accurate information and they gave us their operational areas and from those we selected fifteen cities in which to do the survey.

After we had made that selection we took that out to Mr. Swett and Mr. Lockrae and asked them if there was anything that might be a local condition or an unusual condition in any of the areas where we wanted to make this survey and, if so, we would like to know it and they said the selection was satisfactory and that it was typical of the areas in which they operated.

Q. Having made that selection of areas,—as I understand it, Ross Federal picked the cities within these
2181 general areas that were given to it in the first instance?

A. That is right.

Q. Having made that determination of areas what was the next step that you did?

A. The next step, of course, was to set up the field work. I went out to all of the cities with the exception of—let's see.

Q. Look at your record.

A. I will have to consult my record on that because I don't remember just what the cities were. I went out myself to the cities with the exception of Cedar Rapids, Waterloo and Milwaukee and set the survey up with my supervisors in each one of the cities and stayed there to see that the work was properly done the first couple of days. The three cities which I gave as an exception were set up by my production manager, Mr. B. B. Bray, of Minneapolis.

Q. Well, how did you set up these surveys?

A. Well, we went out and took the telephone book first in each city and looked up the jobbers and dealers under the classified section of the telephone book and then after that I went to see the manager of Minneapolis-Honeywell in each one of these cities and asked him for his salesmen's route books, which I compared with the list that we had

made from the telephone directory, to be sure that it was complete. I just merely made that request and did
2182 not tell them what it was for. They had been authorized by Mr. Swett to let me have those books and I took them over to a desk and sat down and looked them over and took the information as to the dealers off of them, as to who the dealers were and just merely gave them back to the manager without any explanation as to why we wanted them.

Q. In other words, the information you got from these call books was to verify the information you got from the telephone directory as to who were the oil burner dealers and jobbers in that particular city?

A. To verify and to add, because you cannot get in the classified telephone directory all of the people that handle the product in a community.

Q. Well, as a result of your work how many different jobbers and dealers in the oil burner trade were called upon?

A. 535, as contained in my certification.

Q. Now, after you got the results of the field work done with those 535 different wholesalers and dealers, what did you do then?

A. Well, we brought the questionnaires in and made a preliminary tabulation by the city of the information that was obtained.

Q. Did you take any step to verify the information as to oil burner prices that you had received from these wholesalers and dealers?

2183 A. Well, we did for this reason: When we got the information in,—we make in our organization a number of surveys of this type, in which we get price information from manufacturers and usually the information patterns up fairly well as to prices. In other words, there isn't any particular wide range in prices. In this particular case we found that there apparently was no pattern of prices. In other words, we went out and interviewed these dealers and wholesalers and they gave us information as to the prices they paid and the prices they charged and they in most cases signed the reports that the information was correct, but when we got into the office we found that those would not pattern to any particular price range and, therefore, we wrote to the manufacturers of these burners. As I recall, there were 92 of them.

Q. 83, I think.

A. 83, I beg your pardon, and asked them to verify this information, telling them that we had made this price survey for Minneapolis-Honeywell and that the dealers had given us these prices and enclosed a copy of our original, from our tabulation that showed the prices that had been given us by the dealer and asked them if they would verify this for us and in 69 of the cases, why, they came back—

Q. 64, wasn't it?

A. 64, I beg your pardon. In 64 of the cases they came back and verified that information for us.

2184 Q. Well, now, in the report which I will refer to in a minute, did you use any unverified price information, that is, any information you got from dealers and jobbers which was not subsequently corrected or confirmed by manufacturers?

A. No. All the information in this report was from verified information.

Q. Well, will you just tell us briefly what information you were trying to get by this survey?

A. Well, the information they were trying to get in this survey was the price structure as to what the dealer paid wholesale from the manufacturer or from the distributor for oil burners and the price at which those burners were sold.

Q. Is that oil burners complete with controls?

A. Well, if you don't mind I will get my instructions on that. If you will get me my brief case, it has that information in it. What was the question again, Mr. Gilpatric?

Mr. Gilpatric: Read it, please.

(Question read.)

A. Yes, it was oil burners complete with tank and a pipe and controls. That was on the—wait a minute, I am a little bit confused on it. There are two sections to this thing. Well, now, the retail prices—I beg your pardon, there is a correction here. The retail prices were with the tank and pipe and all. The wholesale prices were merely with controls. The installed price was the one which I

2185 understand doesn't have any bearing in this hearing.

You see, we did more than one thing in the survey. We got some sales information also, in addition to this other information.

Q. So that the prices in this report, which will be referred to—

A. Are merely with the controls.

Q. —are the prices paid by the jobber to the manufacturer or the dealer to the wholesaler for an oil burner with controls?

A. That is correct; with controls, that is right.

Mr. Gilpatric: Mark this, please, for identification.

(The document referred to was marked Respondent's Exhibit 171 for identification.)

Q. I show you a report, Respondent's Exhibit 171 for identification and ask you what that is?

A. This is a report of our findings to Minneapolis-Honeywell as to the price ranges by bracket of the jobber prices and dealer prices of domestic household burners of less than two and a half gallon capacity, per hour capacity.

Q. Do you have in front of you another copy of that?

A. That is a copy of that.

Q. Look at the third page and tell me what the references to bracket numbers in the left hand column refer to?

2186 A. Those refer to Minneapolis-Honeywell manufacturers' selling brackets.

Q. You mean by that that the prices following those brackets are the prices paid by the jobber or the dealer, as the case may be, to the oil burner manufacturers who come within that particular bracket of Minneapolis-Honeywell?

A. That is correct, yes.

Q. Where did you get the information from as to where a particular oil burner manufacturer fell bracketwise?

A. A complete list of all manufacturers in the bracket in which they fell was furnished us by Minneapolis-Honeywell at the time we started the tabulation.

Trial Examiner Sheppard: What year does this cover?

The Witness: This covers 1941.

Trial Examiner Sheppard: Just one year?

The Witness: Just at that time, yes. In our instructions to our field representatives we said, "'All information is on the basis of prices in the industry as they were in 1941, before there were any war restrictions on this equipment."

Mr. Gilpatric: I might say, Mr. Examiner, as I said this morning, the year 1941 was picked because it was the last normal pre-war year and, also, because that was the year which had been informally agreed on with Mr. Warmack as the year for the cost study.

Trial Examiner Sheppard: All right.

2187 Mr. Gilpatric: We used the same year for this study.

Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. Now, Mr. Gould, will you explain what this sheet to which I have referred, this third page,—it is unnumbered but it is the third page, on which there is no typing,—is?

A. It is headed—

Mr. Haycraft: Just a moment. I don't want the record to show that Mr. Warmack agreed to anything. He had no authority to agree to anything and I don't want the record to show that he did.

Trial Examiner Sheppard: Is there such a statement there, Mr. Reporter?

Mr. Haycraft: Yes.

Mr. Gilpatric: Well, let me put it this way, then, that the year 1941 was picked for the purpose of both the cost study and this survey of oil burner prices after we had talked to Mr. Warmack. We are not attempting to hold the Commission or Mr. Warmack to any definite agreement on any of these things.

Trial Examiner Sheppard: I take it, in view of what happened this morning—

Mr. Haycraft: This hasn't any relation, as I understand it, to the cost study.

2188 Trial Examiner Sheppard: I am going to leave that open as I said this morning. Mr. Warmack is not bound by anything said here because I want to have him have his say about the matter, and then I will be the judge and the Commission as to the equity of the situation.

Mr. Gilpatric: Mr. Haycraft is right, there is no relationship between these two studies except that we picked the same year for each, that is all. There is no other connection.

Trial Examiner Sheppard: I see.

By Mr. Gilpatric:

Q. Now, Mr. Gould, will you just tell us what that page is supposed to show, what the statistics there are intended to set forth?

A. Well, the figures on this page are an analysis of the difference in prices charged for burners comparing one bracket with the next highest bracket or the next lowest. I

am not familiar with the discount practices, or whatever it is, so I don't know, but it is just merely an analysis showing the difference between what was paid, on the average, by bracket 1 and bracket 2, and brackets 2 and 3, and so forth, on through it.

Q. Now, you will have to be more specific when you say "prices charged". Give us an example of what happened when you went to a particular jobber or dealer
2189 and asked him about his prices. How would you classify him,—how would you classify the information that you got?

A. We classified the information by the lowest price that was given by a bracket 1 dealer and the highest price as to what he paid the jobber.

Q. You don't mean a bracket 1 dealer. You just said that referred to the manufacturer.

A. Well, then, let me clarify that by saying that he was handling the burner in that bracket class. In other words, if you went in to a dealer who handled a burner that was in bracket 1 you asked him what he paid for that and this is an analysis showing the lowest price that was given us and the highest price that was given us by those dealers.

Q. As having been paid by a jobber to an oil burner manufacturer?

A. That is right.

Q. Who on the list furnished you by Minneapolis-Honeywell was classified in this bracket 1, is that right?

A. That is right.

Mr. Haycraft: I object to counsel testifying, Mr. Examiner.

Mr. Gilpatric: I am just trying to show—

Trial Examiner Sheppard: He is trying to simplify it.

Mr. Haycraft: That, Mr. Examiner, would all go
2190 to the weight of the exhibit and whether or not this witness is competent to identify what he is doing, or explain what he is doing. Now, if counsel is going to do it, why, that deprives me of the opportunity of objecting to the exhibit itself.

Trial Examiner Sheppard: Just don't do that, Mr. Gilpatric.

The Witness: I will be glad to answer. If there is anything that you want explained, naturally, I will be glad to explain it in full. As I said, this is an analysis of the figures, after all the figures were obtained and verified and

broken down by manufacturers, Minneapolis-Honeywell manufacturers.

In other words, taking bracket 1 as an example, and the same way down through all the brackets, we found out what was the lowest price, we asked each jobber what he paid for his burner when he got it from the manufacturer.

Mr. Haycraft: Mr. Examiner, I would like at some time or another to be able to offer an objection to the offer of this exhibit. Now, I don't know whether it is going to be offered now or at some other time. They are talking about things in the exhibit and I would rather your wouldn't do that until it is passed on.

Mr. Gilpatric: Suppose I make a formal offer of it and then let Mr. Gould do his explaining?

Trial Examiner Sheppard: All right.

2191 Mr. Gilpatric: Let me first make this brief preliminary statement.

Mr. Haycraft: Yes, I would like to know the purpose of it.

Mr. Gilpatric: The purpose of this offer is as follows: One of the issues raised by Count III of the complaint, which we talked about this morning, is whether or not competitive conditions among the oil burner manufacturers as contrasted with control manufacturers has been affected by the alleged discriminatory price structure of Minneapolis-Honeywell, that is, these price brackets.

Now, you have heard a number of different oil burner manufacturers testify in this case both for the Commission and for the respondent, but respondent felt that to get a better picture of the industry as a whole we should not confine ourselves simply to the testimony of the few who appeared here, so this survey was undertaken and it shows the prices charged by oil burner manufacturers in 1941, some 64 in number out of a possible 83, as reported first by the jobbers to the dealers, some 535 of whom were interviewed, who actually paid the prices. They were the people that bought the oil burners from the manufacturer and they paid various prices ranging all the way, as this shows, from down in the forties up to over a hundred.

Now, that information was then verified by going
2192 back to a particular manufacturer and asking, as Mr. Gould has pointed out, "Are these prices which we have from your trade correct in accordance with what your prices actually were in 1941?" And when that information was so verified it was used in this survey.

The result is that we have what, in our opinion, is a comprehensive survey of the price conditions in the oil burner industry for the year 1941 as compiled by an independent research organization that went out and did this job, having had similar work carried on by this organization for ten, twelve years, and who come in here and offer in the form of a report, which we in turn offer in evidence, the results of that in the form of showing the high and low prices charged by oil burner manufacturers classified according to the particular bracket in which they were treated by Minneapolis-Honeywell for the purpose of what prices they paid, in turn, to Minneapolis-Honeywell for their controls and we think that the relationship, or the lack of it, between what the oil burner manufacturers charged their customers and what Minneapolis-Honeywell charged the oil burner manufacturer for the controls has a definite bearing and is definitely material on the issues of Count III and, in particular, the issue of whether these price brackets of Minneapolis-Honeywell did have the effect or had the tendency or likelihood of substantially affecting competition among the oil burner manufacturers.

2193 Now, it seems to me that again we are faced with a situation where any objections that are raised to this kind of a survey or the results of it go to the weight, how much credency, how much importance should be attached by the Commission to the results of this sort of a survey. You don't have here 64 manufacturers or 535 dealers but you have a man under whose supervision this survey work was carried on and we offer it simply as that, no more and no less.

Mr. Haycraft: May I ask the witness a couple of questions?

Trial Examiner Sheppard: Yes.

By Mr. Haycraft:

Q. When you say "verified", did you personally verify whether or not the prices quoted were actually received or did you rely upon the result of a questionnaire or statement made?

A. No, in verifying we relied on letters received from manufacturers.

Q. You did not check the information back against the original records?

A. Yes, it was checked against the original record.

Q. You looked at the invoices?

A. We didn't look at the invoices. We took the dealer's signed statement.

Q. I am asking you—please answer my question. Did you look at the invoices?

2194 A. We did not, no, because in a great many cases we find that these people do not keep records.

Q. Then they had to trust to their recollection?

A. That was why we verified the prices with the manufacturer.

Q. How could you verify them if you did not look at the invoices?

A. Well, because the manufacturers had records of what they charged these people. We asked them what they charged them.

Q. How do you know they told you the truth about it?

A. We wrote them a letter and asked them to tell us what they charged.

Q. That is what you relied on?

A. Yes.

Q. Did you check the records of the manufacturer or the jobber?

A. Well, the way—

Q. Now, just answer my question, please. Did you check the records of the manufacturer or the jobber?

A. No.

Mr. Gilpatric: We concede that he did not.

Mr. Haycraft: Then, Mr. Examiner, the exhibit is wholly incompetent as well as irrelevant. We cannot try a case and use this as legal evidence when neither the man that prepared it nor anyone connected with it is in position

2195 to say that any statements in there with respect to the prices are correct. It is based upon hearsay, legal hearsay and I submit it is a fundamental objection that cannot be overcome by simply saying "We offer it for what it is worth," because it isn't worth anything.

Mr. Gilpatric: Mr. Examiner, reports of this nature have been used now for a decade in this country both by American business and by governmental agencies. The Department of Commerce, the Federal Trade Commission—

Mr. Haycraft: Wait a minute. The Federal Trade Commission has never done it. They have never used anything like that.

Mr. Gilpatric: Well, we will just stick then to some of the other governmental agencies. The Department of Labor, Bureau of Labor Statistics, I know the Department

of Commerce has, I have seen the reports and this witness has testified the Federal Communications Commission has accepted reports similarly prepared by his organization.

Now, to be sure, if you are going to classify it according to one of these pigeon-holes in the law of evidence, it is not the best evidence. You would have to have in here all of these 535 dealers and all of these 64 manufacturers and if we are not going to be allowed to offer a report independently prepared of this nature, we are going to have to carry on here for a long time and call in 64 manufacturers,
2196 because we are going to get it in the record and we have tried to do it in a fair way and in a way that it couldn't be charged that it was information emanating from respondent's files or someone that was biased or interested in this proceeding and this witness is here to tell you how he did it and the basis of the experience that formed the foundation for it.

Mr. Haycraft: I don't quarrel with the witness, Mr. Examiner. He told us how he did it. It is because of that particular fact that it is not evidence.

Mr. Freeman: That goes to the weight that you give it.

Mr. Haycraft: No, it does not. It goes directly to whether it should be received or not. There has got to be some foundation. It has got to have some foundation and there is no foundation. You haven't any foundation at all. It is different entirely from the exhibit this morning. We had a report this morning where the man prepared the report from the original records, he went there and verified it from the original records themselves. That is a different proposition. We don't have that here.

Mr. Gilpatric: You understand, Mr. Examiner, that this witness and his organization just did not simply accept the recollection of some little oil burner wholesaler or jobber as to what happened three or four years ago. He went out and went back to the manufacturer who, as this wit-
2197 ness says, of course had records on the prices at which he sold his goods in 1941 and where he had those two things corrected and coincided and checked against each other then and then alone was the price used.

Mr. Haycraft: Mr. Examiner, the fundamental error is this, that we are entitled to talk to and see the man who made those prices, that is, the original manufacturer, to see whether he made those prices and whether they are accurate. An exhibit of this kind and character should be based on evidence that has been received in this case, that is O. K.,

but you are putting the cart before the horse. If you had your invoices, your other evidence, your invoices from the manufacturers and jobbers, then you could give the exhibit a proper foundation.

Trial Examiner Sheppard: When you gentlemen first brought that out I thought that was what it was, that it was a compilation of the invoices, and so forth, that we have sworn statements on in this record from the men who did make those sales and I thought it was going to be such a compilation.

Mr. Gilpatric: Well, now, Mr. Examiner, we have here and we will be glad to offer them, the original letters written by these manufacturers to this organization certifying to their prices.

Mr. Haycraft: That doesn't help us. Those manu-
2198 facturers have got to be on the witness stand subject to cross-examination. That is the way we try cases in the Federal Trade Commission.

Mr. Gilpatric: Well, I respectfully differ. I don't think it is—

Trial Examiner Sheppard: Well, gentlemen, one of you says this report is of no value or no weight and the other attributes a great deal of weight to it. I am going to take it, Mr. Freeman and Mr. Gilpatric. I rather agree with Mr. Haycraft on that question, however, but I will give it such consideration as I think it is worth and the Commission will, too, and you gentlemen can use it as you see fit and I am going to accept it on these terms.

Mr. Haycraft: Of course, I have an exception automatically?

Trial Examiner Sheppard: Yes.

(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 171, was received in evidence.)

By Mr. Gilpatric:

Q. Just one further question, Mr. Gould, now that exhibit 171 is a part of the record. Will you just explain what the pages following the third page, about which I asked you before, represent? That is, the fourth, fifth, sixth and seventh pages of the report. Unfortunately, they are
2199 not numbered. Will you tell us what they represent?

A. Well, the following pages are merely a further analysis of the first table, which is a condensed table of all the areas. The following pages by manufacturers' bracket

show the reports as they were given in each area that was surveyed.

Trial Examiner Sheppard: In the fifteen areas?

The Witness: In the fifteen areas.

Trial Examiner Sheppard: Yes.

By Mr. Gilpatric:

Q. In other words, the information on the third page is taken from the information on the following pages?

A. Yes. It is an analysis of the complete fifteen areas.

Q. Yes.

A. The others, the following pages are broken down.

Q. By these fifteen areas, as the Examiner pointed out?

A. By the fifteen areas.

Q. Now, what about this last?

Trial Examiner Sheppard: Now, Mr. Gould, I was going to ask you that. Have you got a sort of a summation of the whole proposition?

The Witness: Well, that is this third page here showing the difference in prices between the various brackets. In other words, as I started to say when he interrupted me here, to give you an analysis of how this works out, take bracket 1, for example, and it goes right on through 2200 that.

Mr. Freeman: Go ahead and explain it. When you say, "It goes right through" the record is not clear.

The Witness: The same thing is done in each bracket so that if you explain it, why, you have explained the whole thing. In bracket 1 we have asked the dealer or the jobber what he paid the manufacturer and the lowest price we got in those fifteen areas was $50. The highest price that we got when we asked the same question, "What did you pay for your burner," was $111.00.

By Mr. Gilpatric:

Q. That is the same manufacturer, now?

A. No, not the same manufacturer.

Q. The same area?

A. No, not even the same area. This is an analysis of all fifteen areas.

Q. Oh, yes.

A. The other is compared back here. The lowest price we got in all the fifteen areas was $50.

Mr. Freeman: For bracket 1?

A. For bracket 1. And for bracket 1; asking the same

question, "What did you pay the manufacturer for the burner," the highest price was $111.00. Well, that might have been a different manufacturer but he was still in bracket one.

Mr. Freeman: Right.

2201 Mr. Haycraft: But did you know that—how did you know whether he had the same equipment on it?

The Witness: That was not gone into, as to just what the equipment was. We asked what the price was.

Mr. Freeman: It was the same equipment in so far as oil burner and controls was concerned, domestic oil burners capable of burning two and a half gallon or less per hour, as the witness has already testified.

Mr. Haycraft: If he doesn't know what the equipment was that was on the burner, that $111.00 might be accounted for by something else.

The Witness: I am merely telling you what we did and what we were asked to do and what came out of it.

Then this lowest price that was given us by jobbers who were handling burners of manufacturers who were in bracket 2, which is $45. So there was a difference between what the bracket 1 man paid lowest and bracket 2 of $5. The highest that was paid by a jobber to a bracket 2 manufacturer was $92—or, rather, was $96.20, or a difference between bracket 1 and bracket 2 of $14.80.

Now, the same comparison is made all the way through the report. This is the jobber price and this is the dealer price but the same formula is used all the way through.

Trial Examiner Sheppard: All right.

Mr. Gilpatric: Have you a copy of the question-

2202 naire here that you used?

The Witness: Yes, I have. Here is a copy of the questionnaire that was used.

Mr. Gilpatric: Mark this, please, respondent's exhibit 172 and this document respondent's exhibit 173 for identification.

(The documents referred to were marked Respondent's exhibits 172 and 173 for identification.)

Q. This sheet called respondent's exhibit 172 for identification is the questionnaire I asked for?

A. That is correct.

Q. Is that the questionnaire which was used in the interviewing done by representatives of your field force with the 535 dealers and jobbers to whom you have referred?

A. That is right.

Q. Is this document, respondent's exhibit for identification No. 173, the instructions issued to your field representatives in connection with the use of that questionnaire?

A. That is correct.

Mr. Gilpatric: I offer those both in evidence.

Mr. Haycraft: I object to them as being wholly irrelevant and immaterial.

Trial Examiner Sheppard: Those were issued, what you sent out to them?

A. That was the questionnaire.

2203 Q. It was a questionnaire, was it?

A. A questionnaire, and it is customary in all research services to issue written instructions to the people who do the field work and that is the written instructions to those people as to how to conduct the field work.

Q. And, of course, you got answers back from these people?

A. That is correct.

Mr. Gilpatric: You took these questionnaires around, as I understand it.

The Witness: By personal interview, yes, to all the dealers.

Trial Examiner Sheppard: That is my understanding, you sent this to them all.

A. No, the man went in and interviewed the dealer or the jobber, as the case may be, personally.

Q. I see and you got the information right there?

A. And the dealer or the jobber in most cases signed here at the bottom of the report.

Mr. Gilpatric: Referring to respondent's exhibit 172.

The Witness: Certifying that this information was correct.

Trial Examiner Sheppard: I am perfectly willing to take this, gentlemen, but I think we ought to have the whole picture and we ought to have the whole thing

2204 that was responsive to these. Of course, anybody who would want to study the report as a whole,—I mean who really studied the whole situation, would be entitled to the responses that these people made.

The Witness: You mean the individual questionnaires?

Trial Examiner Sheppard: That is right.

Mr. Gilpatric: May I say, Mr. Examiner, that we have—we don't happen to have them here,—but we have the original questionnaires that were filled out as a result of these

interviews and signed in most cases by the dealer or jobber and we will be glad to either show those to Mr. Haycraft or to put them in evidence if you wish.

Mr. Haycraft: They ought to be in evidence.

The Witness: There are about forty pounds of them.

Mr. Freeman: All right.

Mr. Haycraft: I will ship them down to Washington.

Trial Examiner Sheppard: Gentlemen, I am going to state that if it is available and any persons from the Commission's staff want to use them for any purpose or reason, then they will be available without incumbering the record.

Mr. Gilpatric: We so state on the record and they will be retained and kept available at any time.

Trial Examiner Sheppard: I will state on the record, Mr. Reporter, that, if necessary, to be available to
2205 any representatives of the Commission who want to make a study of it, and that I am going to accept and give consideration in reference to my study to respondent's exhibits 172 and 173.

(Whereupon the documents above referred to, heretofore marked RESPONDENT'S EXHIBITS 172 and 173, were received in evidence.)

The Witness: Of course, as I pointed out, there are some questions on there that have no reference to this report, on which additional information was obtained for the Minneapolis-Honeywell Company, that does not go to the hearing.

Mr. Gilpatric: But it does contain questions with reference to the price information that you have offered?

The Witness: That is right, it contains all that and more to it.

Trial Examiner Sheppard: All right.

Mr. Gilpatric: I want to supplement my statement, Mr. Examiner, that the company also has available at any time for the use of the Commission the letters which Ross Federal Research Corporation wrote to the various oil burner manufacturers, whose prices had been obtained in the field, and the original letters received back, either certifying as correct or if the information was incorrect giving the correct prices. I am not going to offer all these in evidence but they are available and can be inspected at any time by the Commission.

2206 Trial Examiner Sheppard: That is a part of the work sheets that we have been talking about?

Mr. Gilpatric: Yes.

Trial Examiner Sheppard: They will be made available if request is made.

Mr. Gilpatric: That is all.

Trial Examiner Sheppard: Any cross-examination?

Cross-Examination by Mr. Haycraft.

Q. I notice on the second page of this letter, Mr. Gould, this introductory statement you have in here, in the third to the last paragraph:

"An examination of the data obtained showed that a chaotic price condition existed throughout the industry in 1941 and that the prices given varied from one geographic section to another, and likewise varied within the geographic section itself, and that there was no definite pattern of either wholesaler or dealer oil burner prices."

What do you mean by the word "chaotic"?

A. Well, I mean they didn't match and as you can see by the—

Q. What do you mean, they were not all the same?

A. They did not seem to—in other words, in Baltimore, taking bracket 1 of the table headed, "Oil burner jobbers and dealers purchasing for the various Minneapolis-
2207 Honeywell brackets," under bracket 1, in Boston the low price was $65 and the high price was $72. In Chicago it was $79 and the high price was $84. In Minneapolis the low price was $80 and the high price was $111. You can see there that there were quite wide variations.

Q. What do you mean by "chaotic", that is what I want to get a definition of?

A. Well, I mean chaotic in that they did not show any continuity at all, that they differed widely.

Q. You mean there were different prices, is that right?

A. Widely differing prices, yes.

Q. Are you prepared to testify whether or not the prices quoted were on identically the same things or not?

A. No. The question asked—I don't know just what you mean by that; whether I knew that they were technically the same?

Q. Well, did the burner have anything other than controls on it, for instance?

A. Nothing but controls. We asked the question, "What make of oil burners did you sell in 1941 and what models of each" and we told the jobber or the dealer, whoever was

affected, that we were referring to the two and a half gallon burner, per hour capacity burner, with controls only.

Q. Well, you don't know whether the information you got, though, included tank or pipe or included installa-
2208 tion service or anything of that kind?

Mr. Freeman: He just got through saying the oil burner and controls only.

Mr. Haycraft: Now, Mr. Examiner, I am examining this witness. I did not bother them when they examined him. I am just asking the witness whether or not he knows if the information that he got included other things besides controls and the only way he could find out would be to go and come back with the original records. Now, that is why I am trying to bring this out.

The Witness: No, we defined that all in our written instructions and we said: "Wholesale price,—complete with controls but without accessories, means as they sell it to the retailer without pipe or tank."

Q. Those are your instructions when your men went to the dealers or to a jobber but my question is how do you know whether the information they gave you was in conformance with the questions you asked?

A. We don't know that, only that—

Q. Did you make any inquiry to find out why there was such a variance in the prices for the same articles?

A. We did by talking to dealers.

Q. Now, are you talking about dealers or wholesalers?

A. Wholesalers, as to asking them whether this was the correct price? Naturally, we couldn't make any com-
2209 parisons or inquiry with regard to range in prices because we could not go to one dealer and say, "You gave me such a price, you gave me your price of $111 and the fellow down the street gave me a price of $80, why this difference," because those were trade practices which it would be a breach of confidence on our part to reveal to one dealer what prices were paid by another, either dealer or jobber.

Q. It might be a different manufacturer's line?

A. That is what I pointed out before.

Q. In other words, these different prices referred to different kinds of oil burners, different brands of oil burners?

A. That is right.

Q. Different makes?

A. That is right.

Mr. Haycraft: That is all.

Trial Examiner Sheppard. Anything alse, gentlemen?

Mr. Freeman: No.

Trial Examiner Sheppard: Thank you and you are excused, Mr. Gould.

The Witness: Thank you.

(Witness excused.)

Mr. Gilpatric: Well, Mr. Examiner, except for any redirect examination that may result from Mr. Haycraft's continued cross-examination of Mr. Lockrae and for the additional information which we are to get from Mr. 2210 Owens on September 7th and, of course, any redirect examination of Mr. McAnly, who is going to appear again on September 8th, the respondent has no further proof to offer on its direct case.

Trial Examiner Sheppard: All right, gentlemen. You have stated the reasons why we will have to go into September and I am going to adjourn the hearing to convene in this room at ten o'clock in the morning on the 7th of September and to run as long as you gentlemen will require on your side and then Mr. Haycraft will be given an opportunity to state whether he wants to offer any rebuttal. We will consider that at that time.

Mr. Gilpatric: Off the record.

(Discussion outside the record.)

Trial Examiner Sheppard: On the record. All right, we stand adjourned until September 7th, at 10 o'clock.

(Whereupon, at 3 o'clock p. m., July 24, 1944, the further hearing in the above-entitled matter was adjourned until September 7, 1944, at 10 o'clock A. M.)

2211 Room 1123,
New Postoffice Building,
Chicago, Illinois,
Thursday, September 7, 1944.

Met, at 10 o'clock a. m., pursuant to adjournment.

Before:

W. W. Sheppard, Trial Examiner.

Present:

Everett F. Haycraft, Attorney for the Federal Trade Commission.

Cravath, Swaine & Moore, by R. L. Gilpatric, 15 Broad Street, New York, New York; and Baer & Freeman, by Will Freeman, 135 South LaSalle Street, Chicago, Illinois; appearing for the respondent.

2212 Proceedings.

Trial Examiner Sheppard: I suppose we are all here, gentlemen. We will proceed.

Mr. Reporter, you may convene the hearing in the Minneapolis-Honeywell case which was ordered by the Examiner to be convened in the City of Chicago on this morning, the 7th of September, 1944, for the purpose of finishing Mr. Owens' testimony and for any other matters that may come up.

Before we start I want to correct an exhibit number that the docket section has called my attention to. You all remember that at the last hearing there was an exhibit that I ordered the reporter to mark Commission's exhibit 208, which was some matter sent in to me by Mr. Malcolm Henning of the Penn Electric Switch Company. I ordered that exhibit marked Commission's exhibit 208, but it appears that it had already been marked 207-A and B and Mr. Karsner of the docket section called my attention to that, so I am going to cancel the exhibit that I ordered to be marked 208 and let that exhibit be as it is already on our records, as Commission exhibit 207 A and B. You can make your corrections accordingly.

Now, there is another matter: Under date of July the 25th, 1944 Mr. Henning sent me some figures here that ap-

pears to be the annual volume of control purchases applicable to the price brackets. It goes from bracket 1 to bracket 5. I presume that fits in the testimony somewhere of Mr. Henning.

2213 Now, it appears from my records, gentlemen, that as I have cancelled exhibit 208 I can use that for this exhibit number, which will tie in with Commission's exhibit 207, which is also matter from Mr. Henning; so, Mr. Reporter, you can mark that exhibit Commission's exhibit 208 and it will be accepted into the record and will be considered in connection with Mr. Henning's testimony.

Mr. Haycraft: Is that 208-A and B?

Trial Examiner Sheppard: Yes, that will be Commission's exhibit 208-A and B.

(The papers referred to were marked COMMISSION'S EXHIBITS 208-A and B and received in evidence.)

Trial Examiner Sheppard: Now, is there any other correction along that line that we can take up here, or shall we proceed with Mr. Owens?

Mr. Gilpatric: Mr. Examiner, we submitted to Mr. Haycraft quite an elaborate list of corrections. I don't see any need to stop now, do you?

Mr. Haycraft: I haven't got them yet. I don't know where they are.

Mr. Gilpatric: I guess they are in your office.

Trial Examiner Sheppard: Well, I didn't want to go into the corrections in the entire record. I am going to let you gentlemen get together on that and let you take care of that probably in the last hearing of the case, wherever

2214 that might be, so we won't go into that at this moment.

Mr. Freeman: We are ready for Mr. Owens, if the Examiner please.

Trial Examiner Sheppard: All right, Mr. Owens, if you will come around. Show Mr. J. W. Owens, having been previously sworn in this case, appears on the stand for further testimony.

J. W. OWENS, recalled as a witness by and on behalf of the respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination by Mr. Freeman.

Q. Mr. Owens, at the time you last testified on July 22, 1944 there was certain additional information that you were going to get from your records and under date of August 29th I wrote you a list—

A. You will have to speak a little louder. I have got a bad cold that has affected my hearing very much. I am sorry.

Q. What I want to get, Mr. Owens, from you are those things which you were going to look up since you last testified on July 22nd and I now ask you whether or not you have the prices and brackets with respect to the company known as the Electro-Magnet?

A. I have looked up all that stuff.

Q. Electromatic.

2215 A. We have on record of any dealings with that company.

Q. And when you say you have no records does that mean that you did not quote the company at any time?

A. We did not quote them and we did not sell them.

Q. Do you have the special contract for the year 1937 with Kelly Oil Sales Corporation?

A. I have got a copy of one we made dated January 6, 1937 with—that is the wrong one, pardon me. January 15, 1937. That was with the Sunray Burner, Inc. I believe it is the same company. That apparently was placed following a call by one of our representatives, at which time they placed an order for a thousand sets of controls, that is, the Sunray, which to my understanding is the same as Kelly. It was shipped to Kelly but charged to Sunray Burner and the prices at which the thousand order was taken are somewhat below the January 15, 1937 price records that I have here. Although it is not a signed copy of a contract it apparently is a copy of a contract that was submitted to them.

Q. May I have the contract that was submitted bearing date of January 15, 1937 to Sunray?

A. I am not positive that it was submitted. I can show you the copy of what was in our records. I would guess it was submitted.

Q. Well, in any event, Mr. Owens, you can state that prices corresponding to those appearing upon the
2216 January 15, 1937 paper entitled, "Manufacturers purchase contract," were made to the Sunray Burners or the Kelly people?

A. This is the price at which the order was accepted.

Q. And when you refer to "this is the price at which the order was accepted," you now are referring to a paper dated—

A. February 4, 1937.

Mr. Freeman: The paper entitled, "Manufacturers purchase contract," dated January 15, 1937 to Sunray Burners, Inc., which is the same company as the Kelly Oil Sales Corporation, is offered in evidence as respondent's exhibit number 174.

Trial Examiner Sheppard: Any objection?

The Witness: I have photostated that. Let me have it back. I want all the original papers back. I don't want any further misunderstanding on that score.

Mr. Freeman: Oh, there has been no misunderstanding and I have all of your original papers and they are here and you may have them all.

The Witness: Thank you.

Trial Examiner Sheppard: I think we had an understanding that they would be photostated. You can accept respondent's exhibit 174.

(The paper above referred to was marked RESPONDENT'S EXHIBIT NO. 174 and received in evidence.)

Mr. Freeman: Will you now let me have the paper
2217 dated February 4, 1937 which discloses the prices at which sales were made to Sunray-Kelly?

We offer in evidence the latter or order from Sunray Burners, Inc., dated February 4, 1937, as respondent's exhibit 175.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The paper above referred to was marked RESPONDENT'S EXHIBIT NO. 175 and received in evidence.)

By Mr. Freeman:

Q. Mr. Owens, can you tell me whether or not the set price for controls sold to Sunray Burners in 1937 is the aggregate of the price which you quoted during that year for the three controls that go to make up a set? That is, the

total of the individual price for a KMI stack switch and the type H sensatherm and a limit control?

A. That is correct. The 95 cents difference in price between the $15.00 and $15.95 were furnace controls for the furnace. That was 95 cents higher in price than either the steam or hot water.

Q. So far as the fifteen dollar set price, that included the KMI pyratherm?

A. That is right.

Q. And the type H sensatherm and the ordinary 2218 limit control?

A. That is right.

Q. Now, would you give me the individual unit prices, if you can, for the year 1937 for those same items? Mr. Owens, I have here the original of your 1937 manufacturer's prices, which is already in evidence and you can use that if it will be of any help.

A. Maybe if you would give me my stuff back and kept the photostats I would have all of that information.

Mr. Freeman: I am now handing to you all of the exhibits which you produced at the hearing on July 22, 1944 other than those that have already been turned over to you, that is, to your attorney.

A. Have you got the rest of the contract copies that I have turned over to you?

Q. You have them all now, with those that were delivered to your attorney.

A. All that were what?

Q. You now have all of them.

A. You mean the three blue copies you gave to him that you are talking about?

Q. I delivered to him more than three blue copies.

A. All I have got here is 1940 and 1941. You gave me back 1938 and 1939. I don't believe I can determine from the information I have here just what the separate 2219 billing price was on those.

Q. Do you have the 1937 price bracket structure which you produced when you last testified?

A. Yes. That is this one right here.

Q. And that is respondent's exhibit 149?

A. Yes.

Q. Now, what prices appearing upon respondent's exhibit 149 make up a total equalling the price which you actually extended to Sunray in 1937, if any?

A. You mean the individual prices?

Q. Yes.

A. Individual control prices. I can't tell you from the information I have here. It doesn't add up right. I know there was another contract submitted but I cannot find it here.

Q. Isn't it true that on respondent's exhibit 149-C, ordering from 1000 to 2500 complete sets, to be taken in shipments of not less than 100 complete sets, that the set price included a MKI thermostat or pyratherm was $16.60?

A. Yes, that is true.

Q. So that for the year 1937 we now have in the record a $15 set price, which is lower than any bracket price found upon your prices for 1937, respondent's exhibits 149-B and C?

A. Yes, with the exception of copies of contracts that we have introduced, such as the Williams Oil-O-Matic and
2220 Century. Their prices are on a parallel with the prices quoted Sunray that year.

Mr. Freeman: Well, except, Mr. Owens, we never had the Williams Oil-O-Matic agreement for 1937 or Century, so that if you have any such agreements you might produce them now.

We offer in evidence Williams Oil-O-Matic agreement for the year 1937, dated October 29, 1937, as respondent's exhibit 176 and the price sheet attached thereto, likewise dated October 29, 1937, as respondent's exhibit 177.

Trial Examiner Sheppard: 176-B.

Mr. Freeman: All right.

Trial Examiner Sheppard: Those are now 176-A and B, Mr. Reporter. Is there any objection, Mr. Haycraft?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let them be accepted as 176-A and B.

(The documents above referred to were marked RESPONDENT'S EXHIBITS 176-A and B and were received in evidence.)

Mr. Freeman: We offer in evidence as respondent's exhibit 177 Mercoid Corporation purchase contract with Century Engineering Corporation dated January 6, 1937.

Trial Examiner Sheppard: Any objection to that?

Mr. Haycraft: No.

2221 Trial Examiner Sheppard: Let it be accepted.

(The document above referred to was marked RESPONDENT'S EXHIBIT NO. 177 and received in evidence.)

By Mr. Freeman:

Q. I take it, then, that in the $15 set price to Sunray or Kelly that the KMI or MKI was put in at $8.85, and I am referring to the Century contract where I have taken that figure. Is that correct?

A. That is the price shown.

Q. Now, will you answer my question? Is that the price extended to Sunray?

A. That would be my understanding of it.

Q. Well, a moment ago when I asked you with respect to the 1937 prices, and I referred to the documents that you produced at the last hearing instead of those that you have produced this morning, you said that the price given to Sunray was the same as that given to Century and Williams Oil-O-Matic. That is correct, is it not?

A. That is what I understood.

Q. And I now ask you what price was given to Sunray for a type H sensatherm?

A. According to this price I have here it would be $3.

Q. And when you say "this price here" you are now referring to respondent's exhibit 177,—the Century Engineering contract, is that correct?

2222 A. That is right.

Q. So that at $8.85 for an MKI pyratherm and $3 for a thermostat, your limit control was put in at $3.15, is that correct?

A. Well, the limit control should be $2.85.

Q. Well, Mr. Owens, all I am trying to get is the breakdown of the set price for Sunray, if that is possible and when I asked you to do that you referred to the Century and Williams agreements and we now have them in evidence and perhaps, taking all of those documents which you have produced this morning you can now give me that breakdown as applied to Sunray.

A. Well, that is as close as I can come to it.

Q. Well, then, I note on the Williams Oil-O-Matic price sheet under the heading "Combination sets", that the price for a KMI and a type H sensatherm is $12.20. Is that correct?

A. That is what it says.

Q. How does that price compare with individual price units which we find upon the contract as of the same date, respondent's exhibit 176-A?

A. I couldn't tell you that either.

Q. Well, isn't it true that a type H sensatherm on the contract respondent's exhibit 176-A sold for $3 and a KMI pyratherm for $9.40, making a total of $12.40? Is that not correct?

A. According to this it is $12.40, yes.

2223 Q. And when you say "according to this," you refer to the exhibit 176-A?

A. That is right.

Q. Now, do you know whether they were invoiced at $12.40 or invoiced at $12.20 when they bought controls in the year 1937?

A. I don't even know if they bought any. My guess would be that they were billed at the lower price.

Mr. Haycraft: I object to that and move to strike his guesses, Mr. Examiner.

Trial Examiner Sheppard: Well—

Mr. Freeman: What is your best recollection, Mr. Owens?

Trial Examiner Sheppard: That is right, I was going to say give us your best recollection.

The Witness: The lower price would be my best recollection.

Trial Examiner Sheppard: I will accept that.

By Mr. Freeman:

Q. At what price did you sell limit controls to Williams Oil-O-Matic?

A. I would say, according to this exhibit 176-A, at the price shown on here, which would be $2.85. On the furnace control it would be $3.80.

Q. Well, let us just take the ordinary limit control,

2224 Mr. Owens, that is the lower priced one. That was $2.85?

A. That is correct.

Q. So that even if we take the price of $12.20 for a sensatherm and a KMI pyratherm and add to it $2.85, we get a combination or set price of $15.05?

A. That is right.

Q. And I take it, or, at least, let me ask you for your best recollection as to the price extended Williams in 1937, when Williams bought in sets?

A. Well, the sets very seldom work out. What I mean by that is that most of the shipments were other than in sets.

Q. To Williams?

A. To Williams as well as other customers.

Q. Well, you did not sell in other than sets to Sunray during the year 1937, did you?

A. Yes, I believe we did.

Q. But you don't have any of the individual prices, other than a set price, for Sunray here?

A. I don't know; I might have. No, I haven't.

Q. Well, in any event, I might shorten this by asking you whether or not the prices that you have produced today for the year 1937 are, in fact, lower prices than appeared on the documents that you submitted on July 22, 1944?

Mr. Haycraft: I am going to object to that question. It is too indefinite, Mr. Examiner, no probative value.

2225 Trial Examiner Sheppard: Well, I don't know. I will let him answer it if he can. It is in line with this testimony.

Mr. Haycraft: The record shows, Mr. Examiner, that he produced a large number of exhibits when he was on the stand before. Now, unless counsel indicates which exhibits he has in mind there would be no probative value to it.

Mr. Freeman: I called attention specifically, Mr. Haycraft, to the 1937 price list and that happens to be in one document and one exhibit.

Mr. Haycraft: Is there any reason why the record cannot show the number of the exhibit so that when the Commission and others examine it they will know what he is talking about?

Mr. Freeman: Respondent's exhibit 149.

Trial Examiner Sheppard: That is what I thought it was. You have been talking about it.

Mr. Freeman: Why, we have been talking about it all morning.

The Witness: Apparently there is about a 65 cent set price difference between the lowest price shown on the 1937 prices, exhibit 149-C and the price we extended to Sunray and about 60 cents difference between that and the price given to Williams, according to the figure that we have worked ont here just now.

2226 Q. And referring to the same exhibits, the difference of 65 cents that you have just stated with respect to Sunray is applicable to the bracket where a company buys 250 sets at one time instead of 100 sets as purchased by Sunray, is that correct?

A. Well, it is not exactly correct because, as I would

judge, the Sunray order, it is on order for a thousand sets. Even though they were taken out in several different shipments it is still an order for a thousand sets.

Q. Doesn't your bracket structure say with respect to prices, "Sets to be taken in shipments of not less than 250 complete sets?"

A. That is correct.

Q. And in connection with the Sunray order shipments were to be made in varying amounts from a hundred sets on specific days and 150 on two other specific days, with 400 sets to be taken between June 30 and September 1st,—correct?

A. That is correct.

Q. So that in purchasing as did Sunray for shipment of a hundred complete sets at one time, the set price would have been $16.60, or $1.60 more than what was actually extended Sunray, is that correct?

A. According to the bracket, yes, but not according to the way we had to go after business.

Q. Mr. Owens, that phrase of "going after busi-
2227 ness" rather intrigues me and so that there will be no misunderstanding as to just what you mean by "going after business" and so that the record is clear would you please explain further what you mean by that phrase?

A. Well, the only thing that I mean by that is going back to 1937 and knowing conditions as they were at that time, that any concern that would place with us an order for a thousand sets we would not argue too much about what price we would give them or what bracket he might go into.

Q. And did you follow that practice in 1938?

A. I would say yes.

Q. And isn't it a fact that it is true in the business right today?

A. No.

Q. Or at least up to 1940?

A. Up until when?

Q. 1940, just prior to the present emergency.

A. Well, yes, because we decided in 1941, as I told you, to cut out sending out contracts.

Q. Well, in 1941 we entered into the emergency and, of course, there were then restrictions on commercial manufacture for ordinary civilian use, so I am talking about

the period, say, from 1937 up until 1941, or just prior to the present emergency period.

Mr. Haycraft: I am going to object to the form
2228 of that question, Mr. Examiner, because what is the present emergency period or when does it start? If he means when were the restrictions placed on him by the government, then he ought to indicate the date in 1942.

Mr. Freeman: Well, I will limit my question and fix the terminating date as December 31, 1940.

Mr. Haycraft: I object to that because there wasn't any emergency at that time.

Mr. Freeman: Well, I am asking my question between 1937 and December 31, 1940.

Trial Examiner Sheppard: All right, you can answer that.

The Witness: Just what was the question?

Trial Examiner Sheppard: Go back and repeat that question.

(Record read.)

The Witness: I would say "yes" in answer to that question.

Trial Examiner Sheppard: Mr. Owens, that year of 1938, anyhow, was a period of where you all had a pretty tough time, wasn't it?

The Witness: That is right.

Trial Examiner Sheppard: 1938. The whole industry I mean.

The Witness: Yes.

2229 Trial Examiner Sheppard: Yes. All right.

By Mr. Freeman:

Now, Mr. Owens, on this combination of the KMI and a type H sensatherm, where you gave Williams a 20 cent better price when they purchased the two units as distinguished from purchasing one unit, do you know whether the 20 cent reduction was applicable in like amount to the KMI and the type H sensatherm or did the reduction fall to one of the two units and, if so, which one?

A. I don't believe that was ever used, Mr. Freeman.

Q. Turning, then, to the Sunray Burner order of February 4, 1937, exhibit 175, when you extended a $15 set price there, which is 65 cents lower than the lowest bracket price appearing upon respondent's exhibit 149, to which of the three units did the reduction apply, or was it spread on all three of the units?

A. Reduction from what? The price shown in exhibit 174?

Q. No, I asked you specifically with respect to exhibit 149, which was the exhibit that you referred to and I took your own figures of 65 cents lower than the lowermost price shown on respondent's exhibit 149, passing by any question as to whether the company took a hundred sets at a time or 250 sets at a time or a thousand sets at a time.

A. Well, on that particular one there would be a difference of $1.15 instead of 65 cents.

2230 Q. Well, take either difference, $1.15 or 65: All I want to know is whether that was spread on the three instruments that made up the set or applied to only one instrument and, if so, which one? The amount is immaterial for the moment.

A. I am going to have to merely estimate this.

Mr. Haycraft: I object to that, Mr. Examiner.

Mr. Freeman: Give us your best figures from the documents that you have here produced this morning.

Mr. Haycraft: Furthermore, Mr. Examiner, I am going to object to it. It is irrelevant and immaterial to the issues in this case as to which of the various controls bore the reduction. I don't see that that has any bearing at all, even on the interpretation that counsel gives to the contract.

Mr. Freeman: Much has been said with respect to the specific account—

Mr. Haycraft: May I finish my objection?

Mr. Freeman: I thought you were through, sir.

Mr. Haycraft: I am not. For the simple reason that the respondent's record up to now shows that they deal in sets and they do not sell the same in units; although they are priced in units they sell in sets.

Mr. Freeman: Well, that is a misstatement of fact, Mr. Haycraft.

Trial Examiner Sheppard: I was going to say this: I thought they all preferred to sell in sets and do most 2231 of the time, but they do at times sell in individual units in accordance with the request of the particular customer. I think I will let Mr. Owens give those figures and see whether they are applicable, whether they are applicable to the whole transaction or whether they are applicable to one of the integral parts. It may be a matter of interest.

The Witness: If I answer this question Mr. Freeman is going to hop from this over to the other contract and I am going to have to go through it again, so maybe if we go off the record here a minute I would like to talk to Mr. Freeman and save me one or two headaches at least.

Trial Examiner Sheppard: Yes, let us go off the record. We may simplify it. Let us take a five minute recess here.

(Whereupon a short recess was had.)

Mr. Freeman: Are you ready to resume, Major?

Trial Examiner Sheppard: Yes, go ahead, gentlemen. Get on the record, Mr. Reporter.

By Mr. Freeman:

Q. My last question, Mr. Owens, was directed to whether the reduction when they bought in sets or more than one unit at a time applied to one specific item or was spread equally among the various items and give us that information, if you can, from the documents that you have here.

A. Well, I couldn't say just where that would 2232 apply. I could only estimate it from some of the other prices, like Century Engineering. Now, their contract, the KMI shows at $8.85 and the lowest price we show on exhibit 149-B for 1937 is $10.25 and on 149-C, bracket 5, complete set $16.15.

Now, to add up the complete set price on the Century Engineering you would have $8.85 against $10.25, $3 against $3.35 on the sensatherm and $2.85 against $2.85 for the limit control. Now, that is as close as I can come to estimating what the individual control prices would be.

Trial Examiner Sheppard: It seems to me it would be on the whole set instead of the one individual.

Mr. Haycraft: The limit control, if I may observe there, are the same on both, so it would be on the other two.

Trial Examiner Sheppard: It would be on the other two. That limits it, then, to two of them instead of three.

The Witness: That is right. 35 cents on the sensatherm and the balance would be on the primary control.

By Mr. Freeman:

Q. Which amount is $1.40?

A. That is right.

Q. That is the difference between $10.25 and $8.85, or $1.40?

A. That is right.

Q. Well, apparently, just so we get the record straight, Mr. Owens, taking your individual prices which ap-
2233 pear upon respondent's exhibit 149, that is the lowest prices applicable, make a total for the three units, that is, a KMI, a type H sensatherm and a limit control, of $16.45?

A. That is correct.

Q. And when that same set of instruments, that is, the three instruments that I just referred to individually, are purchased in sets the price is $16.15, taken from respondent's exhibit 149-C?

A. That is right.

Q. However, the Century, in accordance with respondent's exhibit 177 and to Sunray, in accordance with respondent's exhibit 174 and likewise 175, as well as to Williams Oil-O-matic, in accordance with respondent's exhibits 176-A and B, prices were extended to those companies lower than the lower-most prices for 1937 taken from respondent's exhibit 149-A, B and C, is that correct?

A. That is correct.

Q. And that is true whether the purchases were made as individual units or made in sets?

A. That is correct.

Q. Now, Mr. Owens, do you have the contracts for the year 1938 with Lynn Products, Malleable Iron, Oil Equipment, Old Colony, Osher-Reiss, Packard Oil Burner, Pan American, Petroleum Heat & Power and Quiet Heet of Brooklyn?

A. They are all 1938?

2234 Q. Yes.

A. What was the first one?

Q. Lynn Products.

A. The Lynn Products, who, according to our records, were extended No. 3 bracket prices in 1938, I have been unable to locate a copy of that contract but the record should show what price they received in 1938, according to the copies that I gave to you showing the 1938 prices.

Q. And the bracket 3 for the year 1938 corresponded to your Form 33 for that year?

A. That is right.

Q. And how about Malleable Iron?

A. Malleable Iron? We had no contract with them, according to this last information I have, although originally

it showed as a No. 4. We had a contract but we couldn't locate it, but according to the first record we had they show as having been extended No. 4 bracket prices.

Q. And when you say "bracket No. 4," that would be the prices—

A. 44.

Q. 44?

A. That is correct.

Q. As shown on respondent's exhibit 76?

A. That is correct. The same remarks would apply to the Oil Equipment Laboratories at Elizabeth, New Jersey.

2235 Q. Bracket 4?

A. Yes.

Q. And how about the contract?

A. Well, that is it. I can't locate that either.

Q. And how about Old Colony?

A. Old Colony, who shows here as No. 3, apparently—wait, I think I have got that here. That was sent down to New York, to our New York office and was never submitted.

Q. Do you know whether you sold any controls to Old Colony in the year 1938?

A. I think we had that question up once before, Mr. Freeman.

Q. Well, my memory is not as good as yours. If you will just give me an answer that will suit me.

A. It isn't how much we sold or whether we sold them. It is one of the things that did not come under the subpoena.

Q. Well, that is your interpretation. I am asking you whether or not you sold any controls to Old Colony in the year 1938?

A. Well, we did not.

Q. And how about Osher-Riess?

A. Who?

Q. Osher-Riess.

A. Osher-Riess? According to this we submitted them a No. 3. That is, we sent to the New York office a No. 3 bracket price but I have no copy of the contract, which

2236 would indicate that they probably did not submit that price to Osher-Riess that year.

Q. And how about Packard Oil Burner?

A. Packard Oil Burner? They had a No. 2 early in the year and then we changed that to a No. 3 later that year.

Mr. Freeman: We offer in evidence as respondent's exhibit 178-A the contract with Packard Burner Manufacturing Co., dated March 28, 1938 and as respondent's exhibit 178-B the letter of March 15, 1938 to Packer Burner.

The Witness To be photostated and returned.

Mr. Freeman: That is correct.

Trial Examiner Sheppard: Any objections?

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let them be accepted as respondent's exhibits 178-A and B.

(The documents above referred to were marked RESPONDENT'S EXHIBITS NOS. 178-A and B, and were received in evidence.)

By Mr. Freeman:

Q. Mr. Owens, I understood when you testified last July that in order to have a contract price effective it was necessary that a minimum order be purchased initially, otherwise there was no contract. Is that correct?

A. I don't believe I understand that.

2237 Q. Well, referring specifically to respondent's exhibit 78, which is a portion of your sales manual or pricing structure, it was necessary for a company to purchase an initial order of 25 units for a Form 11 contract and 50 units for a Form 22 contract, and so forth, is that correct?

A. Yes.

Q. Now, isn't it a fact that that condition with respect to purchases was eliminated in the year 1938?

A. What was eliminated?

Q. The requirement that in order to get a particular price that you get an initial order with the contract?

A. I couldn't say yes or no on that. If an order was not received there wouldn't be any contract. There wouldn't be any sense of signing at the time if they didn't accompany it with an order.

Q. Well, I asked you the last time with respect to exhibit 78 whether or not it was necessary that an initial order come along with the contract in order for the customer to get a particular price.

A. That was the understanding, yes.

Q. And I understood you to say that in order to get a specific price you depended upon the minimum number of units purchased when the contract was returned to the company.

A. Are you relating to 1938?

Q. Yes.

A. Well, whatever the price schedule shows is all
2238 I know and you have got that, exhibit number—

Q. 73.

Trial Examiner Sheppard: 78.

Mr. Freeman: No. 78.

A. All right, I refer you to that in answer to your question.

Q. Well, if your company discontinued the practice of requiring minimum orders in 1938, did you thereafter adopt that practice in 1939 and 1940?

A. All I can do is refer you to the copy of our records for those years, which I have already turned over to you.

Q. Do you recall whether or not in 1939 and 1940 you required initial minimum orders?

A. I don't remember; I don't recall.

Q. Now, do you have the agreement for Pan American for the year 1938?

A. Did you want the Packard first?

Q. You have already given me Packard, Mr. Owens.

A. Packard?

Q. Yes.

A. I gave you one but we sent them a revised one, I told you, and that one—

Q. Well, then, let me have the revised one and give me any explanation that you care to with respect to the revised agreement.

A. Well, when the revised agreement was sent to
2239 New York, —was sent in by New York I wrote them this letter here and that is the explanation I got back, so that is the whole story. It is quite a bit to read into the records.

Mr. Freeman: Well, referring to the first one, first to the letter that you wrote, dated September 21, 1938, we will offer that letter as respondent's exhibit 179-A and the—

Mr. Haycraft: What is the date?

Mr. Freeman: September 21, 1938. And the reply or explanation, as you stated, dated October 3, 1938, as exhibit 179-B.

Mr. Haycraft: What is the date of the first one?

Mr. Freeman: September 21st.

The Witness: There is the copy of your new agreement.

Mr. Freeman: We also offer in evidence as respondent's exhibit 179-C the second purchase contract for the year 1938.

Mr. Haycraft: Date?

Mr. Freeman: Which is in blank and undated, although there appears the receiving stamp of the Mercoid Corporation dated September 21, 1938.

Trial Examiner Sheppard: That is when they went from one bracket to another, I believe, in the middle of the year, Mr. Owens?

2240 The Witness: Yes.

Trial Examiner Sheppard: All right. Any objection to that?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let it be accepted as respondent's exhibit 179-A, B and C.

(The documents above referred to were marked RESPONDENT'S EXHIBITS Nos. 179-A, B and C and were received in evidence.)

By Mr. Freeman:

Q. Will you now turn to Pan American and tell me whether you have the contract with that company?

A. It is my recollection that we sent a No. 1 bracket contract out to Neil Peterson, our San Francisco distributor, and to the best of my knowledge he never submitted that contract.

Q. And what bracket—

A. No. 1.

Q. Petroleum Heat & Power?

A. According to the records we submitted a No. 4 bracket to our New York office but apparently that was never submitted either because we couldn't find any record of it having been signed.

Q. And No. 4 is your [illegible]?

A. That was in 1938.

Q. Yes. Now, how [illegible] Quiet Heet of Brooklyn?

2241 A. I was unable to locate a copy of the contract for Quiet Heet other than to determine that they were submitted a contract in a No. 2 bracket. There is a letter acknowledging it. Here is another letter of a month later, which will in a way answer the question that you asked a while ago about submitting an order with a contract to make it legal or official. That apparently

was changed, making it unnecessary that they submit an order with the contract to make the prices effective:

Q. So that the record then be straightened out, after March, 1938 it was no longer necessary that a company in order to get a contract of one or the other of your brackets send in with the contract an initial minimum order, is that correct?

A. Well, this one letter would indicate that but I would not state positively that it was carried through on all the various contracts that have been submitted. We might have for reasons of our own still held to that in certain cases.

Q. So that in certain cases you may have required the initial order as a condition—

A. That is possible.

Q. —for a price?

A. I don't say that is the case but it is possible.

Q. Well, at least back so far as Quiet Heet, however, on March 16, 1938 you advised the company, "We are pleased to advise you that the contract"—

Mr. Hayeraft: I object to that unless the exhibit 2242 is in evidence.

Mr. Freeman: Well, it—

Trial Examiner Sheppard: I don't know.

Mr. Freeman: It saves a lot of time because I am not really interested in that letter, only in that one thing and when that is in I am through.

Trial Examiner Sheppard: I think so. I will let you both do that.

Mr. Freeman: "We are pleased to advise"—

Mr. Hayeraft: I would rather have the letter if we are going to save any time on it.

Trial Examiner Sheppard: Just read on, Mr. Freeman.

Mr. Freeman: "We are pleased to advise that your contract has been approved and is now effective without the initial order previously required."

Q. And that same condition was given or made effective to the Packard Burner Manufacturing Co., and I refer you to respondent's exhibit 178-B?

A. The wording of this letter here by Derby at New York would indicate that we might have to pass a ruling because he mentions in here that all contracts will become effective without the initial order, so that possibly answers your question in full, all contracts. I wasn't sure of that before and I couldn't answer it.

2243 Trial Examiner Sheppard: I think that is plain enough.

By Mr. Freeman:

Q. Mr. Owens, you were to determine whether "special" in connection with the Quiet Heet contract had to do with the same prices given to Steel Products.

A. You are jumping now to 1938, I believe.

Q. Yes. That was one of the things that you were to check and give us the information.

Mr. Haycraft: May I ask, is that the same Quiet Heet? We have been talking about Quiet Heet of Brooklyn up to now.

The Witness: Now we are talking about Quiet Heet of New Jersey, is that right?

Mr. Freeman: Correct, and I am asking you now to give me the information that you said you would dig up when you last testified, on record page 2116.

A. That B-55 that we refer to here apparently is the same as B-44 special for Williams. Which contract is that? Cleveland Steel. The only difference between the Quiet Heet and the Williams and Cleveland Steel was the price, was $2.50 on the sensatherm to Cleveland and Williams and $2.70 to Quiet Heet.

Q. Quiet Heet did get a price reduction of 25 cents on the primary?

2244 A. That is correct.

Q. That is, the price corresponded to the pen and ink prices as distinguished from the printed prices appearing on the contract?

A. That is correct.

Q. And that is the reason you refer to it as a special?

A. Yes, or a B-55, which is the same thing.

Q. Now, you were to produce a form of contract known as the B-55 for the year 1939.

A. That is this.

Q. And by "that is this" you are now referring to the contract—

A. B-44 with the price change in it.

Q. So that B-55 for the year 1939 was not any printed price structure but a pen and ink price structure or a modification of B-44 for the same year, is that correct?

A. That would be my understanding of it. Now, wait. Well, here is the other, B-55. You had that.

Trial Examiner Sheppard: Yes, there is one of that already in the record.

The Witness: It is already in the record.

Mr. Gilpatric: Not the contract.

By Mr. Freeman:

Q. Mr. Owens, you are now referring to 1938 as a B-55.

A. Oh, I see. Pardon me.

2245 Q. And we are talking about B-55 for 1939. Let us take our time. I don't want the record confused and I am not trying to confuse you.

A. Well, that is the only explanation I have, is that there was a slight reduction made in those two prices and then it became the B-55.

Q. And we are both talking about the year 1939?

A. 1939, that is correct.

Q. Now, can you give me in connection with the year 1939 the quantities for your Form B-11, B-22, B-33, B-44 and B-55?

A. Well, I believe you already have that in this.

Q. No, we never received it for the year 1939 and you were to dig that up in accordance with record pages 2130 and 2131.

A. You don't have those at all?

Q. No, not the quantities.

A. Do you have the contracts?

Q. We have the contracts, yes.

A. Well, then you haven't got this?

Q. No.

A. Well, there it is.

Mr. Freeman: The witness now hands to counsel a paper entitled, "1939 oil burner manufacturers' net prices," dated 2-28-39, which we offer in evidence as respondent's exhibit 180.

The Witness: To be photostated and returned.

2246 Mr. Freeman: Yes.

Trial Examiner Sheppard: Any objection?

Mr. Hayeraft: No.

Mr. Freeman: And let the record show that this document, respondent's exhibit 180, has been produced to give the quantities required for the various brackets in forms B-11, B-22, B-33, B-44 and B-55 for the year 1939.

Trial Examiner Sheppard: All right. Let the respondent's exhibit 180 be accepted.

(The document above referred to was marked RESPONDENT'S EXHIBIT No. 180 and received in evidence.)

By Mr. Freeman:

Q. Am I correct, Mr. Owens, that the total of the bracket B-11 to B-44, appearing upon respondent's exhibit 180, is set forth as a thousand for B-11, 3000 for B-22, 7500 for B-33 and 15,000 for B-44?

A. That would be my understanding.

Q. And then I notice opposite the word "rider" quantities such as 100 under B-11, 250 under B-22, 500 under B-33 and 1,000 under B-44 and I now ask you whether or not the term "rider" has to do with an initial order requirement in order to get the price of the particular bracket?

A. Have you got your photostats of these original ones we submitted?

Q. Yes, I have.

2247 A. Is there anything on the back page of any of any of those about a rider, right inside here, 1939?

Q. The contracts that you submitted for the year 1939, B-11—

A. Is there anything on the inside at all of any of those?

Q. 153-A to 153-F did not include any rider and if the term "rider" on the price list respondent's exhibit 180 has any bearing or in any way modifies or changes the terms and conditions of the agreements 153-A to F, inclusive, you might give me whatever explanation you can.

A. Well, my only guess on that would be that an order for that number of controls would be required to make that contract effective or to put it into effect. That is probably what the rider referred to, unless there was a—what year was it we had that special, we put out those special net prices where they jump from one bracket to another when they placed an order? Was that in 1939?

Q. That was in 1940.

A. Well, I don't know what that rider could be.

Q. I now refer you to the 1939 agreement with Cleveland Steel Products, which bears the notation "B-44" thereon, but which you said was a B-55 because of a special pen and ink price for primary and thermostat—

Mr. Haycraft: What is the exhibit number?

Mr. Freeman: It has not been offered as yet.

Q. But in which there appears therein a rider.
2248 A. Well, that is the rider then.

Mr. Freeman: All right. We offer in evidence as respondent's exhibit 181 the agreement of Mercoid with Cleveland Steel Products Company dated February 18, 1939.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: No.

Trial Examiner Sheppard: Let it be accepted.

Mr. Freeman: And as part of exhibit 181 there appears therein a rider, is that correct?

A. Yes.

Q. And I now ask whether or not the rider and the amounts specified therein corresponding to a particular bracket as found upon respondent's exhibit 180 is in the form of a sticker which you attached to your various contracts for the year 1939?

A. I would say it does.

Trial Examiner Sheppard: Make the contract 181-A and the rider 181-B.

Mr. Freeman: All right.

(The documents above referred to were marked RESPONDENT'S EXHIBITS 181-A and B and were received in evidence.)

By Mr. Freeman:

Q. Mr. Owens, am I correct in my understanding that as to your 1939 net prices with respect to the 115-W
2249 immersatherm and the 115-3 immersatherm the low net prices were changed from $3.50 to $3.25 on October 11, 1939?

A. That is correct.

Q. Now, Mr. Owens, can you give me the quantities applicable to individual brackets for your forms SB-1 and those used in the year 1940?

A. Well, on looking these over again the only thing I could make out of it was that where the blanket order was placed for a hundred or more sets that would automatically move them up into the next higher bracket.

Q. And by "higher bracket" that meant a lower price?

A. Yes. Your SB-1 with an order automatically became SB-2 or whatever that next one is—MB-2, small, medium and large. The other was LB-3, I believe. Yes, there are three brackets. Where they did not place an

order they got the SB-1 price. If they did, they got the medium price.

Q. But what quantity was necessary?

A. The quantity mentioned on here, that really governed it, which would answer your question to my way of thinking, and would be the number that they ordered at the time. If it was a blanket order covering a hundred or more sets it automatically put the SB-1 into the medium price. The 300 sets would entitle them to the price shown on, I believe, LB-3, $8.25 and $2.70.

Q. So am I correct in my understanding, then,
2250 that for the year 1940 any company that could buy a hundred sets at one time obtained prices corresponding to those found on respondent's exhibit 155?

A. Is that MB-2?

Q. MB-1, or SB-1.

A. SB-1 would be what they would get if they did not order a hundred or more sets.

Q. So that I have a correct understanding, SB-1, respondent's exhibit 155, gives prices which were extended to a company provided it did not order the hundred sets at a time?

A. That is correct.

Q. So that if a company ordered more than a hundred sets at a time it then—

A. A hundred or more.

Q. —obtained—

A. If they placed an initial order of a hundred or more, then they immediately received the MB-2.

Q. And the MB-2 has a number "300" in there, is that correct?

A. And where a company which was submitted a MB-2 contract placed an order for 300 or more sets they would then get the prices shown in the LB-3.

Q. And if a company ordered a thousand sets or more what price would they get?

A. They would get the special net prices shown here.

2251 Q. And when you say "shown here" you are now referring to respondent's exhibit 159, correct?

A. Yes, that is correct.

Q. Well, then, what price would a company get if it bought more than 300 sets, that is, more than 300 primaries and thermostats?

A. 300 or more they would get LB-3; less than a thousand it would be LB-3.

Q. And more than a thousand?

A. They would get the LB-3 prices with the special net prices that applied on the JM.

Q. JMI?

A. JMI and type H, contained in the letter of January 10th.

Q. Well, Mr. Owens, I am still confused on that 300, so straighten it out if you will bear with me for just a moment or two.

Trial Examiner Sheppard: Do you want to go off the record?

Mr. Freeman: No, I want it on the record because I think the record is still confused and I think Mr. Owens would welcome straightening this out.

Q. If a company bought in January, 1940 less than a hundred controls, that is, a hundred primaries and a hundred thermostats, what price would it get for the type JMI pyratherm and the type H sensatherm?

A. You are assuming that they were submitted 2252 on SB-1 contract?

Q. Yes.

A. And you are also assuming that they did not place a blanket order for a hundred or more sets at the time they signed that SB contract.

Q. That is correct.

A. And they sent in an order for one, two or three or less than a hundred sets, then they would be entitled to the prices shown on SB-1.

Q. Contract?

A. Contract.

Trial Examiner Sheppard: That is exhibit what?

Mr. Freeman: And that is exhibit 156.

Trial Examiner Sheppard: All right. Now go ahead.

By Mr. Freeman:

Q. Then in order to get the price of $9.20 for a JMI in 1940 how many units would have to be purchased, and that is the special net prices you referred to, which we find on respondent's exhibit 155.

A. Well, that would apply to any small burner manufacturer who would not be able to buy a hundred or more sets in a year.

Q. Well, if he bought less than a hundred sets in a year he would operate under SB-1 contract, respondent's exhibit 156, correct?

A. That is right.

2253 Q. And that price would be $9.70 for the JMI?

A. That is right.

Q. Which is your intermittent ignition type?

A. Yes.

Q. And $3 for the type H thermostat, correct?

A. That is correct.

Q. Now, if he bought a hundred or more primary controls and thermostats at one time I understood you to say that he would then get the price which we find on MB-2?

A. That is correct.

Trial Examiner Sheppard: And what exhibit is that?

Mr. Haycraft: With the initial order.

Mr. Freeman: Which is exhibit 157.

Trial Examiner Sheppard: All right, that is plain enough. Now, take up the next one.

By Mr. Freeman:

Q. So that the letters of January 10th, SB-1, respondent's exhibit 155, merely gave a price that would take a bracket 1 account over to a bracket 2 account, provided he bought 100 primary controls and thermostats at one time?

A. As far as the main items are concerned. I haven't checked the other price items on that.

Q. And is that all the information you have as to bracket prices for the year 1940?

A. Yes.

2254 Q. That is, the determining factor for the year 1940 was whether they bought a hundred sets at one time, 300 sets at one time or a thousand sets at one time?

A. I wouldn't say that.

Q. Well, can you give me any explanation as to what was the determining factor for brackets for the year 1940? In other words, all I want to know, Mr. Owens, what was the determining factor in extending to a particular company a particular price?

A. I am afraid I couldn't answer that.

Q. Well, at least we have one determining factor here in respondent's exhibit 155, where a company ordered more than a hundred sets and we have another determining

factor of the same kind where a company ordered 300 or more sets?

A. That is right.

Q. As we find on respondent's exhibit 157, is that correct?

A. Yes.

Q. And then we have still another factor of the same kind where a company ordered a thousand sets, as we find on respondent's exhibit 159, is that correct?

A. Yes.

Q. Is it true that you had only those three brackets for the year 1940?

A. That covers all our prices for that year, yes.

Q. Now, was there anything else that you can recall that in any way determined any prices, other than
2255 those that we find on respondent's exhibits 156, 158 and 160?

A. Well, we do have a short period have lower prices prevailing on the type JM pyratherm, but I don't know whether that was 1940 or 1941.

Q. Well, do you have any documents here that will give you information as to any prevailing lower prices for the primary and thermostat?

A. If you will just get your documents out that you have I will be glad to answer questions on them. No, that was 1941.

Q. Mr. Owens, I have delivered to you and to your attorney each and every document that you brought on July 22, 1944 and you now have them.

A. Is that what you are now talking about? No, that was in 1941, not in 1940. That was the only prices we had, yes.

Q. Now, what bracket for the year 1940 was Williams Oil-O-Matic in?

A. I think LB-3 special.

Q. And can you give me the price at which primary controls of the intermittent type were sold to Williams in the year 1940?

A. I didn't hear that.

Trial Examiner Sheppard: Read it.

(Question read.)

The Witness: $7.75 for the JM and $8.25 for the JMI.

2256 By Mr. Freeman:

Q. So that, in reality, there were really four brackets in 1940?

A. That is right.

Q. I have a note here that on record page 2133 you were to tell us the number of units to be purchased in order to entitle the purchaser to the prices specified in your LB-3 contract.

A. Isn't that what we just went over?

Mr. Haycraft: It has already been covered.

The Witness: It says, "Produce information with respect to what you generally do." LB-3 would be sufficient.

By Mr. Freeman:

Q. Well, you tell me what you do in connection with LB-3; in other words, what would be the requirements? Just give me the number and that will end it.

A. Your LB-3 was extended to a few of the large companies, that is, LB-3 special, like Automatic Burner Corporation, which would be a large buyer, Century Engineering, Cleveland Steel Products, Electro, Inc., Clifton, New Jersey, Gar Wood Industries, Korth Oil Burner Corporation, the Ohio Oil Burner Corporation of Peoria, Harvey-Whipple, Inc., Springfield, the Herco Oil Burner Corporation of Lancaster, Lynn Products, Lynn, Massachusetts,

Malleable Iron Fittings, Bradford, Oil Equipment

2257 Laboratories, Petroleum Heat & Power Company,

Quiet Heet Manufacturing Corporation.

Trial Examiner Sheppard: Which one is that?

The Witness: At Newark.

Trial Examiner Sheppard: All right.

The Witness: The other is Quiet Heet Oil Burner. This is Quiet Heet Manufacturing at Newark; and Williams Oil-O-Matic.

By Mr. Freeman:

Q. And the prices to all those companies were the same?

A. Yes.

Q. Can you give me quickly,—and I am about through,—the basis on which Mercoid offered its various 1941 bracket prices to oil burner manufacturers even though you had no contracts for that year?

A. Well, we merely went over the schedule of customers

and determined quotations that we would extend based on the size of the manufacturer.

Q. Well, was there any yardstick that you used? That is, any specific numbers for the year 1941 as apparently you did in earlier years?

A. The same letter went out with all the price schedules.

Q. That is, the same letter in the year—

A. Circular letter.

Q. —1941?

2258 A. That is all we sent out, was that circular letter that went out with each quotation for 1941.

Q. Now, do you have the price schedule that went along with your letter of January 15, 1941 which you have handed me?

A. I am afraid that I haven't got that. You have got it.

Q. No, I never had it, Mr. Owens, and you have never furnished it to me.

A. The 1941 prices?

Q. No, sir.

A. You got them and I never got it back.

Trial Examiner Sheppard: I thought those were all given when you were here last.

Mr. Freeman: I am asking with respect to brackets. That is, the quantities.

A. SB-1, MB-2, LBX.

Q. And you are now referring to all the originals which I returned to you, correct?

A. That is right, this morning.

Q. Well, now, will you give me the quantities that determined whether the SB-1 or MB-2 or LBX price was to apply?

A. Well, we used approximately the same—

Trial Examiner Sheppard: The same things you did before?

The Witness: The same thing we did in 1940.

Trial Examiner Sheppard: I mean the same quantity.

2259 By Mr. Freeman:

Q. I am asking with respect to that, that is all I want. And, Mr. Owens—

Mr. Haycraft: Are you going to offer that evidence he just now identified, the one he handed to you, that letter?

Mr. Freeman: I got all the information I want.

Q. You were to determine the lowest price at which sets of controls were sold to Acme Tool & Gauge Company in the year 1941. Have you done so?

Trial Examiner Sheppard: Is that Acme?

Mr. Freeman: Acme.

A. Well, none of the billings are on a set basis. They ordered 300 sets of controls and we billed the type H at $2.70, JMI at $8.75 and the DA-31s at $2.75, also the figure 35 risatherm for $2.75. Now, we had one order earlier in the year before they placed the order for the 300 sets, that we billed the JMI at $9.20, type H at $2.85 and the DA-31 at $2.75. That price was revised along in May when they placed the order for the 300 sets. That was placed May 16th.

Q. And have you given us the May 16th or the price extended after May 16th of that year?

A. How?

Q. Have you given us the price that you extended to Acme after the order for 300 was given?

A. Yes, I gave you those prices on the 300. That 2260 is the lower prices.

Q. Mr. Owens, I asked you to check, so that the record might be clear, your notation which we find on respondent's exhibit 152-A that A KMI and type H sensatherm was sold in sets to Automatic Burner Corporation for the year 1937 at $14.90 and I asked you to check and tell me whether the set only included those two items or whether it in fact included a limit control.

A. Are you through with this Acme?

Q. No, I am referring now to Automatic Burner Corporation. I am through with Acme.

A. You are through with Acme?

Q. For the moment.

A. Will you repeat that question, please?

Trial Examiner Sheppard: Read the question.

(Question read.)

The Witness: First of all, we did not sell Automatic Burner Corporation anything in 1937, so that it would not be a sale that we would be referring to there. It was undoubtedly a quotation rather than a sale. Now, whether I can find that quotation or not I don't know. I can only guess that that $14.90 was a complete set of controls, that included them.

Q. That is, that it includes the three elements?

A. It includes the three and I think that parallels
2261 our lowest price we quoted that year to Cleveland Steel, to Williams and others. We figured that price around $15 a set.

Q. That is correct, and that is why I wanted to correct the record to show that it included not only a KMI and a type H but also a limit control.

A. I believe it would.

Trial Examiner Sheppard: It would be natural to conclude that.

Mr. Freeman: Well, the record shows otherwise.

Trial Examiner Sheppard: Does it?

Mr. Freeman: Yes, as produced here and I just wanted to get it straightened out.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Now, Mr. Owens, so that there be no misunderstanding with respect to these exhibits, I have already delivered to your counsel and I have his receipts for the originals of respondent's exhibits 148, 150, 151, 154, 156, 158, 160 and 161 and I have this morning handed to you original of respondent's exhibit 147. Will you see if you have it?

A. Wait a minute, 147?

Q. Yes.

A. Yes.

Q. Now, you have got that one?

A. I have got it. I check 147.

2262 Q. And you have exhibit 149-A, B and C, is that correct?

A. I have got 149-B. I also have 149-A and C.

Q. Do you have exhibits 152 and 153?

A. 152-A to E and 153-A to F.

Q. So that the record is clear, you have all of exhibit 152 and 153, correct?

A. Yes.

Q. All right. And exhibit 155?

A. Check.

Q. Do you have it?

A. Yes.

Q. 157?

A. Check.

Q. 159?

A. Check.

Q. Do you have exhibit 162?
A. To 167.
Q. Inclusive?
A. Inclusive.

Mr. Freeman: That is all. Now, with respect to the exhibits which were produced this morning it is requested that counsel for Mercoid Corporation have a negative and four positive copies made and deliver them to us together with the bill for the same.

Mr. Gilpatric: 174 to 181.

2263 Mr. Haycraft: Mr. Examiner, I might say that it is customary for the Commission to retain the exhibits and make photostats and then send the bills to the parties who ordered them. I don't believe it would be proper for the reporter to let those go out of his hands.

Mr. Freeman: Just off the record.

(Discussion outside the record.)

Trial Examiner Sheppard: The usual procedure will be followed here.

Mr. Freeman: Let the record show that we would like the Commission to furnish us one negative and four positive copies of each of the exhibits produced by the witness Mercoid today.

Trial Examiner Sheppard: Just take a note of that, Mr. Reporter and send it back. Now, Mr. Freeman, are you finished with Mr. Owens?

Mr. Freeman: Yes.

Trial Examiner Sheppard: Now, Mr. Haycraft, I think you had better wait until after lunch.

Mr. Haycraft: I think I can get through in a few minutes.

Trial Examiner Sheppard: All right.

Cross-Examination by Mr. Haycraft.

Q. With respect to these various accounts to
2264 which your attention has been called—

Mr. Freeman: Will you refer to them specifically, Mr. Haycraft?

Mr. Haycraft: Can I go on without being interrupted, Mr. Examiner?

Trial Examiner Sheppard: Yes. I don't think he means to interrupt you.

By Mr. Haycraft:

Q. Will you indicate for the record which ones you made sales to during the years covered by your inquiry from 1937 to 1941 and the approximate volume of those sales, if you can? I am referring to the list of companies beginning with Acme Tool & Gauge Company, page 2092, and the testimony on the succeeding pages.

A. For every year from 1937 to 1941?

Q. Yes.

A. Well, Acme, we sold them $700 in 1937, $300 in 1938, $2,700 in 1939, $2,100 in 1940 and $2,000 in 1941.

Trial Examiner Sheppard: Those were sets, were they?

Mr. Haycraft: Dollars, he means.

The Witness: Dollars, yes, sir. $700, $300, $2,700, $2,100 and $2,000.

Trial Examiner Sheppard: That is all right.

The Witness: Alida Manufacturing Company, 2265 Brooklyn, no sales over the years. Arcweld Manufacturing Company—

Mr. Freeman: If he has a list we can save a lot of time if he wants to put it in. That was Mr. Haycraft's suggestion when we were asking about contracts and no contracts.

Trial Examiner Sheppard: That is up to the witness.

By Mr. Haycraft: Is there anything in the paper that you want?

A. No.

Q. Is that all right?

A. That was made up for this particular purpose and wouldn't mean anything.

Q. There is nothing in there that you want to keep confidential?

A. No.

Mr. Freeman: Except that I would like to ask one question, if I may, here.

Trial Examiner Sheppard: Wait a minute, I want to get this straight. Mr. Owens, if it is satisfactory with you we will just take that and save you testifying on it.

The Witness: I will be glad to do it.

Trial Examiner Sheppard: All the information is on there and we will just have the reporter mark that.

The Witness: If you folks can under my—if you can understand my hieroglyphics there. The figures represent hundreds that are shown in the sheet.

2266 Trial Examiner Sheppard: Mark that Commission's exhibit 210, Mr. Reporter.

Mr. Gilpatric: What is exhibit 209?

Trial Examiner Sheppard: I had it marked "reserved". It may be that we put that 208 and 209 in the record of the 22nd. I put 208 in and that is the reason I was just behind one number. Have you got any 209?

Mr. Gilpatric: No.

Trial Examiner Sheppard: I think we had better mark that 209, Mr. Reporter, instead of 210.

Mr. Freeman: That is not in yet?

Trial Examiner Sheppard: No.

Mr. Freeman: I wanted to ask Mr. Owens one question before it goes in. May I ask that question?

Trial Examiner Sheppard: Yes.

By Mr. Freeman:

Q. You said a moment ago that Commission's exhibit 209 was made up for this purpose. At whose request?

Mr. Haycraft: I didn't understand him to say that.

Mr. Freeman: Well, do you want the testimony read?

Mr. Haycraft: Yes, read it back to me.

Mr. Freeman: All right, go right ahead and read it back.

(Record read.)

Mr. Freeman: Does that satisfy you, Mr. Hay-
2267 craft, that it was made for this purpose?

Mr. Haycraft: I didn't hear him say that.

Mr. Freeman: I did and I now repeat my question, to-wit, at whose request was it made up for this purpose, and I am referring specifically to Commission's Exhibit 209.

A. Because that was the way I understood the subpoena at the start.

Q. Was that made up—

A. At my request, after I read the stuff when I first got the subpoena, after I read the subpoena, when I first got the stuff out, I thought this was included and I had it made up.

Q. That is, you thought the volume of sales was to be included?

A. Yes, that is the way I read it.

Q. And did you likewise understand that the prices were to be included?

A. The prices? What do you mean, "the prices"?

Q. That is, the individual price extended to these companies.

Mr. Haycraft: I object to that question as having nothing to do with this exhibit.

Trial Examiner Sheppard: I don't know what this is about at all. I will just let Mr. Owens answer for whatever it amounts to.

The Witness: I am willing to answer the question 2268 if I can understand it.

Q. Do I understand that the exhibit which you have in your hand, Commission exhibit 209, was produced by you following your receipt of the subpoena in November of 1943?

A. That was correct. I had it the first day that I came up here, when I found out that—

Mr. Freeman: That is all I want to know. No objection.

Trial Examiner Sheppard: All right.

(The document above referred to was marked COMMISSION'S EXHIBIT 209 and received in evidence.)

By Mr. Haycraft:

Q. These pencil notations on the exhibit in the various columns at the top indicate the years, do they?

A. This is the sales for the year 1937, 1938, 1939, 1940 and 1941.

Q. And are these all in hundreds of dollars, the figures that are on there?

A. In hundreds of dollars, yes, sir.

Q. So, for instance, the first one says "7-C."

A. That would be $700 and $300, $9,300, $2,000.

Q. You are referring to Braden Engineering?

A. Yes. $1,300, $1,300, $14,200, $13,200.

Q. What is this 137?

A. That is $13,700.

2269 Q. Down on the second page I notice between the name Micro-Westco, Inc., and Mohawk Oil Burner Manufacturing Company, a notation, "Am. Mohawk Corp."

A. Well, that company had at least three different names, the Mohawk Oil Burner Manufacturing Company, the Mohawk Oil Corporation and the Joseph Toker Utilities, so that the figures shown here represent the combined sales to these companies, whose bills were all paid by Joseph Toker.

Mr. Haycraft: It is understood, Mr. Examiner, that

I am not offering in evidence the notation, typewritten notation at the bottom of the page, which does not refer to the exhibit, as I understand it. Is that all right?

Trial Examiner Sheppard: The Examiner will not consider it.

Mr. Haycraft: The typewritten memorandum at the bottom of the page does not refer to the other material in the exhibit, does it?

Trial Examiner Sheppard: Nothing but the names and the amounts, on exhibit 209.

The Witness: Well, that was the information that was put on there. You see, this is page 3 and then we went ahead and got out the rest of the data by the time I got the subpoena.

Mr. Haycraft: I see.

The Witness: This is the first thing I got out.

2270 As I said, I did not understand that that was not included at the time. I made that list up when I first got the subpoena, is the first thing I did.

Trial Examiner Sheppard: All right.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Anything else, Mr. Freeman?

Redirect Examination by Mr. Freeman.

Q. Where we have the figure "132" in pencil below the year 1941 for Burner Parts & Service, now Penn Boiler & Burner Co., I take it that means $13,200?

A. That is what I understand.

Q. And likewise, then, for Herco under the year 1937 the figure—or, rather, for the year 1939 the figure 2494, that means $29,400?

A. Yes.

Q. And for Kelly Oil Sales Corporation the 70 indicates $70,000 in sales?

A. That is what it would indicate but I am not positive that is correct.

Q. Well, for Malleable Iron Fittings for the year 1938 we have $600?

A. $600.

Q. For the year 1939 $3,200?

2271 A. That is right.

Q. For the year 1940, $15,300?

A. That is right.

Q. And for the year 1941, $23,900?

A. I would say that was correct, but this, I am positive that is wrong.

Q. On that Herco we have $12,100 in 1937?

A. Yes.

Q. $13,700 in 1938?

A. Yes.

Q. In 1939 we have $29,400?

A. Yes.

Mr. Haycraft: Mr. Examiner, is it necessary to go into all this? What is the use of offering the exhibit if he is going to testify to it?

Mr. Freeman: Just a minute.

Q. And for 1940 we have $25,800 and for 1941 $21,600?

A. That is right.

Q. And the figures in each case indicate hundreds less the last two figures?

A. That is right.

Q. That is, the zeros are omitted?

A. The only one that I can see that you pointed out that may be wrong would be Kelly. I don't believe they bought $70,000 in that year.

2272 Mr. Freeman: That is the only reason I called your attention to these figures, so that if there were any errors you might correct them.

Trial Examiner Sheppard: All right.

Mr. Freeman: That is all.

By Mr. Haycraft:

Q. Where there are blank spaces, what does that mean?

A. That there were no sales.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Mr. Owens, I want to thank you for coming here. I am glad that you were on the stand and I excuse you at this time.

(Witness excused.)

Trial Examiner Sheppard: We will adjourn at this time until 2:30.

(Whereupon, at 1 o'clock p.m., September 7, 1944 a recess was taken until 2:30 o'clock p.m. of the same day.)

2273 Afternoon Session.

2:30 p. m.

Trial Examiner Sheppard: We will come to order. You may proceed.

Mr. Freeman: Major Sheppard, we would like to recall Mr. Henning for a question or two.

Trial Examiner Sheppard: Very well.

M. E. HENNING was recalled by the Respondent for further examination as follows:

Direct Examination by Mr. Freeman (Continued).

Q. Mr. Henning, when you last testified in response to the subpena duces tecum you produced some eight contracts that your company had entered into with the various companies named upon the subpena and I now ask you whether or not in addition to those companies that you had contracts with, did you actually make sales or did you give quotations as to prices of controls to companies other than those eight that you had contracts with?

A. Yes, we did.

Q. And I have asked you to check your records as to those companies that you actually sold to, named in the subpena, even though you did not have contracts, and

2274 have you prepared such a paper?

A. Yes, we have.

Q. Will you hand it to me?

A. Yes (witness hands document to counsel).

Q. So that the record is clear, will you state whether or not these are all of the companies that you made sales to even though you had a contract or you didn't have a contract?

A. Yes, these constitute all that we could find.

Q. And the tabulation thereon, that is for the years 1937 up to and including 1941, indicate the prices at which you sold controls in sets to the respective companies therein mentioned.

A. Yes.

Q. And will you tell us whether or not, of the companies mentioned, the controls included a thermostat, a limit con-

trol, and a primary of the intermittent type or the constant ignition type?

A. I believe these were intermittent.

Q. And I notice under the name Century Engineering—

Mr. Haycraft: I object, unless the Exhibit is in evidence.

Mr. Freeman: What was that objection?

Mr. Haycraft: I object to your questioning about it.

Mr. Freeman: All right; we will offer it in evi-
2275 dence as Respondent's Exhibit 182.

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: Let me see it.

Trial Examiner Sheppard: Mr. Freeman will let Mr. Haycraft see it.

Mr. Haycraft: May I ask the witness some questions about it?

Trial Examiner Sheppard: Yes.

Mr. Haycraft: What do the figures on here represent,—the price or the amount, or what?

The Witness: These figures represent the price per set, consisting of three pieces.

Mr. Haycraft: It does not represent any volume?

The Witness: No.

Mr. Haycraft: Then as I understand it, you say that actual sales were made to these various firms at the prices indicated.

The Witness: Yes, or quotations.

Mr. Haycraft: Some of them may not have been sales.

The Witness: That is correct.

Mr. Haycraft: Either sales or quotations.

The Witness: Yes; as I understood it, the subpena asked for both, either sales or quotations.

Mr. Haycraft: Did you superintend the prepara-
2276 tion of this Exhibit?

The Witness: Yes, I did.

Mr. Haycraft: And from what sources was it prepared?

The Witness: It was prepared from our Pricing Department.

Mr. Haycraft: Was it prepared from invoices or was it prepared from price sheets?

The Witness: From our regular Pricing Department which prices all invoices.

Mr. Haycraft: You can't tell then whether actual sales were made at these prices or not?

The Witness: Yes; I am sure that some sales were made because this sheet also includes some contracts which we

had and in those instances we give you the dollar-cents volume.

Mr. Haycraft: But my question is whether you can testify whether the sales were made to each and every name mentioned on here?

The Witness: I couldn't from looking at it, but I can see from this that each of these include a number of companies where sales were made.

Mr. Haycraft: I object to it as irrelevant and immaterial.

Trial Examiner Sheppard: I will accept it and
2277 give it study in reference to your other testimony connected therewith.

(The paper referred to, was marked for identification as RESPONDENT'S EXHIBIT 182, and was received in evidence.)

Mr. Freeman: That is all.

Trial Examiner Sheppard: Any cross examination?

Mr. Haycraft: No. Yes, I believe I would like to ask him one question.

Trial Examiner Sheppard: Step back.

Cross-Examination by Mr. Haycraft.

Q. Where there are blank spaces on the Exhibit, what does that indicate?

A. That no sales or quotations have been made to the company.

Mr. Haycraft: That is all.

Mr. Freeman: We offer in evidence as Respondent's Exhibit 183, a book of patents having to do with primary controls and thermostats under which Respondent manufactures its primary controls and thermostats here involved. Mark it.

(The bound book of documents referred to was marked Respondent's Exhibit 183 for identification.)

Trial Examiner Sheppard: Any objection?

Mr. Haycraft: As I understand it, these are the
2278 patents listed in the stipulation.

Mr. Freeman: Correct.

Mr. Haycraft: No objection.

Trial Examiner Sheppard: Let it be accepted.

(The documents referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 183, were received in evidence.)

Mr. Freeman: I would like to make a statement for the record with respect to the portion of the Complaint by the Commission involving the Freeman patent and the Cross patent. At the time Respondent filed its Answer in this cause it had a favorable decision with respect to its practices from the United States Circuit Court of Appeals for the 7th Circuit. That case went up to the Supreme Court, which was argued in December of 1943 and decided by the Court on January 3, 1944.

The Supreme Court of the United States reversed the Honeywell-favorable decision from the 7th Circuit Court of Appeals, and on February 7, 1944 denied a petition for re-hearing.

Promptly upon the denial of the petition for rehearing Respondent in this case terminated all of its agreements of every kind involving either the Cross patent or the Freeman patent, all of its practices condemned by the Supreme Court have been eliminated, and I want to
2279 state on this record as counsel for the Respondent, that all of the practices complained of in connection with the Cross patent and the Freeman patent have now been ended and are not now being carried on in any way by the Respondent.

I might also say that patent markings in connection with these two patents have been removed from any and all controls sold by the Respondent and that in Respondent's literature it has eliminated any reference to either of these two patents or the markings involving those two patents.

Mr. Haycraft: I should like to ask counsel if we are to infer from this statement that there will be no defense testimony or evidence submitted on these two counts?

Mr. Freeman: There will be no further evidence of any kind because the Supreme Court has spoken and we are living up to the decision of the Supreme Court, and I think we can save time on the part of the Respondent and likewise on the part of the Commission, because that is now a dead issue.

Trial Examiner Sheppard: What count of the Complaint was that in? I have forgotten.

Mr. Gilpatric: Count I, paragraphs 5 and 6.

Mark this as Respondent's Exhibit 184.

(The document referred to was marked Respondent's Exhibit 184 for identification, consisting of 27 pages.)

2280 Mr. Gilpatric: We offer in evidence a copy received from the Securities & Exchange Commission of a prospectus relating to Perfex Corporation, dated July 8, 1944. Since the relevancy of this may not be readily apparent I would like to make this brief explanation of the offer:

One of the issues in this proceeding is whether the practices and conduct of the Respondent have affected competition among control manufacturers. We have had the testimony through a witness called for the Commission, Mr. Julius Luthe, the president of Perfex Corporation that his company started in the control business in 1936 and by 1941 considered itself the second largest manufacturer in the industry.

This prospectus, which is put out by the Perfex Corporation and on file with the Securities & Exchange Commission corroborates that evidence. It states, among other things as bearing on this issue—

Mr. Haycraft: I object to what it states if it is going to be received in evidence.

Mr. Gilpatric: Well, I think with that statement and showing this, of course, to Mr. Haycraft, that will be sufficient as an introduction (handing documents to counsel). We are only relying for the description of the business of Perfex on pages 5, 6 and 7.

Mr. Haycraft: I object, Mr. Examiner, to the offer 2281 on the ground that it covers a period of time subsequent to the time which is really in issue in this case and that it includes the activities of the Perfex Corporation in the war period and so, in my opinion, has no probative value in this proceeding.

Furthermore I am deprived of the opportunity of cross-examining the witness who prepared it with respect to a number of the statements contained therein, a privilege which should be granted in all cases of this kind.

Mr. Gilpatric: It is only offered to the extent that it relates to and supplements the testimony of Mr. Luthe. Any statements that are extraneous to his testimony as to the position of Perfex and its ability to compete and become one of the principal factors in the industry are not offered and we do not claim them to be binding on the Commissioner or Perfex Corporation.

Trial Examiner Sheppard: I think the testimony as already had by witnesses in reference to not only Perfex but some others that came out in the testimony in reference

to the prosperity and growth of these various units are enough study for the Examiner and possibly for the Commission to show the indications along those lines. Those witnesses were subject to cross-examination by Mr. Haycraft.

A statement of this kind, which is more or less a public record taken from the Securities & Exchange Com-
2282 mission may be of interest to me and to the Commission, both, and I would have let it go in without objection, but if Mr. Haycraft wants to cross-examine on that and he has that right, I am going to bar it, so the motion to incorporate this in the record is denied.

Mr. Gilpatric: Then it is marked for identification, and we will have an exception.

Trial Examiner Sheppard: That is right; and any use you gentlemen may want to make of it can be done.

Mr. Gilpatric: Now, except for the recall of Mr. McAnly—

Trial Examiner Sheppard: He will be here tomorrow.

Mr. Gilpatric: He will be here tomorrow, and outside of correcting two figures in his report and making a brief statement about his testimony, the Respondent's case will be completed, and subject to any redirect examination after Mr. Haycraft's cross examination.

Trial Examiner Sheppard: We will adjourn till tomorrow morning at 10 o'clock a.m.

(Whereupon, at 3 o'clock p.m. the hearing in the above-entitled matter was adjourned to Friday, September 8, 1944, at 10 o'clock a.m.)

2283

Room 1123, New Postoffice Building,
Chicago, Illinois,
Friday, September 8, 1944.

Met, at 10 o'clock a. m., pursuant to adjournment.

Before:

W. W. Sheppard, Trial Examiner.

Present:

Everett F. Haycraft, Attorney for the Federal Trade Commission.

Cravath, Swaine & Moore, by R. L. Gilpatric, 15 Broad Street, New York, New York; and Baer & Freeman, by Will Freeman, 135 South LaSalle Street, Chicago, Illinois; appearing for respondent.

2284 Proceedings.

Trial Examiner Sheppard: Convene the hearing, Mr. Reporter, in Docket 4920, Minneapolis-Honeywell case. Show the usual appearances and show Mr. H. T. McAnly of Chicago, having been previously sworn in this case, reappears upon the stand by agreement for, I believe, cross-examination at this time, isn't it?

Mr. Gilpatric: Well, there are a couple of questions we would like to supplement.

Trial Examiner Sheppard: All right, on behalf of the respondent, Mr. Reporter.

H. T. McANLY, recalled as a witness by and on behalf of the respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination.

Mr. Gilpatric: In the first place, it appeared after the close of the hearings last July that the bracket prices shown on two pages of the report, respondent's exhibit 170, differ from the prices shown in Commission's exhibit 1, that is the stipulation. The difference was due to the

fact that in two years—in one year, rather, two of the bracket prices shown in the stipulation were lower than those shown in the report because of the fact that on quantity purchases of limit controls there was a further reduction allowed.

Trial Examiner Sheppard: What years were those?

2285 Mr. Gilpatric: Just 1941. So I would like to ask Mr. McAnly to read into the record the three corrections, the three sets of corrections which are necessary in order to eliminate that inconsistency.

Trial Examiner Sheppard: Can you make it on the report?

Mr. Gilpatric: We haven't got it here, unfortunately. You see, the original exhibits, I suppose, are in Washington.

Trial Examiner Sheppard: All right, it will have to be done on the record then.

Mr. Gilpatric: All right.

By Mr. Gilpatric:

Q. Will you indicate what they are, Mr. McAnly?

A. On page 4, the schedule at the bottom of the page, in the price schedule column opposite bracket No. 4 it reads $15. It should read $14.90. Bracket 4-A reads $14.50. It should read $14.25. Now, page 6 schedule—

Q. Exhibit A?

A. Exhibit A, column 3, opposite bracket 4 reads $15. It should be $14.90. Opposite 4-A it reads $14.50. It should be $14.25. And in column 6, price differential opposite bracket 4 reads 35. It should be 45 cents. 4-A reads 50 cents; it should be 65. And opposite bracket 5 it reads 75. It should read 50.

2286 Q. Now, Mr. McAnly, do these changes which you have just made for the record affect in any way the other computations and conclusions in that report, respondent's exhibit 170?

A. No, they deal only with selling price differentials in the last three brackets and our report, of course, dealt only with cost and made no attempt to compute or compare cost differentials with selling price differentials in those three brackets. We stopped with 3-A, as we have explained before, so that this makes no change in any of our comparisons.

Trial Examiner Sheppard: And this change that you have just indicated there happened only in 1941?

The Witness: That is right.
Mr. Gilpatric: Yes.
Mr. Haycraft: Well, the whole exhibit is 1941.
The Witness: Yes.
Trial Examiner Sheppard: Yes, it only deals with 1941.
Mr. Gilpatric: It only deals with 1941.
Trial Examiner Sheppard: That is right.

By Mr. Gilpatric:

Q. Now, Mr. McAnly, in view of the bulk of this report and the desire of everyone, including, I believe, the Trial Examiner, to have the essence of it briefly stated, I wonder if you could summarize very briefly by way of concluding your testimony what this report shows,
2287 so that we will have in one place in the record a very short statement of what it is?

Trial Examiner Sheppard: Very good.

The Witness: Our job was to make an analysis of the actual costs incurred by Minneapolis-Honeywell during the year 1941 in the manufacture and distribution of controls for domestic oil burners, with a view toward ascertaining which of those costs could be so apportioned between Minneapolis-Honeywell's eight manufacturers' price brackets as to account for or justify the difference in price between those brackets. We set out to make this apportionment by the use of methods and procedures which are recognized as in accordance with accepted accounting practice.

As I testified last July, out of total costs for 1941 of approximately $11,000,000, we excluded from the allocation over $8,500,000, consisting principally of manufacturing costs, general advertising and certain items of home and branch office selling and general administrative expenses. That left some $2,445,000 for analysis and distribution where applicable among the price brackets. The types of expenses thus distributed consisted of certain home office selling and administrative expenses, various branch office expenses and expenses of the finished goods stores and shipping department.

Using only recognized bases of apportionment we reached the conclusion that, compared to a total price difference of $6.50 between Minneapolis-Honeywell's
2288 socalled discount price, which was its highest price to manufacturers for 1941, and its bracket 5 price,

which was its lowest price, there was a cost differential of $9.40 per set of controls. In other words, the over-all reduction in price from Minneapolis-Honeywell's top price to its bottom price, as represented by its 1941 price bracket structure, was more than justified by cost savings realized through selling in quantities to the lowest price group.

When it came to distributing those cost savings among the eight brackets, however, all but 46 cents of the $9.40 was spread over the first five brackets, so that what was left, namely, 46 cents per set of controls, was not enough to account for $1.60 difference in price between brackets 4 and 5. That is why our report stopped short of allocating costs as between brackets 4, 4A and 5. That fact does not, however, detract from our first conclusion that the over-all difference in price between the top and the bottom brackets was justified, nor does it mean that the price differences between the last three brackets could not likewise be justified by cost savings, were we able to allocate additional items of cost excluded from consideration in this report, which was not practical.

I think that summarizes the contents of our report and conclusions.

2289 By Mr. Gilpatric:

Q. Well, Mr. McAnly, in view of the corrections made in the report should that $1.60 figure be $1.85 now? Could you figure that out?

A. Let me see. No, your 45, 65 and 50 are still your $1.60.

Q. Well, the difference in selling price between $14.90 and $13.75 is only $1.15.

A. Well, your difference is your difference between $15.35 and $13.75, isn't it? It is the price of 3A and 5.

Q. You are right.

A. It doesn't make any change in that at all, just within the last three brackets.

Mr. Gilpatric: All right. That is all we have, Mr. Examiner.

Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Haycraft.

Q. In your study did you make comparison between the products sold at $17.35, bracket 4, with your $13.75 and $14.25 and $14.90 in determining whether or not the difference was justified?

Mr. Freeman: Just off the record.

(Discussion outside the record.)

Mr. Haycraft: Exhibit A I am referring to. I am looking at exhibit A now of respondent's exhibit 170.

2290 Mr. Freeman: All right.

Mr. Haycraft: Page 6 of the report.

A. Well, we only carried our comparisons down as far as 3A.

Q. You made no comparison with any of the various brackets then, 1, 2, 3, 3A, with 4, 4A and 5?

A. No. Comparisons are available on the exhibit for comparisons within the brackets up to 3A, but as the schedule shows we only have 46 cents left and to attempt to spread the 46 cents over the last three brackets would not have meant anything to compare with the $1.60 that was the sales price differential.

Q. Now, referring to exhibit B of respondent's exhibit 170, will you explain how you arrived at the figures under the separate columns in line 1, that is, "Manufacturing cost of products sold"?

A. Well, that, in effect, is the sum of the individual product costs produced by the company as set forth in the sales analysis records of the company.

Q. What does the item $7,665,233.49 represent?

A. That is the manufacturing cost of all products sold.

Q. Of all products?

A. That is right.

Q. Including things other than controls for burners?

A. Oh, yes. That is everything.

Q. What is the $6,382,399.65?

2291 A. Well, that is the manufacturing costs of all products except cost of products sold to the oil burner manufacturers.

Q. In other words, that is the difference between the first column, $7,665,233.49 and $1,282,833.84?

A. That is right.

Q. Now, then, what is the basis for the last line, "Manufacturing costs applicable to products sold to oil burner manufacturers"?

A. Well, that is the actual product sold to each of the oil burner manufacturers, the quantities of each, extended by their factory cost to produce.

Q. Where did you get the figures?

A. From the records of the company. In other words,

the company have in their records the specification cost of each item, material, labor and burden and then we multiplied that out and that is the total and I think we explain in the report here how we reconciled that with the over-all cost. In other words, that is the sum cost,—the same cost that the company uses when they figure inventories, product costs for selling prices, and so forth.

Q. Now, then, how are these various items made up in the remaining columns on there, namely, "Manufacturing cost of products sold by price brackets", then the "Discount, and the No. 1, 2, 3, 3A, 4-4A and 5"?

A. Well, we had the sales on the units sold to
2292 the customer within each bracket and that merely is the extension of those units multiplied by the factory costs of each. In other words, that is an analysis of that $1,282,833.84 figure.

Q. You mean that you made a total of the sales by units to oil burner manufacturers in each bracket?

A. That is right. We got that from these sales records. That is a part of the company's regular procedure. They have cards that give us that information, on which we based our study, and on which we test our study.

Q. In other words, if a customer was put in class 5, regardless of the reason he may have been put in there, you counted the units sold to that customer under class 5 in making up your tabulation?

A. That is right, by customer bracket analysis.

Q. I suppose you have work sheets so that I can ask you about specific customers, as to where they were classified?

A. I think we have.

Q. Can those sheets be made available? Will those work sheets be made available?

Mr. Gilpatric: Yes, they will be.

By Mr. Haycraft:

Q. Then, as I understand it, after you determined the number of units in each classification you multiplied that by the cost?

A. Yes, that is the cost.

2293 Q. The unit cost that you determined from your compilation or their figures, which?

A. Well, they are their figures which we verified and satisfied ourselves that they are right.

Q. What was the unit, the basis used in determining those figures, the cost unit? What did you multiply by?

A. Well, each limit is made up of a bill of material that has a series of parts and sub-assemblies and assemblies and each one of those in turn has a specific cost computed. In other words, the company maintains costs all the time in their records.

Q. What I am trying to determine is what you used in making up this $6,196.14?

A. We used the cost on the various products that were represented by the customers in that classification, that covered their purchases.

Q. I want to know what the number was, what was the unit, what was the figure that you used?

A. Well, they are gathered from the different units in there. That is the total cost of all the products sold to the oil burner manufacturers in the discount group. The only purpose of that line there anyway is to determine a base against which to measure this distribution cost and get a percentage which, in turn, you can apply to the set of controls.

2294 Q. All right. Now, then, tell me this: What proportion of the total manufacturing cost, $1,282,833.84, is represented by the brackets that you used,—discount, and the 1, 2, 3, 3A?

A. What portion?

Q. Yes, what percentage of that?

A. Well, the sum of 1, discount, up through 4A.

Q. Through 3A?

A. Through 3A. I would have to figure that. The sum of all of them equal $1,200,000, to the $857,000, which is roughly two-thirds, would leave about one-third that would represent the costs in that group.

Q. Then your testimony is that the analysis that you made is only about on a third of the products sold and manufactured?

A. That is right, about a third spread between brackets. Of course, the over-all covers the $857,000 as well, when you talk of over-all.

Q. Well, the only over-all comparison you made was between the discount column and the last column 5, is that right?

A. That is right.

Q. You did not make any comparison, for instance, of

column No. 1 with No. 4, 4-A and 5, or between column 2 and column No. 4, 4A and 5?

A. No, but any one of those columns can be compared with 5 very easily.

Q. Well, that is not the question. I am asking you
2295 whether this report contains that comparison, not whether it can be compared. I am asking you whether you did compare it.

A. Just a second. I think we have—no, I guess there is no schedule that contains a comparison of 2 with 5 or 1 with 5, but I cannot help but add that it can be readily compared from the report, from the figures contained in the report.

Q. Now, referring to line 9 of this same exhibit will you please explain in detail how you arrived at the figures appearing on that line applicable to each of the price brackets? Just where do you get $9.40, $5.12, $2.04, $1.15 and 46 cents?

A. Well, we determined in line 8 the ratio of the distribution cost as finally allocated to the price brackets, which we express in line 8.

Q. How did you make up line 8?

A. Well, by dividing the total under line 6 by line number 1.

Q. All right.

A. Then the application of that ratio—

Q. You misspoke yourself there, didn't you? You mean line 7, don't you, the total?

A. Oh, yes.

Q. $10,902.30.

A. That is right, line 7.

Q. Divided by $6,196.14, is that right?

2296 A. That is right, which gives you the ratio. Then we apply that ratio to the cost of the standard set of oil burner controls.

Q. Where is that in the report and what is the figure that you use?

A. As I said, it is readily ascertainable. I mean it can be calculated, but I think—

Mr. Haycraft: I think, Mr. Examiner, we should have some explanation of that which would verify the figures. He says it is the standard cost for the set.

The Witness: It is the cost of that set, to which has been applied this item to get the—

Trial Examiner Sheppard: Suppose I give you fifteen or twenty minutes and let you boys do that.

Mr. Haycraft: They have it.

The Witness: We can give it. I think it was felt that there wasn't any reason to carry in here the specific cost as an item, that it could be explained.

Mr. Freeman: The manufacturing cos all the way through is the same regardless of bracket.

The Witness: We have made no change in that. The only thing is we do not show in here the cost of that set and, therefore, we were requested to leave it out. It can be computed.

2297 Mr. Freeman: It doesn't make any difference what the cost of a set is as long as we start with the same cost all the way through each bracket.

Mr. Haycraft: That is a matter of argument, Mr. Examiner and I am entitled, it seems to me, in cross examination of this witness to find out the basis of these various figures.

Trial Examiner Sheppard: Yes. I am going to have you do that right now, if it takes half an hour.

Mr. Freeman: Do you contend, Mr. Haycraft, that the manufacturing cost enters into this picture?

Mr. Haycraft: It does if it is used as a basis.

Mr. Freeman: We do not use it as a basis.

Mr. Gilpatric: We do not do that in this whole report.

Mr. Haycraft: I would like to have the witness testify, Mr. Examiner. I am asking him these questions.

Trial Examiner Sheppard: All right, go ahead. Let Mr. Haycraft do his examining.

The Witness: Well, we apply the ratios to this base, which is the manufactured cost of this set. Therefore, the cost, if you divide the $9.40 by these ratios, you will have the cost. We use the same cost all the way across. Now, it is only a matter of very simple calculation for us to produce the cost figure that represents the cost of the set. That is what you are after, isn't it?

2298 Trial Examiner Sheppard: All right. Let me know if you want this witness to do that and I will have him do it.

Mr. Haycraft: I am merely trying to find out what the report represents, Mr. Examiner.

Q. I wish also to ask you this question: I notice you refer to the cost on a set basis and yet we have in the

beginning of the exhibit and all the way through it unit volume. Now, how did you relate your unit volume to a set price and set cost?

A. Well, there are three units to a set.

Q. Is that the way you did it?

A. That is the way it is done and this set, that is, the one for oil burners, is the main item, the most popular and we confined it to that. I think that is explained in the report.

Q. Now, then, on page 8 you have got here various distribution costs, cost differentials and price differentials and so on. Now, are those all on a unit basis or on a set basis? You will recall the report indicates the price scale is on a set basis.

A. That is right.

Q. Now, what about the distribution costs and the cost differentials and the price differentials?

A. They follow the price scale. They are per set.

Q. They are all on per set?

A. It is a segregation of the bracket classification, is the way it is described. It is a unit classification but by purchasing one set that gives you three units, isn't 2299 that right?

Q. In other words, your discount column would be equal to about 50 sets?

A. That is right, it should read 1 to 50 and number 1 should be 50 and one-third of that.

Q. Now, that same explanation would be true as to page 4, wouldn't it, that you made?

A. Yes, sir.

Q. Now, turning to page 13 of the report, in the middle of the page reference is made to: "Statistics relating to sales, manufacturing cost of products sold, number of sales invoices, and number of billing lines were obtained from tabulations prepared on electric sorting and tabulating equipment from approximately six hundred and thirty thousand punched cards. The punched cards were prepared by the company in the ordinary course of its business during the year 1941 as a part of its regular accounting and sales analysis procedure and covered all sales of the company."

Now, what did these punched cards show? You say they were cards that were used. What did they purport to show?

A. Well, the company accomplished their sales analysis and various statistics as to quantities and items sold by using the International Business Machines electrical sorting and tabulating procedure and that requires a key punch operator to punch on this card, making holes
2300 in certain fields on a card which identifies each line of the invoice as to quantity and product number and in their case unit cost and selling price, that is, the extension of that quantity and that is all tied up then with the particular invoice from which these cards are prepared so that they may be resorted back and tested against these cards.

Q. Are these cards coded so as to show the bracket classification of the customer?

A. I don't know whether there is a definite code on bracket classification or whether we took that from the specific customers. They are not on the individual cards, no, but they are identified by customer. Then you see the company can sort these cards by using any field they desire to prepare any kind of statistics.

Q. Well, who did the sorting of the cards, that is what I am trying to get at? Did you do it or did the company?

A. Well, that was done under our supervision and we exercised the same care in testing anything that was done that we would normally during the course of any audit. We laid out the procedure and worked with their personnel representatives.

Q. Well, did you check the classification, the assortment as to classification? You say they could be sorted as to classification, as to customers and then they should be sorted as to classification. Did you check it your-
2301 self as to the classifications? How sure can you be, for instance, that you got all the cards in each classification, in the 1, 2, 3, 3A, 4, 4A and 5 and so on?

A. Well, I would say that the test of the work that we did in connection with the preparation of data was sufficient to satisfy us that it is accurate. I think the punched cards that we handled or accounted for came within two per cent of the total sales dollar volume of the company, so that we are sure we had all the cards.

Q. Well, that may be but how are you sure, or how can you be sure that you had them classified right?

A. Well, we satisfied ourselves sufficiently that we are willing to make the statements that we have, that we think that they are accurate.

Q. Yes, but, Mr. McAnly, under cross examination at this time I am trying to find out what steps you took to satisfy yourself? In other words, the Commission has got to be satisfied now, that is the next step.

A. Well, as far as the detailed test checking that we did, I have with me here two of the men who did the work so that in the event there is any question as to just exactly the steps that we took we can make a definite statement on that. In other words, the extent of our participation in this thing we can give to you first hand.

Q. I will pass that for the time. Who were the 2302 men that worked on it?

A. Mr. Reese and Mr. Johannsen.

Mr. Freeman: Do you want to have him answer that question right now?

Mr. Haycraft: If he can answer it.

The Witness: I will be glad to have him answer that question.

Mr. Freeman: Well, he is here now.

Mr. Haycraft: Well, I would rather get through with this witness and then take Mr. Reese.

Q. Who was the other man?

A. Mr. Johannsen.

Q. Now, on page 14, under the title, "Salesmen's calls:

"Salesmen's calls were segregated into two general classifications, manufacturers and other customers.

The calls on manufacturers were divided between oil burner manufacturers and other manufacturers.

Reports of salesmen's calls on file at the home office were inspected and tabulated by us. Effect was given to the relative time consumed in making calls on manufacturers as compared with calls on dealers, jobbers and other customers from data furnished by the salesmen or their supervisors in which consideration was given to the specific customers and territories."

Now, to what extent did you make the inspection of 2303 salesmen's reports that you referred to? Did you find that there were full files of salesmen's reports in all offices where you made your study?

A. Well, we point out in the last paragraph that there were a few cases where we did not have all of the data. We had access not only to salesmen's calls, but to correspondence, expense reports covering traveling.

Q. Were you able to determine from the inspection that

you made of these reports the length of time that the salesman spent at the places of business of each of the customers that he called on?

A. Well, the only place that any relative time was considered was getting a variation of the time required generally among manufacturers by getting a few salesmen who called wholly on manufacturers.

Q. Did you make any attempt to distinguish or divide this time as between manufacturers in the various brackets? In other words, did you make any attempt to determine how long salesman A spent in the office in calling on manufacturer X as compared with manufacturer Y, X being in one classification and Y in another?

A. Not by the salesman.

Q. Not by the same salesman?

A. But each salesman's calls were analyzed and his salary and traveling expenses spread among the 2304 manufacturers uniformly on a pure call basis, but if one salesman, the same salesman, handled several customers in different bracket classifications they would be a uniform cost per call, but to the extent that the different salesmen handled the different customers in the different bracket classifications it naturally would follow that their specific expense was spread over the brackets that they handled. So if one customer is handled by one salesman, his cost would follow in that classification uniformly, each salesman, but not an average of all. Do you see what I mean?

Q. I see what you mean and I think that you have answered my question. I wanted to ask you whether it would be possible to make the study as I have indicated in my question,

A. I don't think so from the data that was available.

Q. That is, would that be due to the fact that it was a long time back?

A. That is right and I doubt if you could tell from the sales call reports the relative time that he might spend. I think that if it were possible we would try to give effect to that, although we felt that we had to accomplish some of that by confining it to the specific salesman.

Q. I assume that you have in your study indicated the, —in your work sheets you have a full record showing the salesman, the names of the accounts that the salesman called on.

2305 A. Yes, sir.

Q. So that can be checked.

A. That is right. It is in such shape that it can be checked.

Q. Now, looking at page 22 of the report, where employes listed on that page are engaged in part in connection with sales to oil burner manufacturers and in part connected with sales to other manufacturers, how were those percentages arrived at in the division of time in those two columns?

A. Well, as explained underneath, by direct consultation with the respective individuals, which was true in the majority of cases.

Q. Would the answer be, then, that estimates were made?

A. Well, "estimate" might be a little misleading. They are more in the nature of opinions.

Q. And not based on—

A. No, there is no time report.

Q. —time records, then?

A. No.

Q. How did you arrive at 87.9 per cent for this fellow Dennison, consulting engineer, on oil burner manufacturers and 12.1 per cent on other manufacturers? That is getting it down pretty fine. I am just wondering whose opinion could get that close?

Mr. Gilpatric: It is seven-eighths if you give it in terms of numbers.

2306 The Witness: That is probably the way it is. One-eighth and seven-eighths.

Mr. Haycraft: I would like the witness to do the answering, Mr. Examiner, rather than counsel.

Trial Examiner Sheppard: All right. The Examiner is paying more attention to the witness.

By Mr. Haycraft:

Q. As I understand it, then, these percentages were based upon the opinions of employes of the respondent as to the division of time?

A. And checked with their supervisor, but I would like to make this comment if I may. At the bottom of the page we do draw a comparison. In other words, after this was accomplished and we got the respective opinions of these people, as a result we applied that,—in distributing their salaries and their traveling expense or cost to the extent

they had it, we allocated 40 per cent to heat control whereas—allocated 40 per cent of this to oil burners, whereas the actual sales volume of oil burners was 43 per cent. In other words, even after taking their opinions or estimates, which is the best you can get, there is a measure of how much in line it might be when in the final analysis it did not give us as much as if we had spread it in a lump on a sales basis. While neither may be exactly right, certainly one has some effect in checking the other.

2307 Q. What was the basis for the 43 per cent and 57 per cent?

A. Well, of your heating control sales 43 per cent was oil burner and 57 per cent other. Now, this allocation—

Q. What figure is that?

A. That is down on page 22.

Q. Where else can you find the figures that you base your 43 per cent on?

A. Well, just from the figures that we have taken of the salary,—or, rather, of the sales. It is not in the report exhibits. It is merely a comment in the report.

Q. Don't we have that here?

A. No, it is not separated. They would be included in that column in the first exhibit A there, "other customers."

Q. Exhibit A or exhibit B?

A. Exhibit B I guess it is. On line 1, exhibit B.

Q. You do not have those figures, then, do you, which show the 43 per cent and 57 per cent?

A. We do not have the figures that make up the two percentages but the sales analysis records of the company disclose that on the heating control sales volume 43 per cent is oil burner and 57 other, so that we just drew the comparison in here to show that this allocation is a reasonable approximation, if that is what you may call it.

Q. Well, as I understood in the beginning of this thing, you were going to include those items which were

2308 readily ascertainable. As I understand it here you say—on page 12 you say:

"The items of distribution cost fall into two general classifications:

1. Those which unquestionably affect differentials in cost as between customers.

2. Those which are generally accepted as having no effect on such cost differentials.

The items in the first group which unquestionably affect

cost differentials fall into two further general divisions, namely: those which lend themselves readily to bracket classification and those which are not so readily allocated to bracket classification.

In this report we have utilized only those items affecting distribution cost differentials which were readily allocated to the respective quantity brackets."

Now, in your opinion, does this figure that I have just called your attention to on page 22 come within that definition, "readily allocable?"

A. I would say it does.

Q. And yet they are based upon opinion?

A. It is a direct selling cost.

Q. And yet they are based upon opinion and not based upon time records?

A. Well, the only cases where the opinion enters into it is the division between oil burner and other manufacturers.

2309 Q. Yes.

A. Under your oil burner classification—

Q. Isn't that an allocable proposition? You are checking a call on the oil burner manufacturer and other manufacturers, aren't you?

A. Yes, and I contend that the test that was used as determined by the total volume makes it a pretty reasonable allocation.

Q. You would not contend for a moment, though, that it is accurate when it is not based on time records, would you, as an accountant?

A. I can point out to you many cases where time records are not necessarily accurate either. In other words, because there is a time record supporting something does not make it accurate. My opinion is that an individual that is an executive can give you a much better idea of how his effort is devoted than anything he could put down in the form of a time record. In fact, in cost accounting today we have very little use for so-called actual time records. We work on what is called the required time as determined scientifically. If they take more time than that we do not call that cost to the item. It is a cost that is thrown out.

Q. Is that the policy you followed in preparing this report?

A. In preparing the report as applied to the basis
2310 of allocation where it is used.

Q. Now, turn to exhibit C, page 20 of exhibit 170. Now, you have a figure there of $92,908.80, shown as heating controls division,—salaries to the heating controls division. Have you got that?

A. Yes, sir.

Q. Now, look at the bottom of page 21, under the same office and administrative expense, analysis of exhibit C. You have a sub-heading, "Heating controls division, $90,699.80." Now, which one is correct?

(No response.)

Mr. Hayeraft: We can pass that for the time being.

A. Let us check that.

Q. If you want your assistants to take a look at that, why, we will pass that for the time being.

A. I can say this, that regardless of that item there, which could be a slip, the amount that is applied, the 45, is a part of the $90,699.80, so that the discrepancy is in the not applied section. That is carried out on the next page. It is probably just an error in classification in the total column here. Your total salaries on exhibit C are $171,127.81, so that the classifications within the group of 171 are a little different here on exhibit C than they are over here, but the amount that is segregated between other customers and the amount we used agrees in total 2311 with the 171. Is that clear? I mean have you got the figures?

Q. That is the only explanation you have to make at this time?

A. That is the only one I have here today unless we check the thing and see.

Q. You know of no reason why the items could not be the same in both places in the exhibit, do you? They are supposed to represent the same thing?

A. Well, they represent the same total. Now, it is just a different segregation, yet one is called "Heating controls division."

Q. Well, they should come out in the same amount?

A. They do come out exactly to the same amount in total but it is a group.

Q. They do not come out $92,809.80?

A. No, but we have used less than 92 in the other schedule, which means that some part of that is down in the non-applied.

Mr. Freeman: Mr. Reese can answer that for you Mr. Hayeraft.

Mr. Reese: On exhibit C—

Mr. Haycraft: Just a minute.

Mr. Freeman: He doesn't want it now.

Mr. Haycraft: I would like to have but one man at a time.

Q. Now, turning back to pages 16 and 17 of re-
2312 spondent's exhibit 170, under the caption, "Other oil burner manufacturers also manufacturing other equipment," you make an example there of the Conco Engineering Works. Will you explain the accounting bases for the figure that you arrived at there to determine the percentages of primary control sales volume, which would determine the amount allocable to the control sales volume to this concern?

A. Well, you understand the purpose of that, Mr. Haycraft.

Q. No, I don't think I do. I would be glad to have you explain that, too.

A. Well, we have what we class in the report as mixed manufacturers, oil burner manufacturers that also manufacture other equipment and we wanted to deal with the oil burner end of their business to make them comparable with the oil burner manufacturers who were exclusive oil burner manufacturers.

Q. Well, that being true why was it necessary to have any more than the volume of the sales to that concern?

A. Well, we had to separate the volume of sales to that concern between oil burner sales and other and this was the means that was worked out to arrive at that split between the two.

Q. Well, wouldn't the actual invoices do that?

A. Yes, but we didn't have the time to take each invoice and separate each customer.

Q. I thought that had already been done by the
2313 630,000 cards that you are talking about. That was my understanding of the purpose of the cards, to show you line by line on your invoices the products sold to these various customers whose names you had on there and then you classified them by brackets. That is what you said.

A. That is right.

Q. Then what was the necessity of this?

A. Well, we had no breakdown. The detail,—the reason for this and the reason why we had to resort to this

as the best basis I would like to refer to Mr. Reese, who worked that out.

Q. All right, I will put that down for Reese, too.

Turn to page 37 of the report. Now, here we have a study of office salaries, receivables from credit department, billing and order department, stock room and office salaries generally which are specifically set forth here on page 37.

Now, I would like to call your attention to two or three items there that are not very large but I would like to see just what your reason for including them is. The switchboard item of $438.94: What accounting principle was followed there in including the switchboard expense?

A. You are dealing with branch expenses there and the function of the switchboard in connection with a lot of telephoning and in connection with the receipt and shipment of orders. I think we give each—we have got an explanation.

2314 Q. Pages 46 and 47?

A. Yes.

Q. Well, how did you determine it was $438.94 as the amount operable to burner controls?

A. Well, we say it follows, closely follows the correspondence, invoices and other documents contained in the general files.

Q. Well, how do you mean closely follows? What did you do, count the pieces of paper?

A. That is right.

Q. Just count pieces of paper and use that as a measuring stick for the number of telephone calls, is that it?

A. We use that as a basis for making the split.

Q. Are you assuming that they are going to use the telephone every time they write a letter or a memorandum?

A. No, but—

Q. Isn't that one of the items you cannot allocate?

A. Well, that becomes a matter of opinion again, doesn't it?

Q. Well, what is your opinion?

A. I would say that it is allocable and it is reasonably accurate, that your activity with your customers is measured by your correspondence. It pretty generally lines up with all activity with the customer and if that is true, why, using that as a basis for spreading telephone expense is proper.

Trial Examiner Sheppard: Was that arbitrarily
2315 done or was it done upon some actual basis?

The Witness: Well, the basis was determined by examining the contents of the files and the percentage we applied was used to determine the split of that expense. The item itself was practically immaterial, so we did not approach this thing by necessarily just picking out the items that would be material. We looked at the classification of expense and tried to work out a basis. In this case it looks rather ridiculous to even play around with a four hundred dollar item but we tried to be consistent.

By Mr. Haycraft:

Q. What is the accounting system you followed in accounts payable?

A. I think that is also the—

Q. How did you get accounts payable at all in this exhibit? That doesn't have to do with accounts payable. It has to do with the purchase of commodities, doesn't it?

A. Well, accounts payable in this exhibit, you are dealing there again with branch expense. The purchases of branches are primarily purchases of material and other items that have to do with the operation of the branch.

Q. We are dealing with sales, aren't we?

A. Wait a minute. The department handles all the salesmen's expense accounts and customers' remittances. The name "accounts payable department" is somewhat of a misnomer. It is an accounting term but we
2316 describe it. We say this department checked and paid all salesmen's expense reports, and customers' remittances. In other words, when you get down to a branch operation you do not have too well defined functions in that office.

Q. Now, take the item on this same page of, "General office clerical, $2,041.43." How did you determine the percentage to be allocated to oil burner manufacturers in that instance?

Mr. Gilpatric: What page is this—48?

The Witness: Is this on page 48?

Mr. Haycraft: It is broken down on page 48.

A. Well, now, we state there that these expenses are of a general character, that they are overhead. They represent the overhead and supervision of the other individuals within the functions covered at the branch, so following what is an accepted principle of overhead dis-

tribution we spread this expense in relation to the salary of the other individuals. In other words, that is quite comparable in a shop to spreading the foreman in relation. He goes along and we spread in relation to the people that work under him.

Q. Well, how did you determine whether it went into a bracket, that is, 1, 2, 3 or 4?

A. Well, we took the other salaries which had been allocated on these various bases from the branches and we said these general costs thus would follow those.

2317 Q. Is it one of those that you estimated back here where we find opinions?

A. No, this is a branch. That is the home office. This is actual allocations that have been made.

Q. How did you allocate the salaries of the other officials that have been made here? Was that based on actual or estimate?

A. Which one are you talking about now?

Q. You say "other office salaries." How did you determine other office salaries?

A. Well, we just went back to the bottom of page 47, which shows the basis of the accounts payable. $135 out of $3,900 of accounts payable was allocated over into brackets and on the switchboard $438.

Q. You are not answering my question. You referred to the fact that you allocated this on the basis of other office salaries. What are the other office salaries?

A. I am trying to tell you the other office salaries were allocated on the branch office basis and after we got them allocated then we spread the other office salaries in relation to that.

Q. Does that go back then—

A. That goes back to all of these items that are listed on page 37 down to "general clerical".

Q. In respect to the switchboard you say you

2318 referred to papers in the general files. Now, did you follow that generally in the other items there or did you have a different method for determining the percentage bases allocable to the manufacture of these various items?

A. Well, after we got the switchboard and the mail desk and the sales record calls and stenographic and so on allocated as we have outlined then we took the supervisory expenses, salaries of the office manager and other clerks who could not be allocated to functions and spread

them as an overwriting, so to speak, on the salaries that we had spread on these various bases, which is a common method of overhead allocation or practice. Overhead follows the labor.

Q. Turning now to page 49 of the report, you have an item there under, "Rent, Light, Heat", and so forth, of $92,759.70, a total item. Then the amount allocated to oil burner manufacturers is $2,227.76. Is that on the basis of floor space or what is the basis?

A. Floor space of each one of these functions that a branch performs and then the cost of the floor space of the function was distributed to the brackets in the same way that the functional cost of the salaries were distributed.

Q. Floor space first?

A. Yes.

Q. And then following the same thing?

A. Yes. We have certain men charged to the 2319 order department and the billing department and that expense was allocated to the oil burner manufacturers in the same way that the rent was allocated and in the same way that the clerks were spread. It is the same allocation to oil burner manufacturers because based on what we call a bracket allocation.

Q. Now, the salaries of the supervisors in these branch offices—

A. What page are you on now?

Q. We are still on page 49. "The expense for the space used by the heating control salesmen was distributed to the various price brackets on the basis of the heating control salesmen's salaries and expense. The expense for space allotted to industrial sales and service," and so forth, was eliminated.

Now, is this salesmen's salaries and expense the items that you referred to a moment ago in your testimony as being spread over in accordance with the various items explained on page 37?

A. The individual salesmen?

Q. Or is there a difference between the way you have determined that?

A. Oh, the salesmen's salaries and expense we covered much earlier in the testimony.

Q. Does that include the home office as well as the branch? I thought it was the home office salesmen.

A. No.

2320 Q. Is that branch office as well?

A. The individual branch salesmen, the individual salesmen were spread.

Q. What I am trying to get at is, how did you relate, if you did relate, your supervisor in the branch office to the home office with respect to the salesmen?

A. They are on the salesmen's call basis.

Q. And that goes back to the—

A. To the sales call reports.

Q. To the sales call reports which you referred to in your earlier testimony?

A. That is right.

Q. Is that true with respect to the item at the bottom of page 58, "Selling salaries and expenses"?

A. That is right. That is covered on 59.

Q. Now, calling your attention to the second paragraph on page 59, it says:

"The salary and expense of each salesman who called on oil burner manufacturers were reduced to a cost per day by dividing the sum of the salesman's salary and expense by the number of days engaged in sales work. The cost per call on oil burner manufacturers was determined by dividing the daily average number of calls, which each salesman could make on manufacturers, into his cost per day."

Now, what I want to know is how did you deter-

2321 mine that particular figure, what each salesman could make?

A. Well, in some cases we had a record of salesmen who called only on oil burner manufacturers, so we could get a measure there and then by contact with various supervisors and so on we felt we had to give a weighting to that, otherwise it worked in reverse as far as helping us in our calculation, because to just use an average cost per call on average dealers and manufacturers, —or, rather, on both dealers and manufacturers would give you a lesser cost, so what we did was attempted to give a weighting that would be truly representative as far as it was possible to get it of oil burner,—of what the oil burner or what the manufacturer call requires as compared with the others.

Q. And you added that all up together and an average drawn from that?

A. Well, you remember it was done by salesmen. Each specific salesman was spread individually.

Q. Well, take, for illustration, could you determine—

A. You see, the average number of calls which these salesmen could make, if he only called on manufacturers, performed by the various supervisors and based on experience within that respective territory,—you see you have to do it by each man because one individual might have a closely populated district and could have four or five manufacturers within easy reach.

2322 Q. Was there any indication in your study there as to how long a time or how much time these salesmen are allowed to spend with their customer? Was there a limit placed on the amount of time he was to spend with them?

A. I don't think there is.

Q. You say the other determining item is what calls each salesman could make on manufacturers, that is, the average number of calls?

A. Well, you have to look at each salesman's specific manufacturers and he has to—and then also the scope of his work. That would be something he would work out with his supervisor, and finally the sales manager. After all, there is some direction of these salesmen.

Q. I assume you have work sheets on that to show what items you took into account?

A. That is right.

Q. Now, turning back to page 50 you have an item of "postage." Would you include stationery and supplies there, or is that just postage?

A. It is just postage, I guess.

Q. On page 49 we have the stationery and supplies?

A. Yes.

Q. I take it that these were based upon—is that described in the paragraph, "The expense of the smaller branches," and so forth, with respect to those items?

2323 A. That is right. In other words, the postage follow the contents of the files as far as correspondence and so on.

Q. The general files. What do you mean by "general files"?

A. Well, that would include—the general files would include everything.

Q. Did you pull out correspondence with oil burner manufacturers?

A. That is right.

Q. And count those pages and sheets as compared with the other?

A. Compared with the total.

Q. Compared with the total?

A. Yes.

Q. Did you examine those files in these two offices in Chicago and New York or did you examine those files in each branch office?

A. Well, we explain in here that Chicago and New York, we conducted surveys there for examination and that makes up more than half the branch space, I believe. Now, we used Indianapolis and Boston as typical branches to measure the rest of them and based on the experience there we felt that,—we had to be practical in this thing and when you take Boston and Indianapolis and New York and Chicago you have the great majority of the total cost.

Q. Now, at the bottom of page 51 you have an 2324 item, "Unclassified expense, $13,358.94." What do you mean by unclassified expense?

A. Well, as explained at the top of page 52 there, they are just miscellaneous items in connection with the operation of the branch. We figure their overhead the same as rent and anything else, or an overwriting expense that should follow the direct.

Q. And on what basis did you determine to divide that between the heating control business and other business?

A. In relation to the salaries of the individuals, on the basis that they were divided.

Q. How could you determine that if it is unclassified?

A. No, no, the amount of this expense is not described other than just as unclassified or miscellaneous expense, but it is easy enough to get a ratio of that expense to salaries that have been distributed and if four and a half per cent of the salaries were distributed, why, four and a half per cent of this expense should follow those salaries. It is an indirect item that can be tied down to the branch cost as an overhead item.

Q. Now, I take it that the office traveling expense on page 52 was only taken from the Chicago and New York branches, is that right?

A. That is the only place that they had a separate account on this for the office manager and that follows the basis that we distributed his salary on. I assume

2325 in the other branch it is not a big enough item that was carried. It is not a very big item here.

Q. How about the management expense,—the same way?

A. Well, that is covered on page 53. It is a little different. There again we follow personal calls or supervision of salesmen.

Q. Did you have any records showing the amount of time that the management—

A. We had personal call records. You see, the branch manager's time is divided between making calls of his own and supervising salesmen, so the personal calls would follow his own calls and the supervision is—his supervision cost was allocated in relation to the salesmen's calls that he supervises.

Q. You have then the names of the accounts so that we could separate them between the accounts?

A. On the personal calls, yes.

Q. And whether it was on oil burner business or manufacturer business or jobber business or on other items outside?

A. That is right, that is his personal calls.

Q. Yes. Did you make any allocation between the item of that expense,—I mean between the time that he spent in supervising and those that he made calls, or does one follow the other?

A. Well, what he spent supervising was spread 2326 in relation to the salesmen's calls, of the salesmen that he supervised.

Q. Well, then, you related it directly to the length of time when the salesman called. Now, is that the same salesman that you allocated his time when he should have called, or the length of time that he could have called?

A. Well, the only could have or should have that enters into this picture is trying to get away from using just a pure average cost per call when it is known that you do have to devote a little more time in dealing with manufacturers than you do with dealers on the average.

Q. Your reports do not disclose the length of time that he used in various calls. Doesn't he on any daily report show that? Do you have any daily report showing the time that he spent in making calls each day?

A. Well, the reports would not be too complete in that respect because there is a lot of time in any selling cost

between days and between calls and it is difficult to allocate. You have almost got to work on an average over a number of days. As long as you work with the same salesman—

Q. Even though he may have called on one bracket man today and on another bracket man tomorrow or he may have called on two different brackets on the same day, you are going to make an average?

A. Yes, I would say your average would probably be more accurate than any attempt to determine just
2327 what would constitute the time of a call.

Q. That would be regardless of the fact that he may have spent two days with a bracket 5 man and ten minutes with a bracket 1 man.

A. And tomorrow it might be the reverse.

Q. I am just asking whether that is true or not, what I just said? Your average—

A. Yes.

Q. Let me put it this way: The average would not disclose the actual time that may have been spent with, say, a customer in classification 5 as compared with a customer in classification 1?

A. That is possible. It would depend upon the period that you computed the average over, but I would like to also say that you have to at least consider how it is practical and possible to figure these items into a selling price and, therefore, you have to use averages.

Q. Well, you have to use averages if you are going to do anything about it, but the question that I want to know is whether you are going to get anything like an accurate comparison of the length of time that a salesman may spend in the various classifications in such a system?

A. Well, I would say you would get as accurate a one as you can possibly compute.

Q. With past records. You could certainly com-
2328 pute it with current records, couldn't you?

A. Well, I doubt it. That is, you can compute anything if you put it down on a piece of paper but what would constitute the time of a call, the time a man actually was in the plant of a customer, the time he had to interview, the time he spent getting there and if he is here and tomorrow he has to be over some place else who pays for the difference in the time lost. If you go into anything like an actual time it would be important to have all of that

to get anything that would mean anything, but you can say that over a period of time it takes so much time on an average to handle the affairs of a manufacturer and particularly with a salesman, one salesman.

Q. That is the basis of your report here, then. In other words, you have it worked out on what a salesman,—the time that he should take?

A. What each salesman, what each salesman who constantly calls on the same group of accounts. Now, it is obvious, if it is true that he takes more time to handle a large distributor than a small one, then that salesman is not going to have as many customers, so his average cost per call will be higher and, therefore, will be reflected as a charge against the cost of doing business with that type or bracket of customer, so this is done with each salesman.

Q. What do you mean? You are assuming, then, that one salesman calls only on one classification?

2329 A. No, I didn't say that.

Q. Then how are you going to distinguish between the length of time he is going to call on different customers in different classifications? Your average figure would not reflect those differences.

A. Well, I don't believe that there is anything in evidence to show that there is any difference in the time on the average it should take.

Q. All right, that is what we are trying to find out, because I understand that is the purpose of this exhibit, to show that either there was or was not and I am trying to find out from you the nature of the study you made to determine that. You cannot tell us today, can you, as you sit there whether or not this report reflects a difference in the cost or the expense of selling to class A, class 1 or 2 or 3 or 3A from a salesman's standpoint with respect to the length of time that he spends in calling on those various accounts?

Mr. Gilpatric: Mr. Examiner, I think he is arguing with the witness. The report states what it attempts to show and what it covers and we have had all this average business before.

Trial Examiner Sheppard: I think we have had this. I think the witness has explained what he can, unless you have something else.

Mr. Haycraft: I would like to have that last ques-

2330 tion answered.

Trial Examiner Sheppard: If you can add anything else to it, Mr. McAnly, I will let you do so.

The Witness: Well, he asked me whether in my opinion our report discloses the cost of doing business with the various customer bracket classifications and I say as far as it has gone it does and the basis that we—

Mr. Haycraft: Well, you didn't get my question.

The Witness: And the basis that we have used for salesmen's costs, by confining it to individual salesmen and using an average within the salesmen, in my opinion does reflect the true cost because if he spent more calls with one customer than another we would have a higher cost on that customer.

Trial Examiner Sheppard: That is the reason I asked you a while ago if it was an average that you attempted to show there instead of measuring the time on the report sheets that the salesmen made, or sent in, where he called upon Mr. A for a half hour or he called upon Mr. B for three hours. A great many people have salesmen indicate how long they spent with a customer and I thought possibly these report cards that the respondent had probably showed that and you took those figures.

The Witness: No.

Trial Examiner Sheppard: And if you did not it 2331 has got to be sort of an average, in my judgment and you have to do it as best you can by allocating to one salesman and two salesmen the approximate time in the course of a business day. That is the way I am taking it, anyhow.

The Witness: That is right.

Trial Examiner Sheppard: All right, go ahead.

By Mr. Haycraft:

Q. On page 75 you have listed an item under "Sales clerical salaries" and show the sales clerical account segregated on certain functional activities and I notice among other things you have a receptionist, switchboard operator and general file clerks. Does the receptionist follow the same classification or method of classification as your switchboard operator and general file clerks?

A. Where is that?

Q. In the middle of page 75.

A. Oh, up here, I see.

Q. It runs back to a number of invoices there, I take it. That is your branch office expense,—home office expense.

A. Total number of invoices. Yes, that is the home office.

Q. How did you relate your receptionist activity to invoices?

A. Well, the only basis that is used, the relation is merely in dividing this $11,000 worth of expense between oil burner and other. Correspondence, telephone
2332 calls and general activity with customers pretty generally follows the volume of orders received, which in turn is either measured by orders or invoices and it just wouldn't have been practical at the home office to attempt to go into the volume of correspondence in the files and so on because it is a different situation, so we merely took the measure of activity with customers that way, with measure of volume of activity, not price, and applied this class of expense on that basis, which only gives you about five per cent.

Q. Well, I was just wondering how you figured that the receptionist—

A. The receptionist does not prepare orders or invoices but the receptionist is a part of a general group, mailing and everything else, that does deal with customer relationship, which in turn is measured on the basis of the number of times we deal with a customer, which in turn follows a number of invoices.

Q. Now, did you follow any different system of allocation of expense between manufacturers of—between customers that are manufacturers and others in your home office expense than you do in your branch office?

Mr. Gilpatric: May I have that question read?

(Question read.)

The Witness: Well, I would say yes. In many cases they are not even comparable; I mean the basis. In
2333 each case we tried to follow a distribution that would give us the most accurate answer. Now, where they were exactly similar, why, the basis that could be worked out was used.

By Mr. Haycraft:

Q. Well, on page 82 I notice you have here, "Miscellaneous legal expense and audit fees."

A. Yes, but we did not use any of that.

Q. You have a number of items in there having to do with credit and collection expense. Over on page 90 you have, "Doubtful accounts written off." Where do you

draw the line of distinction between credit expense as a legal fee and doubtful accounts written off?

A. Well, the doubtful accounts were specific write-offs within these brackets.

Q. You have an item of credit and collection expense on page 37, if you will go back and look at that. I want to see where you drew your line of distinction between those two. The credit and collection expense on page 37 is included and yet on page 82 you—

A. That is branch expense again, isn't it?

Q. That is the reason I asked you the question a while ago. That is what I am trying to straighten out now.

A. I think, further, in our accounting department at the home office we also have that same class of expense, but I am really talking legal and audit fees, outside legal fees.

2334 Q. Well, you have a collection expense here in your miscellaneous legal and audit fees.

A. Well, it is outside legal cost.

Q. In other words, when a case goes to court you mean?

A. Apparently. Have we got the detail on that here?

Mr. Reese: We have a page—

The Witness: 82.

Trial Examiner Sheppard: Wait a minute. I don't want too many people talking here.

Mr. Gilpatric: Let the record show, however, that we have that information and that there are others here who can supply it if you want it.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. I want to again make sure that I understand your testimony here, that all of this study that you have here had to do with the allocation of expenses and so on in brackets up to and including 3A and did not include the accounts which fell in the 4, 4A and 5 brackets, is that correct?

A. We treated them collectively.

Q. You treated them collectively?

A. They are in here collectively.

Q. But they are not in here separately?

A. No.

Trial Examiner Sheppard: They show in the results?

2335 The Witness: We show in the total. In other words, when we reach a point where we are within, —I don't think it was exactly the 46 cents,—we finally came out to where it was apparent that we couldn't have made any distinction between the figures we were going to be able to develop from those brackets we just treated them collectively. Some of them we had and some of them we did not but we ceased to make any further division.

By Mr. Haycraft:

Q. But you did bring them in here at various places where you have them lumped?

A. That is right, they are all lumped. The breakdown would not mean very much, any breakdown we might have would not be too accurate because when we ceased to consider them we just forgot them from the standpoint of division.

Trial Examiner Sheppard: I was going to ask you that same question, Mr. McAnly, but Mr. Haycraft has covered it, so now I won't bother you any more.

Mr. Haycraft: That is all.

Mr. Gilpatric: No redirect, but we will have to recess for a few minutes before we put Mr. Reese on.

Trial Examiner Sheppard: All right, we will take a short recess.

(Whereupon a short recess was had.)

Trial Examiner Sheppard: All right, gentlemen, 2336 let us go on.

Mr. Gilpatric: I call Mr. Reese.

H. H. REESE was thereupon called as a witness for the respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Trial Examiner Sheppard: Give me your initials, sir.

A. H. H. Reese.

Q. And your address, your business address?

A. 1204 First National Bank Building, Minneapolis.

Trial Examiner Sheppard: All right, proceed.

By Mr. Gilpatric:

Q. Mr. Reese, you are employed by the accounting firm of Ernst & Ernst, are you not?

A. That is right.

Q. And you have in that capacity worked on the report made by your firm on the determination of cost differentials relating to the Minneapolis-Honeywell Company?

A. Yes.

Q. Respondent's exhibit 170?

A. Yes.

Q. Now, will you turn to page 1 of exhibit C, page 20 of the report and page 21 and explain, if you can, the reason why on the first page salaries of the heating controls division are shown at $92,809.80, whereas on
2337 page 21 the salaries of the heating controls division are shown as $90,699.80?

A. Yes, sir. On exhibit C, page 1, the figures shown are in accordance with the accounts as they are kept by the company. In preparing our study we found in some instances that for our purpose we would have to make segregations and combinations of accounts in order to truly reflect the bracket differentials. Therefore, on the group making up the $171,000 figure we took the individuals whose salaries comprised that total and in making that study and the classification of each individual we arrived at $90,699.80 as being applicable to heating controls and, in turn, as shown by the total there, we accounted fully for the $171,000 total.

Q. But as to heating controls alone you allocated somewhat less than the company had?

A. Yes, sir, but the purpose of that, I might restate, was to facilitate any subsequent checks that would be made by the Federal Trade Commission, to enable them to trace our figures back to the books and our papers backing up this report show the connection between the $92,000 and the various other items listed with a total of $171,000 and also with the $90,000 that we classify as heating controls.

Mr. Gilpatric: All right.

Trial Examiner Sheppard: Cross-examine.

Mr. Haycraft: I have nothing on that, Mr. Examiner, but there were two other points that I was going to
2338 examine Mr. Reese on if I may be allowed to do so at this time.

Mr. Gilpatric: All right, go ahead.

Cross-Examination by Mr. Haycraft.

Q. One was the explanation of the items that were on the punched cards, that were used in the preparation of your exhibit, the 630,000 punched cards.

A. The specific information evidenced by the punchings?

Q. That is right.

A. Well, it would be the customer and the—

Q. The name of the customer?

A. Yes, which was identified by a number, you understand.

Q. Yes.

A. And the sales, the number of items.

Q. The nature of the items?

A. Yes, sir, and the cost.

Q. Now, as I take it you had to get from the company, that is, the respondent the classification of the various customers?

A. Yes. To clear that point up, the tabulations, as you can imagine, were on huge listing tapes about so wide and the company has a code book in which it designates,—the code designates the bracket classification of each customer by customer number.

Q. The same number that is used in this?

2339 A. Yes. And in using that code book we prepared special tabulations, hand tabulations of the machine tabulations and thus built up the analysis of sales and cost of sales of bracket classifications.

Q. I am going to ask you the same question that I asked Mr. McAnly, that he could not answer but that he thought you could answer, and that is to what extent did you check those code classifications to determine that they were correct and that your resulting tabulations correctly reflect the volume of business done with each classification?

A. Our papers will show the exact number of invoices that we used to make comparisons. I cannot tell you the exact number but I will say the detail was very substantial. In other words, we satisfied ourselves that the information shown on these punch cards reflected listings actually from the company's billings in the form of invoices to their customers.

Q. Did you spot check, is that what you mean?

A. Yes, there was quite a number of them.

Q. For instance, if I should give you the names of three or four accounts could you tell me in what classification you put those in?

A. Yes, because we built those up by hand and it is subject to verification.

Q. And they can be made available?

A. Yes, it is available for your auditor.

2340 Q. Now, the other question had to do with the items on pages 16 and 17 of the report, exhibit 170, and the necessity for projecting these oil burner manufacturers who also manufacture other equipment, why that could not be done by just taking the same accounts that you referred to in your testimony, why it was necessary to go into this detail as indicated by pages 16 and 17?

Mr. Gilpatric: Mr. Haycraft, we are going to have Mr. Johannsen, another one of the Ernst & Ernst men, to cover that. That was his field.

Mr. Haycraft: All right, let it ride. That is all.

Trial Examiner Sheppard: You are excused.

A. F. JOHANNSEN was thereupon called as a witness for the respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Trial Examiner Sheppard: Give us your name and address.

A. A. F. Johannsen, Minneapolis.

Q. And your address is Minneapolis?

A. Yes, Minneapolis.

By Mr. Gilpatric:

Q. Mr. Johannsen, you are employed, are you not, by the Ernst & Ernst firm?

A. Yes, sir.

2341 Q. You have worked on this report, respondent's exhibit 170?

A. Yes, sir.

Q. In particular are you familiar with the subject matter on pages 16 and 17 of the report dealing with what are termed mixed manufacturers?

A. Yes, sir, I am.

Q. Will you explain, if you can, the necessity for the

use of the ratios and the treatment of these mixed manufacturers' volume that is explained on those pages and why you did not use simply the cards as has been suggested earlier?

A. The equipment that is sold to oil burner manufacturers, such as thermostats and other heating control equipment, also is used in conjunction with other types of manufactured products such as furnaces, hand boilers and other types of heating equipment. In order to segregate them we had to classify the mixed manufacturers into two groups, those mixed manufacturers who manufacture furnaces and also oil burners and other manufacturers who also manufacture oil burning equipment. The reason we segregated them into furnace manufacturers is because the furnace manufacturers do not use the same standard combination of controls that is used by other heating equipment. If I may refer to this, they use a combination control, fan limit control, which is not used in connection with an oil burner and, therefore, we had to segregate the sales applicable to the manufacturer of oil burning equip-
2342 ment and those applying to the furnace equipment which they manufacture.

Q. In other words, there were certain situations where the same manufacturer was buying control equipment to put on different types of heating equipment, one of which was the standard set of oil burner controls, namely, the oil burner unit, and the other the furnace unit and he only used the primary and the thermostat in that standard combination, plus a third unit that was not part of the standard?

A. That is right.

Mr. Gilpatric: You may cross-examine.

Cross-Examination by Mr. Haycraft.

Q. With respect to the volume of business of these special controls sold to oil burner manufacturers that were also sold to other manufacturers, were they included in any way or were they excluded from your report?

A. Will you repeat that, please?

(Question read.)

Q. I will repeat it. What was done with respect to the figures showing the volume of sales of these special combination controls that were sold to burner manufacturers who were also furnace manufacturers?

A. The portion which was determined to be oil burning equipment going on oil burning equipment was in-
2343 cluded in the cost applicable to oil burners and the other was excluded.

Q. Now, this Conco Engineering Works that was used here as an example, what did that company manufacture?

A. They manufactured heating equipment other than oil burners and also oil burners. They were not a furnace manufacturer.

Q. What was the other heating equipment that they made?

A. I believe in this case that it was a stoker or a gas burner. They manufactured both the gas and stoker and oil burner.

Q. Well, then, as I understand it your study did not include sales of heat controls for other than oil burning equipment? If it was gas burning it was not included, or if it was stoker or controls for coal it was not included, is that right?

A. That is right.

Q. Well, wouldn't your figures in the invoices on these punch cards show that information?

A. No, sir, they do not. They show that there were so many units sold but it does not show whether they were used in connection with an oil burner or whether they were in connection with a furnace or whether they were in connection with some other type of heating equipment and, therefore, since those figures were not available we had to determine as best we could do it for the various classes.

Q. And the method you followed is set forth there on these two pages?

2344 A. That is right. I can explain that in detail if it is not clear to you.

Mr. Haycraft: Off the record I think it is probably a good explanation to make off the record.

(Discussion outside the record.)

By Mr. Haycraft:

Q. I will ask one question for the record. I assume you have the work sheets on this so that they can be made available to our accountant?

A. Yes, sir.

Mr. Haycraft: That is all.

Trial Examiner Sheppard: All right, thank you, sir.

Mr. Gilpatric: With that the respondent rests its case.

Trial Examiner Sheppard: All right, Mr. Haycraft, what about any rebuttal that you have?

Mr. Haycraft: I am going to have to have rebuttal. Perhaps I had better lay a foundation for it. Mr. Examiner, at this time I move to strike from the record respondent's exhibit 170 as being incompetent and of no probative value. Depending on your ruling on that, as to whether there will be any rebuttal on that particular phase of it.

Trial Examiner Sheppard: The motion is denied. The Examiner believes that it constitutes some information that ought to go to the Commission in this case.

2345 Mr. Haycraft: Then in view of your ruling, Mr. Examiner, I am sure that we will have rebuttal testimony and that after Mr. Wormack has had an opportunity to check against the original records to make up an exhibit, which will purport to cover the same territory and also following that there may be other testimony necessary in view of the testimony of Mr. Owens. There has been quite a wide field opened with Mr. Owens and the other two witnesses, that is, Mr. Henning of the Penn Electric Switch and the Perfex Corporation.

However, I am not in a position at this time, not having had a chance to go over this record since our last hearing, being engaged in other matters, I cannot tell you at this time where that testimony should be taken but I think probably we could finish it here, we could figure on a hearing here in Chicago, to present our rebuttal on this exhibit 170 and also probably the other matters that I may want to present. I would like to be given as much time on that as possible, to meet your engagements and the engagements of counsel for the respondent. I won't know just where I am until I get back to Washington.

Trial Examiner Sheppard: I want to give you. Mr. Haycraft, plenty of time to let Mr. Wormack make his study of this exhibit. I have been interested in respondent's exhibit 170 and it seems both long and rather complicated and will require some study. How about this

2346 going over until the middle of November? Or how about the middle of October?

Mr. Haycraft: Well, the only thing is I have another case set down for hearing in New York on the 17th of October which will probably take until close to the middle

of November. If you could make it the middle of November I think probably that would give us time enough.

Trial Examiner Sheppard: Well, now, let's see, gentlemen. I don't want to put this case over until the first of the year.

Mr. Gilpatric: We would like to see the end of this case some time.

Trial Examiner Sheppard: Yes, I want to get through with it, too. Get off the record, Mr. Reporter.

(Discussion outside the record.)

Trial Examiner Sheppard: On the record.

Gentlemen, in view of what Mr. Wormack tells me in reference to his activities for the next two months on other cases, as well as on this one and Mr. Haycraft's engagements and the engagements of respondent's counsel I am not disposed to set a definite date now for resuming the testimony in this case, but I am going to adjourn it on five days' notice with this understanding, Mr. Wormack, that when you are ready you communicate that fact to Mr. Haycraft and he to me and then I will take it up with the respondent's counsel and set a date as quickly as is possible to resume this case, taking into consideration
2347 what you have all told me and with that understanding all around, gentlemen, I am going to declare the hearing here adjourned.

(Whereupon, at 12:25 o'clock p. m., September 8, 1944, the hearing in the above-entitled matter was adjourned without date.)

2348 Room 307, U. S. Court House,
Minneapolis, Minnesota,
Tuesday, January 9, 1945.

Met, pursuant to agreement, at 11:15 o'clock, a. m.

Before:

W. W. Sheppard, Trial Examiner.

Present:

Everett F. Haycraft, Attorney for the Federal Trade Commission.

Gravath, Swaine & Moore, by R. D. Gilpatric, 15 Broad Street, New York; and

Baer & Freeman, by Will Freeman, 135 South La-Salle Street, Chicago, Illinois; appearing for respondent.

2349 Proceedings.

Trial Examiner Sheppard: Mr. Reporter, convene the hearing in the Minneapolis-Honeywell case, Docket No. 4920. It appears this is our first hearing since September 8, 1944. Show the usual appearances.

Before we start, gentlemen, there has been a little mix-up in our exhibits called to my attention by the Official Reporter, and I am going to read into the record the corrections that I have made.

Mr. Henning's letter, dated December 2, 1943, now appearing in the record as Exhibit 207-A and 207-B, I am going to have re-marked and it will be hereafter designated and known as Commission's Exhibit 210-A and 210-B.

(The paper referred to was remarked Commission's Exhibit 210-A and 210-B for identification.)

Mr. Hayeraft: I assume it will be stipulated that everything said as to Exhibit 207 will apply with respect to Exhibit 210.

Trial Examiner Sheppard: That is right.

Mr. Henning's letter to the Examiner, dated July 25, 1944, appearing in the record as Commission's Exhibit 208-A and 208-B, will be hereafter known and designated as Commission's Exhibit 211-A and 211-B.

(The papers referred to were remarked Commission's Exhibit 211-A and 211-B for identification.)

2350 Trial Examiner Sheppard: The exhibit indicated and appearing in the record now as Commission's Exhibit 209-A, -B, and -C will be given a new designation and be hereafter known as Commission's Exhibit 212-A, -B, and -C.

(The documents referred to were remarked Commission's Exhibit 212-A, 212-B, and 212-C.)

Trial Examiner Sheppard: Now that leaves, Mr. Reporter, our next number to be used, if any, by the Commission as 213, and the next number on behalf of the Respondent will be 185.

Mr. Gilpatric: Mr. Examiner, Respondent has one more exhibit to offer in its direct case. Mr. Reporter, will you mark this for identification Respondent's Exhibit 185?

(The papers referred to were marked Respondent's Exhibits 185-A, 185-B, 185-C, 185-D, 185-E, and 185-F for identification.)

Mr. Gilpatric: The purpose of this offer, Mr. Examiner, is to have the record contain the price brackets extended to the 88 oil burner manufacturer customers of Minneapolis-Honeywell, who were named in the stipulation, Commission's Exhibit 1, and about whom we already have in the record the total amount of their sales by the Respondent and other control manufacturers, and who are also named in the subpoenaes that were issued at the re-
2351 quest of Respondent to certain other control manufacturers. The Respondent would like to have the record show the prices at which these particular 88 accounts were sold by it during the years 1937 through 1941. This exhibit was prepared under Mr. Lockrae's supervision from the records of the company, and if Mr. Haycraft wants to examine Mr. Lockrae about it, he is available.

Trial Examiner Sheppard: All right; do you want to do that now, Mr. Haycraft, or later? I will probably accept the exhibit and give you a chance to cross-examine Mr. Lockrae, if you want to, a little bit later on.

Mr. Haycraft: I would like to ask Mr. Lockrae a few questions about it at the present time.

Trial Examiner Sheppard: Let the record show Mr. A. H. Lockrae, having been previously sworn, appears on the stand again for examination by Mr. Haycraft.

A. H. LOCKRAE was thereupon called as a witness by the Commission and, having previously been duly sworn, testified further as follows:

Cross-Examination by Mr. Haycraft.

Q. Where did you obtain the information on which this exhibit is based, from which it was prepared?

A. From our sales records.

2352 Q. Is there any particular title or description that you give to the sales records from which this was prepared?

A. Well, there are two or three sources from which the information is available. The first was the contract itself, which is kept in our order department files, and also from the price records maintained in the order department on the individual customer's price cards.

Q. Is there a code-book kept of these prices as compared with the contracts?

A. I don't quite understand—

Q. Well, is there such a book in your records, a code-book where you can locate and find the customer designation?

A. Well, we go primarily right by the contract that you originally issued. That is the origin of each customer's price each year.

Q. Now at the top of this exhibit it is referred to as "Price Brackets Extended". Now, as I understand it, this exhibit does not purport to show the quantities actually purchased by these various companies, or whether or not they were entitled to be in these particular brackets because of quantities they purchased?

A. The statement simply shows the price brackets that were extended the customer.

Q. During those particular years?

A. During those particular years.

Trial Examiner Sheppard: I thought the record had that.

Mr. Gilpatric: Not for these particular accounts.

2353 It has the bracket structure for these years but not the individual prices.

By Mr. Haycraft:

Q. In order to determine the actual price you would look at the bracket?

A. You would look at your price schedule.
Mr. Gilpatric: In Commission's Exhibit 1.
Mr. Haycraft: That is all.
Mr. Gilpatric: That is all.

(Witness excused.)

Trial Examiner Sheppard: Off the record.
(Discussion off the record.)
Trial Examiner Sheppard: For the record. Respondent's Exhibit 185-A to -F is received.
(The papers referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 185-A, 185-B, 185-C, 185-D, 185-E and 185-F, were received in evidence.)
Trial Examiner Sheppard: Now do I understand that is the end of your case?
Mr. Gilpatric: Yes.
Trial Examiner Sheppard: Now, Mr. Haycraft, I am ready for whatever you have in rebuttal.
Mr. Haycraft: Mr. Examiner, I wanted to recall Mr. McAnly in connection with Respondent's Exhibit 170, 2354 and I was authorized by the Commission to bring him from Chicago to Minneapolis. Counsel for the Respondent very kindly stated that if necessary to have him here, they wouldn't require us to do that, but he felt that Mr. Reese and Mr. Johannsen, who prepared Respondent's Exhibit 170 would probably be as well informed, if not better informed, as to the details of that exhibit.
Trial Examiner Sheppard: They are here then?
Mr. Haycraft: They are here, and with that understanding I would like to call Mr. Reese,—I believe he is the senior accountant and worked on that exhibit,—to go into some detail as to the way in which the exhibit was made up.
Trial Examiner Sheppard: Let the record show Mr. H. H. Reese, having been previously sworn, appears on the stand again for examination by Mr. Haycraft.

H. H. REESE was thereupon called as a witness by the Commission and, having previously been duly sworn, testified further as follows:

Cross-Examination by Mr. Haycraft.

Q. I believe you testified in this proceeding at Chicago on September 8, 1944?

A. I did, yes.

2355 Q. That you had worked on the determination of cost differentials, which is in evidence as Respondent's Exhibit 170?

A. That is right.

Q. This exhibit that I now show you (indicating)?

A. Yes, sir.

Q. Do you have available the worksheets that were used by you in the preparation of that exhibit?

A. They are on file at our office, yes.

Q. Do you have any of them available in the court room this morning?

A. I do not.

Q. Will you testify, first, as to the problems that were given you in the preparation of this exhibit,—what the problem was and what your instructions were with respect to the preparation of the exhibit?

A. I think that is set forth here in the introductory paragraph of our report, Mr. Haycraft.

Q. On page what?

A. 4.

Q. By that you mean of Respondent's Exhibit 170?

A. Yes, sir.

Q. Under the title "Introductory Statement"?

A. In the opening paragraph.

Q. Well now, in this Introductory Statement you

2356 have here, does that contain the bracket classification that was to be used in the preparation of the exhibit?

A. That is shown at the bottom of that page.

Q. What was your source of information as to this bracket classification? Did you get that from the respondent, the Minneapolis-Honeywell?

A. Yes, sir.

Q. How were you to determine whether or not the account that you were studying fell within those classifications?

A. That was the classification established by the company, covered by its contract with its customers, and the prices that had been charged.

Q. And those you accepted?

A. That is right.

Q. You did not make then, as I understand it, any study to determine whether or not the prices at which these various customers were sold corresponded to the bracket that should be assigned to them in accordance with the quantity they purchased?

A. We made no reclassification of the brackets assigned to the respective customers.

Q. Well, you did not make any before the preparation of the exhibit. Have you had occasion to make such a study since?

A. No, sir.

2357 Q. Will you turn to the table on page 6 of the exhibit.

A. (Witness complies.)

Q. Now, this is entitled, "Statement Showing Volume Brackets, Prices, Distribution Costs, and Comparison of Reductions in Costs for Specified Brackets with Reductions in Respective Prices". Then you have eleven columns on this page, and then under the first column "Bracket Classification" you have 1, 2, 3, 3A, 4, 4A, and 5. First, there is "Discount". Now, that Discount is the first bracket classification?

A. Yes, sir.

Q. Is that what we might call a list price?

A. Yes, sir.

Q. Then in the next column you have the "Annual Unit Volume", and I take it that refers to the number of units that the customer was required to purchase in order to come within the respective brackets, is that correct? In other words, in the Discount bracket, if you bought from 1 to 149, he would be entitled to the basic price?

A. Yes, sir.

Q. Which in this instance is found in the next column in the amount of $20.25, is that right?

A. Yes, sir.

Q. And then in order to come under bracket 1 he had to buy from 150 to 1,049, and the price for that

2358 bracket was $17.35?

A. Yes, sir.

Q. In order to come within bracket 3 he had to buy from 3,000 to 7,499 and the price he was to get was $15.90?

A. Yes, sir.

Q. In bracket 3A he is supposed to buy from 7,500 to 14,999 and at the price of $15.35?

A. That is right.

Q. In bracket 4 he was supposed to buy from 15,000 to 22,499 and the price was $14.90. There was a correction, as I understand it, of the original exhibit, is that right?

A. Yes, sir.

Q. In 4A he was supposed to buy from 22,500 to 29,999 and pay $14.25 for purchases in that bracket, is that right?

A. Yes, sir.

Q. And bracket number 5 was 30,000 units and up, and $13.75 was the price for that quantity?

A. Yes, sir.

Q. Now then, as I understood your testimony a moment ago, you based your exhibit and preparation of the exhibit on the assumption that the prices furnished you for the respective customers were not only the prices actually paid but that the quantities they bought were within those respective brackets.

Mr. Gilpatric: I object to that, your Honor. That 2359 wasn't the witness' testimony. He simply stated that he took the brackets as they had been assigned by the company and didn't make any assumptions.

Trial Examiner Sheppard: Is that correct?

Mr. Haycraft: No, he didn't say he didn't make any assumptions. That is counsel's statement.

Trial Examiner Sheppard: I am asking the witness. Straighten us out on that.

The Witness: I stated that we used and accepted the bracket classification established by the company.

By Mr. Haycraft:

Q. Now in this "Distribution Cost" that you have in column 4 of $90.40 on your discount bracket, how was that made up? How did you determine the $90.40 in the distribution Cost?

A. Do you mean how—

Q. I think if you will look over on page 7, Exhibit B, you probably can answer that question.

A. The various elements of Distribution Costs, including Home Office selling expenses, branch expenses, Home

Office administrative expense, and warehouse and shipping expenses are assigned to the various brackets by appropriate means described in the text of the report, and were assigned to the unit on the basis of the specification cost of each unit.

Q. Well, for instance, on this Exhibit B, on page
2360 7, I notice you have in this column under "Discount" $10,902.30.

A. Yes, sir.

Q. Now, that is the sum of the amounts that you had allocated of the different forms that fell within that Discount bracket as furnished you by the Minneapolis-Honeywell Company. Now, do you have your work sheets showing the names of the forms that—

A. (Interposing) I do not have them here but we have them; they are available.

Q. Would you have them available so as to bring them to the court room this afternoon?

A. Yes, sir.

Q. And you have work sheets, I take it, for each of the other brackets?

A. Yes, sir.

Q. In other words, your work sheets would cover that whole exhibit?

A. Yes, sir.

Mr. Haycraft: I will ask to have this marked for identification.

(The documents referred to were marked Commission's Exhibits, 213-A, 213-B, 213-C, 213-D, 213-E, 213-F; 213-G, 213-H, 213-I, 213-J, 213-K, 213-L, 213-M, 213-N, 213-O, 213-P, 213-Q, 213-R, 213-S, 213-T, 213-U, 213-V, 213-W, 213-X, 213-Y, 213-Z, 213-Z-1, 213-Z-2, 213-Z-3, 213-Z-4,
2361 213-Z-5, 213-Z-6, 213-Z-7 and 213-Z-8 for identification.)

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. Referring to Commission's Exhibits 213-A to -Z-8, inclusive, will you state just what those sheets are and how you made them up?

A. Yes, sir. We covered that in here on page 13 of Respondent's Exhibit 170.

Q. Whereabouts on the page?

A. Starting with the same paragraph here (indicating), "Statistics relating to sales, manufacturing cost of products sold, number of sales invoices, and number of billing lines were obtained from tabulations prepared on electric sorting and tabulating equipment from approximately six hundred and thirty thousand punched cards."

Q. This exhibit then, is the result of that which you just described there?

A. That tabulation, yes.

Q. All right. Now, from this exhibit are you able to testify as to the actual quantity sold to any given account mentioned in there?

A. The number of units sold are shown, yes.

Q. Now, will you refer to the Master Oil Burner
2362 Company? Can you find that?

A. Yes, sir.

Q. How many units were sold to Master Oil Burner Company in 1941?

A. Referring to this tabulation, it indicates 989.

Q. Was that direct from the factory, or does it include the branch office?

A. That is factory shipments.

Q. See if there are any branch sales.

A. 20.

Q. Making a total of 1,009?

A. Yes, sir.

Q. Now, what price did they pay?

A. Our figures here do not show the price.

Q. What bracket did you put them in then—can you tell from that?

A. Yes, this is in the Discount bracket.

Q. What volume should be included in this Discount bracket?

A. 1 to 149.

Q. Then, according to Exhibit 170, what bracket should this customer have been put in?

A. Well, the number of units indicated here includes items other than the oil burner—no, I am wrong on that. I would like to have the unit figure elaborated on by Mr. Johannsen later on.

2363 Q. You can't answer that?

A. There is a technical angle on that that I am not sure of at the moment.

Q. Do you want to consult him before answering?

A. Right now—

Q. Well, I would like to get the answer at this time.

Mr. Haycraft: If he wants to consult Mr. Johannsen off the record, I have no objection, Mr. Examiner.

Trial Examiner Sheppard: We will go off the record a minute and you can confer.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. All right, now do you want to answer?

A. Yes.

Q. The question is, what bracket should that go in?

A. It would be in—

Q. The quantity bracket?

A. That would be bracket 1.

Q. Bracket 1. In other words, the quantity that they had bought would entitle them to be put in bracket number 1?

A. Yes, sir.

Q. Now, the Jackson Oil Burner Company.

A. On the same page,—that is 198.

Q. All right, what bracket did you put that in in 2364 Exhibit 170?

A. That was in the Discount bracket and should have been—

Q. Bracket number 1?

A. Yes.

Mr. Gilpatric: When you say "should have been" you are talking about the quantities—

The Witness: Based according to the quantity.

By Mr. Haycraft:

Q. Now, in preparing Respondent's Exhibit 170, page 7, were these two items included in the amount of $6,196.14, which was the Discount, manufacturing cost of products sold by price brackets?

A. Yes, sir.

Q. Now, in determining the $90.40 on page 7, which was one of the original questions I asked you this morning, in column 4 on page 6—

Mr. Freeman: Exhibit 7?

By Mr. Haycraft:

Q. (Continuing) Do you remember the preliminary questions I asked you?

A. No.

Q. Now, in making up the $90.40 item which appears here on page 7, to what extent or for what purpose do you use the $6,196.14 item in the Discount column on the top of the page?

2365 A. $6,196.14, you say, at the top?

Q. Yes.

A. That was used in establishing the ratio of distribution cost to manufacturing cost.

Q. In other words, the $10,902.30 item was related to the $6,196.14 item? The total distribution costs, in the amount of $10,902.30, was related to the manufacturing cost of products sold, $6,196.14; and the ratio of the distribution cost to manufacturing cost was 1.760?

A. Yes.

Q. Then what use was made of your 1.760 to determine your $90.40?

A. That was applied to the cost of the standard set.

Q. Which was $5.34?

A. Approximately, yes.

Q. Where do you get that figure of $5.34?

A. From the cost records of the company. It was omitted from this report at the request of the company, but it is available.

Q. Now, which bracket in this exhibit, page 7, did you place the cost of distribution, or serving of this Master Oil Burner Company,—also in the Discount bracket?

A. Yes, sir, the same.

Q. The same as the manufacturing?

A. Yes, sir.

2366 Q. Do you know whether or not there was an adjustment at the end of the year on that account?

A. The retroactive—

Q. Adjustment?

A. I don't know.

Q. Would that exhibit for identification show that?

A. No.

Q. Now, take the account of the Ace Engineering Company. In what bracket did you place that in Exhibit 170?

A. That was in bracket 1.

Q. And what was the volume of sales?

A. In units?

Q. In units, factory and branch.

A. 1,072.

Q. In what quantity bracket should he fall?

A. According to the quantity, that would come under bracket 2.

Q. In that bracket the quantity limits were from 150 to 1,049 units, is that right?

A. That is right.

Q. Now, the B & W Oil Service Company, in what bracket did you put that?

A. That is in bracket 1.

Q. What is the volume of his sales?

A. 59 units.

2367 Q. In what bracket should he be placed in?

A. That would be in the Discount bracket.

Q. In the Discount bracket?

A. Yes.

Q. And in making up this exhibit, in which column did you place his cost,—in the Discount column?

A. No, we put him in bracket 1, as he was classified by the company.

Q. In other words, his cost figures went into bracket 1?

A. Yes, sir.

Q. Now take the account of the Braden Eveready Company—

A. 42 units.

Q. In what column was he placed?

A. He is in bracket 1.

Q. And in what bracket should he fall from the quantity standpoint?

A. The Discount.

Q. The Discount bracket. And then you placed his cost figures in column number 1 in this exhibit, in the Bracket 1 column?

A. Yes.

Q. Tak the account of Carlson Brothers Tool & Machinery Company—

A. 24 units.

Q. In what bracket did you place him in this exhibit?

2368 A. In bracket 1 also.

Q. The cost figures went into bracket 1?

A. Yes.

Q. According to the quantity sold, where should he have been?

A. Discount.

Q. The C. F. M. Corporation—
A. 93 units.
Q. In what bracket did you put him in the exhibit?
A. Bracket 1.
Mr. Gilpatric: I want to make it clear that we don't accept this questioning as an admission. The Ernst & Ernst firm didn't put these fellows in any bracket. They found them in these brackets and the reports reflect that.
Trial Examiner Sheppard: I understand that.

By Mr. Haycraft:

Q. And according to the quantity, what bracket would that have gone in?
A. Discount.
Q. Chalmers Oil Burner Company,—in what bracket did you put his cost figures?
A. 1.
Q. And what quantity did he buy?
A. 36.
Q. And what bracket then, according to the quan-
2369 tity, would he go?
A. In the Discount bracket.
Q. Columbus Metal Products Company,—in what column did you place his costs?
A. 139 is the quantity there.
Q. And where would that be?
A. That would be in Discount.
Q. Drexel Manufacturing Company,—in what column did his cost go?
A. Number 1. 58 is the number of units.
Q. That would be in the Discount bracket from a quantity standpoint?
A. Yes.
Q. But you placed him, you said, in bracket 1.
A. In bracket 1.
Q. Goodrich Oil Burner Manufacturing Corporation.
A. That is in number 1.
Q. What is the volume of sales?
A. 66 units.
Q. In what bracket then would he fall from the quantity standpoint?
A. Discount.
Q. Greenwood Engineering Company?
A. That is in bracket one.
Q. What is the volume of sales?

2370 A. 133.

Q. In what bracket would he fall from the quantity standpoint?

A. That would be Discount.

Q. Hyle Oil Burner Company,—in what bracket did you place him in this exhibit?

A. That is in bracket 1; 121 sales; that would be in Discount.

Q. 121 sales in the Discount bracket. Milwaukee Oil Burner Company,—in what bracket did you place him in this exhibit?

A. Number 1.

Q. What was the volume of his sales?

A. 132.

Q. What quantity bracket would that entitle him to?

A. To the Discount.

Q. Oil Burner Exchange, Inc.—

A. 137.

Q. In what bracket did you put his cost figures?

A. That was in bracket 1.

Q. In what bracket would he fall from the quantity standpoint?

A. Discount.

Q. Quiet Heet Oil Burner Company,—in what bracket did you put him in the exhibit?

2371 A. That is number 1.

Q. How many did he buy?

A. His quantity was 96.

Q. Which would place him in what bracket from a quantity standpoint?

A. Discount.

Q. R. & S. Products Corporation.

A. Number 1, and 52 units in quantity.

Q. What bracket?

A. Discount.

Q. Rayfield C. L. Company,—in what bracket did you put his cost figures?

A. Number 1, and the quantity is 141.

Mr. Freeman: Is that 141?

The Witness: 141 units, yes, sir.

By Mr. Haycraft:

Q. And 141 would put him in Discount, is that right?

A. That is right.

Q. Red Wing Oil Burner Company,—in what bracket did you put his cost figures?

A. Number 1.

Q. What was the volume of sales?

A. 63.

Q. 63 units, which would put him in what quantity bracket?

A. Discount.

2372 Q. Swirling Heat, Inc.,—in what bracket did you put his cost figures?

A. Number 1, and his quantity was 122.

Q. That would put him in what bracket from a quantity standpoint?

A. Discount.

Q. Syncro Flame Burner Company.

A. In bracket number 1; the quantity is 26.

Q. In what bracket would he fall from the quantity standpoint?

A. The Discount bracket.

Q. Wayland Machine Company.

A. Number 1.

Q. The volume of sales?

A. It would be 105 units.

Q. That would put him in the Discount bracket?

A. Yes, sir.

Q. Weishettle Company, Inc.,—in what price bracket did you put him in your exhibit?

A. Number 1.

Q. What is the volume of his sales?

A. 51 units.

Q. In what bracket would he fall from the quantity standpoint?

A. Discount.

2373 Q. Columbia Boiler Company.

A. 130 units.

Q. And you put that in your price bracket 1?

A. Yes, sir.

Q. And what would it come under on a quantity basis?

A. Discount.

Q. Kienzel and Merrick,—what price bracket did you place that under?

A. That was in number 1.

Q. What is the volume of his sales?

A. 11 units.

Q. That would put him in what bracket?
A. Discount.
Q. Mechanical Products Company.
A. 129.
Q. And you have put him in price bracket number 1, have you?
A. That is right.
Q. In what bracket would he fall from the quantity standpoint?
A. According to the quantity it would be Discount.
Q. Scholze and Stadler—in what price bracket did you put him in the exhibit?
A. Number 1.
Q. And what is the volume of his sales?
2374 A. 92 units; that would be Discount, according to quantity.
Q. Kool-O-Matic Combustion Company,—in what price bracket did you put him?
A. Number 1.
Q. What was the volume of his sales?
A. 78 units.
Q. In what bracket would he fall from the quantity standpoint?
A. That would be discount from quantity.
Q. Pacific Automatic Heat Corporation,—in what column did you put him in the exhibit?
A. Number 1; 88 units.
Q. In what bracket would he fall from the quantity standpoint?
A. Discount.
Q. Liberty Air Flo Burner, Inc.,—in what price bracket did you put him in your cost study?
A. Number 1.
Q. What was the volume of sales?
A. 44 units.
Q. In what quantity bracket would that put him?
A. Discount.
Q. Plymouth Engineering Works,—in what bracket did you put his cost figures?
A. Number 1.
2375 Q. What was the volume of sales?
A. 97 units.
Q. What quantity bracket then would he go in?
A. Discount.
Q. Seal-O-Strain Corporation.

A. Number 1.
Q. And what was the volume of his sales?
A. 109 units.
Q. In what bracket would he fall from the quantity standpoint?
A. Discount.
Q. Campbell Machine Company,—in what bracket did you put him in your cost study?
A. In bracket 2.
Q. That would be 1,050 to 2,999 units?
A. That is right.
Q. Or the $16.45 price?
A. That is right.
Q. You put him in bracket 2 in your study. What was the volume of his purchases?
A. 505 units.
Q. In what quantity bracket then would he go?
A. Number 1.
Q. Chandler Company,—in what price bracket did you put him in the exhibit?
2376 A. Number 2.
Q. What was the volume of his purchases?
A. 802.
Q. In what quantity bracket then would that go?
A. Number 1.
Q. Fairfield Oil Company,—in what price bracket did you put him in the exhibit?
A. Number 2.
Q. How many units did he buy?
A. 858.
Q. In what quantity bracket would that place him?
A. Number 1.
Q. General Oil Heating Company,—in what price bracket did you place him?
A. Number 2.
Q. And how many did he buy?
A. 731.
Q. In what quantity bracket would that put him?
A. Number 1.
Q. Hi-Point Corporation,—in what bracket did you place him in your cost study?
A. Number 2.
Q. How many did he buy?
A. 852.

Q. And in what quantity bracket would that place him?

2377 A. Number 1.

Q. Todd Combustion Equipment Company,—in what price bracket did you place him?

A. Number 2.

Q. How many did he purchase?

A. 972.

Q. In what quantity bracket would that place him?

A. Number 1.

Q. Enterprise Engine & Foundry Company,—in what price bracket did you place him in the exhibit?

A. He is in bracket 2.

Q. And how many did he buy?

A. 4,061.

Q. That was from the factory. Did he buy some from the branch also?

A. Yes, the total is 5,131.

Q. Then in what bracket would he fall from the quantity standpoint?

A. Bracket 3.

Q. Bracket 3, or $15.90, and the range is from 3,000 to 7,499 units in that bracket, isn't it?

A. Yes, sir.

Q. Do you know whether or not there was a credit given at the end of the year?

A. No.

2378 Q. But at any rate you put him in bracket number 2 for the purpose of this study?

A. Yes, sir.

Q. You can find that out, can't you?

A. Whether or not a retroactive credit was issued?

Q. Yes.

A. Yes.

Q. Atlas Manufacturing Company.

A. 821.

Q. In what quantity bracket then would that place him?

A. That would be in number 1.

Q. DeSoto Oil Burner Corporation.

A. It is in number 3; the quantity is 1,977.

Q. In what quantity bracket would that place him?

A. Number 1.

Q. Diesel Oil Burner Corporation, New York.

A. I beg your pardon,—that would be number 2. And the next account?

Q. Diesel Oil Burner Corporation of New York. In what bracket did you place him in your study?
A. Number 3.
Q. What quantity did he buy?
A. 1,916.
Q. In what bracket would he fall from the quantity standpoint?
2379 A. Number 2.
Q. Electral Incorporated,—in what bracket did you place him in your study?
A. Number 3.
Q. What quantity did he purchase?
A. 1,118.
Q. What quantity bracket did that entitle him to?
A. Number 2.
Q. Gasconaire Company.
A. It is in number 3.
Q. You placed him in number 3 in your study?
A. Yes, sir.
Q. What quantity did he buy?
A. 1,016.
Q. In what quantity bracket would that place him?
A. Number 1.
Q. Gold Star Oil Burner Company.
A. It is in number 3.
Q. What quantity did he purchase?
A. 2,441.
Q. Now, in what quantity bracket would that place him?
A. That would be number 2.
Q. Gould Engineering Company,—in what bracket did you put his cost figures?
A. Bracket number 3.
2380 Q. What was the volume of his sales?
A. 2,671, was the quantity.
Q. In what quantity bracket would he fall?
A. That would be number 2.
Q. Lynn Products Company,—in what bracket did you place him?
A. Number 3.
Q. What quantity did he purchase?
A. 2,209.
Q. In what quantity bracket would he fall?
A. Number 2.
Q. Malleable Iron Fittings Company.

A. Number 3.
Q. What is the quantity of his purchases?
A. 1,923.
Q. In what bracket would that place him?
A. Number 2.
Q. Sawmeyer Corporation.
A. Number 3.
Q. What was the volume of his purchases?
A. 2,402.
Q. What quantity bracket would that entitle him to?
A. Number 2.
Q. Wisconsin Oil Burner Company.
A. Number 3.
2381 Q. What price bracket?
A. Number 3; 1,376 units.
Q. In what quantity bracket would that place him?
A. Number 2.
Q. Sun Ray Burners, Inc.
A. Sun Ray, did you say?
Q. Yes. You put that in 3, did you?
A. Yes. The quantity we have here is 1,077.
Q. In what quantity bracket would that be?
A. That would be under 2.
Q. Hart Oil Burner Corporation,—in what price bracket did you put him?
A. Bracket 3; 2,446 units.
Q. And according to the volume of purchases, what quantity bracket should be have gone in?
A. 2.
Q. York Oil Burner, Inc.,—what bracket did you place him?
A. That is in number 3.
Q. What is the volume of his purchases?
A. 1,641.
Q. In what quantity bracket would that place him?
A. Number 2.
Trial Examiner Sheppard: We will take an adjournment until 2 o'clock.
2382 (Whereupon, at 1:15 P. M., a recess was taken until 2 P. M., this day.)

2383 **Afternoon Session.**

2 P. M.

Trial Examiner Sheppard: Come to order, gentlemen. You may proceed.

H. H. REESE resumed the stand and testified further as follows:

Cross-Examination by Mr. Haycraft (Continued).

Q. The next company is the Beckett Engineering Company. In what price classification is that?

A. 3A.

Q. That is for purchasing from 7,500 to 14,999 units at $15.35, is that right?

A. That is right.

Q. Now, how many units did this company buy?

A. 2,031.

Q. And according to the quantity bracket, what quantity bracket would he fall in?

A. 2.

Q. Bethlehem Foundry & Machine Company.

A. That is 3A.

Q. How many did he buy?

A. 6,464.

Trial Examiner Sheppard: Off the record.

2384 (Discussion off the record.)

Trial Examiner Sheppard: On the record.

By My Haycraft:

Q. In what bracket would he fall from the quantity standpoint?

A. 3.

Q. Delia Oil Burner Company,—what price bracket did you place that in?

A. That was 3A; 5,459 units.

Q. And what quantity bracket would that fall in?

A. That would be 3.

Q. U. S. Burner Corporation,—in what price bracket?

A. 3A; 6,348 units. That would place it in 3.

Q. Ray Oil Burner Company.

A. That is 18,056.

Q. In what quantity bracket would it fall?

A. That was in 3A and according to the quantity it would be in 4.

Q. Now, can you, from consulting that exhibit before you, tell me how many of the customers you had for 3A that I haven't questioned you about? In other words, what proportion of your total number were in the same quantity bracket?

A. The total number here is 7.

Q. In other words, out of the 7, two of them were in the same quantity bracket as you put in the price
2385 bracket, is that right?

A. Yes, sir.

Q. Now take Century Engineering Company. What bracket did you put that customer in?

Mr. Gilpatric: On that and from here on we object to going into the brackets 4, 4A, and 5 because we don't make any claim that the bracket differences there are borne out by cost.

Mr. Haycraft: There is a claim though, Mr. Examiner, that that group of brackets as between the Discount brackets is justified.

Mr. Gilpatric: Not for 4, 4A and 5. It doesn't make any difference whether a manufacturer is in 4, 4A or 5 for the comparison he is making.

Mr. Haycraft: I will read the statement here on page 9, which reads: "From the costs which we have been able to allocate, the overall reduction in price between the discount bracket and bracket number 5 is more than justified and also the successive reductions in price between each bracket from the discount bracket to bracket number 3A, inclusive, appear in order. From the amount of cost which was allocated to bracket number 3A (totaling $0.46), it is obvious that the successive reductions in price aggregating $1.60 from bracket number 3A through bracket number 5 cannot be justified through the use of the
2386 portion of operating costs which was readily allocable to the customer quantity bracket classifications."

Trial Examiner Sheppard: All right, if it is there, you can go into it.

By Mr. Haycraft:

Q. Now, in making up your cost study in what price bracket classification did you put Century Engineering Company?

A. Number 4.
Q. And that is 15,000 to 22,499 units with a price of $14.90, is it not?
A. Yes, sir.
Q. Now, how many did they buy?
A. 8,398.
Q. And that would entitle them to what quantity classification?
A. That would be 3A.
Q. Hardey Whipple, Inc.
A. That is in 4.
Q. How many did he buy?
A. 8,632.
Q. What quantity bracket would he go in?
A. 3A.
Q. Norge Heating & Conduit Division,—in what price bracket did you put him in the cost study?
A. 4.
2387 Q. How many did he buy?
A. 10,771.
Q. That would entitle him to w[illegible] quantity bracket?
A. That would be 3A.
Q. Paragon Oil Company.
A. That is in 4.
Q. How many did he buy?
A. 14,501.
Q. That would place him in what quantity?
A. 3A.
Q. Reif Rex Oil Company,—in what price bracket did you put him?
A. We put him in 4.
Q. How many did he buy?
A. 4,940.
Q. And what quantity bracket would that place him in?
A. 3.
Q. Scott Newcombe, Inc.
A. That would be 4.
Q. How many did he buy?
A. 9,003.
Q. That would place him in what quantity bracket?
A. 3A.
Q. Silent Glo Oil Burner Corporation.
A. That is in 4.
2388 Q. How many did he buy?
A. 11,289.

Q. In what quantity bracket would that put him?
A. 3A.
Q. Wayne Oil Burner Corporation.
A. That is in 4.
Q. How many did he buy?
A. 1,267.
Q. And in what quantity bracket would that place him?
A. Number 2.
Q. Korth Oil Burner Corporation,—in what price bracket did you put him in?
A. 4.
Q. What did he buy?
A. 22,739.
Q. What quantity bracket would that put him in?
A. 4A.
Q. Do you know whether or not there was any refund given?
A. No, I don't.
Q. Nu-Way Corporation.
A. That is in 4.
Q. How many did he buy?
A. 5,874.
Q. And what quantity bracket would that place him in?
A. 3.

2389 Q. Now in that number 4 bracket, were there any of the accounts that you entered there in the price bracket that corresponded to the same quantity bracket, or were they all different? In other words, if they had been granted the discount they were entitled to in the quantity bracket, would any of these have fallen into the number 4?
A. No, sir.
Q. And the Anchor Post Fence Company,—in what price bracket did you put him?
A. That was 4A.
Q. That covers 22,500 to 29,999 with a price of $14.25, is that right?
A. Yes, sir.
Q. How many did he buy?
A. 3,339.
Q. What quantity bracket then would he fall in?
A. 3.
Q. Incidentally, were there any other accounts in this bracket, 4A, according to your study?
A. Other than mixed manufacturers, no.

Q. We are not including them. All right now, in what price bracket did you place the Automatic Burner Corporation?

A. Number 5.

Q. And bracket number 5 covers 30,000 and up, with a $13.75 price, doesn't it?

2390 A. Yes.

Q. All right, how many did he buy?

A. 19,838.

Q. In what quantity bracket would he fall?

A. Number 4.

Q. The Cleveland Steel Products Corporation.

A. That is number 5.

Q. How many did that company buy?

A. 19,445.

Q. In what quantity bracket would he go?

A. Number 4.

Q. Delco Appliance Division,—in what price bracket did you put him?

A. Number 5.

Q. How many did he buy?

A. 26,691.

Q. According to the quantity bracket, in what bracket would he go?

A. 4A.

Q. Gilbert & Barker Manufacturing Company,—in what price bracket did you put him?

A. Number 5.

Q. How many did he buy?

A. 25,404.

Q. According to the quantity, in what bracket would he fall?

2391 A. 4A.

Q. The May Oil Burner Company,—what price bracket did you put him in?

A. 5.

Q. How many did he buy?

A. 14,191.

Q. According to the quantity bracket, where would he fall?

A. 3A.

Q. Micro West Company,—what price bracket did you put him in?

A. 5.

Q. How many did he buy?

A. 6,992.

Q. According to the quantity bracket, where would he be?

A. 3.

Q. Timken Silent Automatic Company,—what bracket did you put him in?

A. 5.

Q. How many did he buy?

A. 11,411.

Q. In what quantity bracket would he fall?

A. 3A.

Q. Williams Oil-O-Matic Corporation,—in what bracket did you put him?

A. 5.

2392 Q. How many did he buy?

A. 16,332.

Q. In what bracket then would he fall from the quantity standpoint?

A. 4.

Q. Now, how many other customers did you have in this bracket aside from those I have listed?

A. 3, I believe.

Q. And they bought over 30,000 units, those other three?

Trial Examiner Sheppard: Over how many?

Mr. Haycraft: Over 30,000 units.

Trial Examiner Sheppard: That is 10,000 sets.

By Mr. Haycraft:

Q. 30,000 units would be 10,000 sets, wouldn't it?

A. That is right.

Q. Now, in making up Respondent's Exhibit 170, page 7, you have under Distribution Costs—home office selling expenses, branch expenses, home office administrative expense, and warehouse and shipping expenses. Now, when you say "Home Office Selling Expenses", where did you get the figures from on that, those items of that heading?

A. Those were expenses incurred at the home office.

Q. That is at the Minneapolis-Honeywell home office here in Minneapolis?

A. That is right.

2393 Q. Now where did you get the figures as to the branch expenses?

A. The amounts were taken from the books of the company at the home office.

Q. Well, what branches were included there?
A. All branches.
Q. And what branches were they?
A. There is a list in here (indicating).
Trial Examiner Sheppard: I think they are listed, aren't they?
Mr. Freeman: It is all in the report; I don't know why we need to go over it again and have this man list them. He has said, "all branches".
Trial Examiner Sheppard: Just give the page number.
The Witness: On page 8 the branches are given in detail.

By Mr. Haycraft:

Q. Well now, in making up your distribution cost study, as indicated on pages 11 and 12, the following pages there, I notice here on page 12 that you have listed the discount bracket the same as the bracket we have been talking about. Now, in making your entries in these columns here under price brackets, did you follow that set-up there, or did you follow the actual prices that you found in the ledgers, or books of the Respondent?

2394 A. We followed the actual company classification.

Q. So that this bracket as set forth here on page 12,—I mean this system of brackets or set up of brackets,—was not followed at all?

A. That is the basis that the company uses, but we followed their actual classification in other words, that is the potential quantity.

Q. Well, it says here, "Preliminary to the assignment of distribution costs which affect cost differentials in price brackets, it was necessary to make a separation of sales and manufacturing cost of products sold between Oil Burner manufacturers and all other customers as follows:"—and then you list this group of brackets here. Was that actually done? Was the separation on that basis?

A. No, the separation was made on the basis of the company's classification of each customer.

Q. That is, at the prices at which they were actually sold rather than the quantities?

A. That is right.

Q. Now, can you trace for us the manner and give us an illustration of how the distribution cost figures were made up for any g. en oil burner manufacturer customer, showing the various items that went into the distribution cost? For instance, take this oil burner manufacturing

company in Chicago,—the Automatic Burner Cor-
2395 poration. Do you have any figures on that company to show how you allocated the distribution costs for the salesmen's time and all that sort of thing?

A. That was based, as the report indicates, on the number of calls on the customer, the invoice lines, billing lines, the number of invoices rendered, and so on.

Q. Well, when that all had been totalled up, that was placed in the price bracket on which this particular customer was placed?

A. Yes, sir.

Q. And not according to the quantity that he bought?

A. That is right.

Q. Now, if you had followed the policy, as indicated here on page 12, of allocating and dividing up the customers according to the quantity they bought, do you have any way of knowing whether the figures that you obtained as to the cost of distribution for each price bracket would be the same or varied from those figures which you have presented in this study?

A. There is no way to know unless you actually recast the figures.

Q. Will you explain why that is true?

A. Because such a change would change all factors affecting the final result.

Q. Will you mind indicating for the record what
2396 those factors were and how they would be changed by the changing of the bracket classification?

A. It would change the allocation of the various elements of distribution costs. It would change the cost of sales, and it would be in a different price category.

Q. Can you give us an illustration, or would it be possible to work up an illustration on actual accounts,—take five accounts, and run an account in each one of the brackets and show how that would be changed?

A. I don't think it would be practical to arrive at any results with less work than reclassifying everything.

Q. In other words, you think a projection of that kind would not serve any purpose?

A. I don't think it would.

Q. I merely wanted to have you illustrate for the Examiner and for the record, if you can illustrate it, by taking some account, any one account that you want to at random that we have worked on here today, and show how, putting it in the bracket, the quantity bracket that it would fall

in, it would change its relationship to the exhibit. I used that Automatic Burner Corporation because that is one we were so familiar with at Chicago.

Mr. Gilpatric: You are asking him to assume that the prices changed?

Mr. Haycraft: Assume that he sold at the price
2397 to which he was entitled in the bracket.

Mr. Gilpatric: In other words, taking Automatic, if you are using that as an example, you would assume a higher price from that account because you put him in a lower bracket?

Mr. Haycraft: That just happened to be one that is 4 now. We might take one with probably a little more outstanding difference. It might be Micro West Company, which should have been in 3 if it had been sold according to the quantity bracket. I don't care anything about the difference; I just want an illustration of what changes it would make, what elements and factors we would have to take into consideration.

Mr. Gilpatric: But you are asking him to assume that Micro West instead of being charged bracket 5 prices was charged bracket 3 prices?

Mr. Haycraft: Yes.

Mr. Gilpatric: That is purely hypothetical, you understand.

Trial Examiner Sheppard: I will let it go in, but I will consider it as that. Of course, I am interested in the actual situation.

Mr. Gilpatric: Yes.

A. Well, the effect there,—I can't tell what the effect would be. The changes would be moving these five
2398 elements of cost from the bracket in which we classified them to a lower bracket, which would mean the allocation of the cost of salesmen's calls, and billing lines, —perhaps I don't get your question.

By Mr. Haycraft:

Q. That is exactly what I want. It would also make a change in your manufacturing cost columns, too, wouldn't it?

A. Yes, sir. I said all five facts.

Q. Which were used as the bases for figuring your ratio?

A. That is right; it would change all of those.

Q. Turning to page 58 in this exhibit 170, Mr. Reese,

I notice you have one item here, "Selling Salaries and Expenses" in which you allocate to the oil burner manufacturers about $40,000. You have got that divided up in price brackets and Discount 1, 2, 3, 3A, and a group of 4-4A-5 together. I should like to ask you this question, if it is possible for you to furnish me with the work sheets from which this group of figures were made up so that you can testify as to the actual allocation of the expenses to the different customers, and I will give you the names of the accounts that I want to make the test study in: Master Oil Burner Company, the Ace Engineering Company, the Ray Oil Burner Company, the Enterprise Engine & Foundry Company, the Wayne Oil Burner Corporation, and the Korth Oil Burner Corporation, and the Automatic Burner Corporation.

2399 Mr. Gilpatric: Mr. Reporter, will you read the question back, please?

(The question was read by the reporter.)

Mr. Gilpatric: Those work sheets, Mr. Examiner, have been available to the Commission now for about three months. We will give the work sheets back, but we are not going to have Ernst & Ernst do a lot of work.

Mr. Haycraft: I am not asking him to do any work; I am asking him to testify as to what he has done, and I am certainly entitled to that.

Trial Examiner Sheppard: I take it, gentlemen, that you will agree that a great deal of this is interesting to me because it is a clarification of what is in that record there, Exhibit 170. You all are familiar with it; I am not. I haven't touched it yet and all this is rather illuminating to me. Can you do that for us, Mr. Reese?

The Witness: Off the record, may I speak to my assistant?

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: Yes, with respect to salesmen's calls, they can be allocated directly to each account.

By Mr. Haycraft:

2400 Q. What other elements do you have on this exhibit, page 58, under selling salaries and expenses, do you have besides salesmen's calls in there?

A. All of your various—

Q. Over on 59, don't they all relate back to the salesmen's calls, every one of them?

A. Everything that follows the salesmen's calls can be traced.

Mr. Haycraft: All right. I would like to then request, Mr. Examiner, that that be done and the witness be excused today and that he appear tomorrow morning with those work sheets so that he can testify further with respect to those accounts.

Trial Examiner Sheppard: Can you do that in that time? We will go off the record, Mr. Reporter.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: May I reopen that question on one point with respect to the allocation of certain indirect selling expenses to the individual accounts? I would like to clear up one point that, for instance, sales supervision was not assigned specifically to any one of these companies. It followed the over-all allocation of salesmen's calls, or the cost of salesmen's calls.

By Mr. Haycraft:

Q. Once you determine your cost of salesmen's 2401 calls, you have the basis for your allocation?

A. That is right, but there is no reason to allocate it to a specific company. That was handled in the over-all rather than individually.

Mr. Haycraft: The main thing I was after was the salesmen's expenses. That is my next line of examination, Mr. Examiner, and in view of what you said this morning or this noon as to your wanting to help the reporter to keep up his daily copy, why I thought that would be a good place to stop, and if we could have that available tomorrow morning I could go into that.

Mr. Freeman: I suggest that we let Mr. Johannsen go back and get whatever work sheets are necessary and let Mr. Haycraft continue with his further examination of this witness, and then when these papers are here produced Mr. Haycraft can come back to this.

Trial Examiner Sheppard: All right, can we go on with this witness now on anything further, Mr. Haycraft?

Mr. Haycraft: I can't go any further until I have the information that we asked for.

Trial Examiner Sheppard: All right then, you get the information we want on that proposition, Mr. Reese, and have it for us tomorrow sometime. If you can have it the first thing in the morning, all right; otherwise, we will

give you more time. We are going to take an ad-
2402 journment now until 9 o'clock in the morning.

Mr. Gilpatric: Mr. Examiner, I don't want this to happen tomorrow. I have come all the way from New York and the Commission has had four months to find what it wanted so they would be able to proceed. The papers have all been available. Now we have other engagements and it is just not fair to the company or to ourselves to tell us at this time they want something that we haven't got here. Mr. Haycraft could have told Mr. Freeman in Chicago yesterday about this when he saw him. We weren't told a thing about it.

Mr. Haycraft: I told Mr. Freeman two or three days ago and I told him again yesterday that I wanted to go into the details of this report.

Mr. Freeman: You didn't ask for any specific work sheets or we would have had it here. The work sheets of Ernst & Ernst have been available for better than four months and they have been inspected and inspected by accountants for the Commission. They are now available at the offices of Ernst & Ernst in Minneapolis and the Commission can come back and get them any time they want them.

Mr. Haycraft: I move then that we adjourn to meet in the office of Ernst & Ernst tomorrow morning. If they don't want to bring them over here, we will go over there.

Trial Examiner Sheppard: I had this hearing
2403 here in Minneapolis because of the question of these records, you know.

Mr. Freeman: We are not refusing to furnish these records. They are available and we offer them to you.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

Mr. Freeman: I just want to say that Mr. Haycraft should designate now what else he may want to get into, and we will have them over here.

Mr. Haycraft: That is all I can think of at the present time, but I don't want to put myself in the position of saying that I am not going to ask for anything more.

Trial Examiner Sheppard: I am going to take the adjournment. Can you all meet at 9 o'clock in the morning instead of 10? All right then, Mr. Reporter, we will stand adjourned until 9 o'clock tomorrow morning.

(Whereupon, at 3:20 P. M., January 9, 1945, the hearing in the above-entitled matter was adjourned.)

2404 Room 307, U. S. Court House,
Minneapolis, Minnesota,
Wednesday, January 10, 1945.

Met, pursuant to adjournment, at 9 o'clock A.M.

Before:

W. W. Sheppard, Trial Examiner.

Present:

Everett F. Haycraft, Attorney for the Federal Trade Commission.

Gravath, Swaine & Moore, by R. L. Gilpatric, 15 Broad Street, New York, New York; and Baer & Freeman, by Will Freeman, 135 South LaSalle Street, Chicago, Illinois; appearing for respondent.

2405 Proceedings.

Trial Examiner Sheppard: Convene the hearing, Mr. Reporter, pursuant to the adjournment taken yesterday, and show the usual appearances.

Mr. Haycraft: At the close of the hearing yesterday afternoon I gave Mr. Reese the names of some firms that I wished him to secure some original work papers on with respect to the cost of the salesmen's activities, what they call salesmen's reports, and after the session was closed we talked unofficially around here and off the record and compromised by giving him four other names, the names of four other firms which have come out of one office. I wanted to make the burden as light as I could on the office, and I am informed this morning that Mr. Johannsen is better equipped to answer those questions with respect to that matter than Mr. Reese because he worked on that end of the report himself.

Trial Examiner Sheppard: It has been my idea all the time that if we could just have one or two cases to illustrate the point here it would be better than going into great detail.

Mr. Reporter, show this gentleman, Mr. A. F. Johannsen of Minneapolis, Minnesota, having been previously sworn, appears on behalf of the Commission.

Mr. Haycraft: I would like to have him show the
2406 same appearance as Mr. Reese, if you don't mind.

Trial Examiner Sheppard: Yes, Mr. Reese was on the stand yesterday and this gentleman will testify along the same lines, but I understand he has more definite knowledge of the questions involved.

A. F. JOHANNSEN was thereupon called as a witness by the Commission and, having previously been duly sworn, testified further as follows:

Cross-Examination by Mr. Haycraft.

Q. What, if anything, did you have to do with the preparation of Respondent's Exhibit 170, Mr. Johannsen?

A. Well, are you speaking now of the detailed work in accumulating the information, or in writing the exhibit?

Q. Both.

A. I either prepared or supervised the preparation and accumulation of the information that is contained in the report, and also with the help of Mr. Reese and other members of our organization prepared the formal exhibit, the formal report.

Q. At the bottom of page 58 of this report there is an item of "Selling Salaries and Expenses" and on the next page is an explanation of how the information was gathered which is set forth in this tabulation. Is that your work?

2407 A. That is either my work directly or under my supervision.

Q. Well now, you were asked, I believe, to be prepared to testify this morning with respect to four accounts in the New York area, New York branch area, with respect to the salesmen's expenses, salesmen's salaries, and so forth. Are you prepared to do that?

A. I am prepared to give you the information as to the number of calls and the cost of those calls on these companies.

Q. Well, would you name the companies that you have in mind and take them up one at a time.

A. Well, the first company is the General Oil Burner Company.

Q. Where is that located?

A. That is located in Baltimore, in the New York area.

Q. Do you know what price classification that was placed in in your report on page 7 of the exhibit?

Mr. Gilpatric: In bracket 2, according to Exhibit 185.

A. In bracket 2.

By Mr. Haycraft:

Q. Is that General Oil Burner Company or General Oil Heating?

A. I have General Oil Burner Company.

Mr. Gilpatric: May we go off the record?

Trial Examiner Sheppard: Off the record, Mr. 2408 Reporter.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

By Mr. Haycraft:

Q. All right, skip General Oil Burner. Take the next one then, Mr. Johannsen.

A. Gold Star Oil Burner Company.

Q. Where are they located?

A. In New York.

Q. And that is in what bracket?

A. Bracket number 3.

Q. What salesmen called on them?

A. Frank Ammon, W. J. Brown, A. Michelson, and J. D. Patrick.

Q. Now, did they all call on them at the same time or different periods of time?

A. Our records unfortunately do not show whether they called on them together or individually.

Q. Does it have the time devoted for each one, the number of calls for each one?

A. Yes.

Q. How many calls did Frank Ammon make?

A. Frank Ammon made one call.

Q. Was he a salesman or a supervisor?

A. He was a salesman.

Q. All right, go ahead. Brown,—how many calls 2409 did he make?

A. W. J. Brown made six calls.

Q. How many did Michelson make?

A. Four calls.

Q. And Patrick?

A. Thirteen.

Q. Now, how did you determine the amount of money to be charged to this particular account for salesmen's calls?

A. I would like to have that question repeated.

(The question was read by the reporter.)

A. We first determined the total number of days that the salesmen worked.

Q. Was that each salesman? Have you put it as if one salesman made all the calls?

A. I believe your question was, how did you determine what this salesman's cost per call was.

Q. That is right, this company's cost per call.

A. Well, for each salesman.

Q. That is right, go ahead.

Mr. Gilpatric: He is now talking about Ammon, is that correct?

The Witness: I am now talking about Ammon.

By Mr. Haycraft:

Q. All right, go ahead.

A. We determined first how many days Frank
2410 Ammon worked in sales work.

Q. How many days did he work?

A. He worked 244 days.

Q. All right, then what did you do?

A. We determined through information on the salesmen or their supervisors, based on the territory that they worked in and the type of calls that they made, how many calls they could make on contract manufacturers per day.

Q. That was an estimate given to you by other employees of the respondent?

A. That was obtained either from the salesman or from the salesman's supervisor.

Q. You don't recall now which?

A. The records that we have here do not show.

Q. But then, in other words, it wasn't based upon actual time records?

A. No, sir.

Q. (Continuing) Of the length of time that this salesman spent with this particular account?

A. No, sir, the salesman's call record did not show the actual time elapsed.

Q. All right, what did you do next?

A. We then determined the cost per day by adding the salesman's salary and his expenses and his direct supervision to establish the cost per day.

2411 Q. And what did you get in the case of this particular salesman?

A. The cost per day was $16.34.

Q. How many calls did you have him making on the contract customers, according to your record?

A. You are referring now to the daily calls, or the total calls?

Q. The daily calls.

A. He made two calls per day on contract manufacturers, which brings his cost per call to $8.17. In addition to that, we have his general supervision, which includes the eastern zone manager, which is Mr. Michelson, and determined the amount of supervision applied to this individual salesman. This was accomplished by determining the man-days of all salesmen over which he had supervision and by taking the ratio of man-days to the amount of his salary and expense allocable to supervision we arrived at a cost per day and then further worked that out to a cost per call.

Q. What was it in this instance?

A. It was 58 cents.

Q. Per call?

A. Per call.

Q. And you had four calls, is that right?

A. That is not right.

Q. You are talking about Ammon yet,—58 cents 2412 to be added to Ammon?

A. That is right. In addition to that we had further supervision by Mr. Chapler, who supervised the heating control salesmen of the eastern zone.

Q. How did you work that, the same way?

A. In this we took all the heating control salesmen of the eastern area, arrived at the man-days for all salesmen. By taking the ratio of that portion of his salary expense which was allocated to supervision, we arrived at a cost per day, and extended that further to a cost per call for the individual salesman.

Q. You say that part was allocated to supervision. Did he have other duties besides supervision?

A. He also made direct calls himself.

Q. How did you divide his time? Was that estimated again, or based on actual records?

A. Mr. Chapler worked a total of 244 days. He made 72 calls on contract manufacturers. The number of calls that he could make per day was one, because of the nature of the call that he made. Therefore we accounted for 72 days spent on his own personal calls on contract manu-

facturers. In addition to this he spent thirteen days calling on customers other than contract manufacturers. This was arrived at by dividing the number of calls that he did make on other than contract manufacturers
2413 by the number of calls that he could make, which is three calls per day. That gives us thirteen days, leaving 159 days which was allocated to supervision.

Q. Well then, how much did you allocate to Frank Ammon from Chapler's supervision?

A. $3.06 per call.

Q. Why do you say that he only made one call a day whereas Ammon was making two calls a day on contract customers,—that is, when he made calls himself and was not engaged in supervision?

A. That was the information furnished us as to the number of calls that he could make, based on the type of customers that he called on.

Q. Did they tell you what type of customers he called on as compared with the other fellow?

A. I don't quite get the question.

Q. Well, you say he could only make one call because of the type of customer that he called on. Now, as I understand it, Ammon, for instance, could make two calls. What was the difference in the type of customer that Ammon was supposed to call on and Chapler was supposed to call on?

A. I don't think that I can answer as to the type of calls.

Q. It didn't come to your knowledge?

A. I am not familiar with the companies that they called on.

Q. Did you have any other supervisory expense
2414 than that what you have indicated? Was that the total?

A. That was the total.

Q. Then the total of that would be about $11.81 per call for Frank Ammon, is that right?

A. That is right.

Q. Now, in which bracket did you enter that in making up your final tabulation, in which price bracket?

A. In regard to Gold Star Oil Burner?

Q. Yes.

A. It was entered in the bracket in which Gold Star had been placed by the company.

Q. That was 3?

A. That was bracket number 3.

Q. Now, what was the cost per call of W. J. Brown? I assume that was worked out on the same basis?

A. He was worked out on the same basis. In fact, I might add that all salesmen were worked out on this basis.

Q. And what was your cost per call for W. J. Brown?

A. $17.51½.

Q. And Michelson?

A. Michelson was $74.38.

Q. Now, he was his own manager, you say?

A. That is right. J. D. Patrick was $11.84½.

Q. Then what did you have as the total of all to be charged?

A. The total cost of calls of the four salesmen
2415 mentioned here on the Gold Star Oil Burner Company was $568.40.

Q. All of them went into bracket number 3, is that right?

A. That is right.

Q. That $568.40 was a part of this item of $9,736.89 on page 58?

A. That is right.

Q. Now, would there have been any difference in the manner of figuring the cost per day if this account had been placed in bracket number 2? Would there be any difference in your $568.40 if he had been in a different discount bracket?

A. I don't quite get your point.

Q. I say, if it was a fact that he should have been in bracket number 2 rather than bracket number 3, would that make any difference in your item of $568.40?

A. When you are speaking of—

Q. The sum of the salesmen selling to the Gold Star Oil Burner Company,—in other words, the amount of money allocated to that account for salesmen's calls was $568.40 as a part of the expense?

A. That is right.

Q. Now, would it make any difference as to what his quantity of sales were? There was no relation—

Mr. Freeman: Mr. Haycraft uses "his" to mean the Gold Star Company.

By Mr. Haycraft:

2416 Q. There was no relation as between the Gold Star's cost for purchases?

A. No, this was not in relation to sales.

Q. However, if it had been figured on the basis of bracket number 2, Discount bracket number 2, it would have been placed on page 58 in the item where you have $4,731.17, would it not?

A. If it had been placed in bracket 2, it would have been added to bracket number 2.

Q. And taken away from bracket number 3? In other words, it would make bracket number 3 smaller and bracket number 2 higher, would it not?

A. Yes, it would be taken out of 3 and placed in whatever bracket you placed it in.

Q. Do you have before you there the figures as to the purchases by this particular account?

A. No, sir.

Q. You know what the brackets were though, do you not, Mr. Johannsen?

A. By referring to the report, I can tell.

Q. Referring to page 2,379 in this record, the quantity purchased was 2,441 units. What bracket would that put him in from a quantity standpoint, Mr. Johannsen?

A. It would put him in bracket 2 strictly on the quantity purchases.

2417 Q. Yes. Now then, take the next account—

Trial Examiner Sheppard: He was in bracket 2, wasn't he?

Mr. Haycraft: No, they put him in bracket 3.

The Witness: When you say "they put him in",—do you mean that we—

Mr. Haycraft: No, the respondent put him in bracket 3 in figuring the expense. The witness testified that those costs were put in bracket number 3 that I have just been asking about.

By Mr. Haycraft:

Q. Now then, will you take the next account that you have there?

A. Korth Oil Burner Corporation.

Q. Where is that located, New York City?

A. It is located in New York.

Q. And in what price bracket was his expense allocated?

A. Bracket number 4.

Q. Now, what does your record show as to the salesmen calling?

A. My record shows that W. J. Brown made one call and Chris Jensen made thirteen calls.

Q. Those were all the calls that were made?

A. Those were all the calls recorded.

Q. Are either one of those supervisors?

2418 A. W. J. Brown is a supervisor.

Q. Now then, following the same procedure, will you give us the amount that was allocated per call for each one of these salesmen for this account?

A. W. J. Brown was $17.52; Chris Jensen was $15.88½.

Q. That included supervision?

A. That included supervision.

Q. And that made a total of $33.40 per call?

A. It does not.

Q. What was the total amount of calls, the total amount allocated to this account on salesmen's calls?

Mr. Freeman: Do you mean for all calls?

Mr. Haycraft: All calls.

A. $224.03.

By Mr. Haycraft:

Q. That was made a part of this $11,681.29 on the exhibit, on page 58?

A. Made a part of bracket number 4.

Q. And that is a part of 4, 4A, and 5 that is shown on this exhibit, is it not?

A. That is right.

Q. Now, how many units did this company buy?

A. I don't have that information.

Mr. Gilpatric: It is on page 2,388 of the record.

By Mr. Haycraft:

2419 Q. Page 2,388 shows that this customer bought 22,739 units. What bracket would that put him in according to the quantity bracket?

A. What was the figure?

Q. 22,739.

A. Bracket number 4A.

Q. Then if he was placed in bracket 4A, it would still go into this $11,681.29 on page 58? There would be no change on that?

A. That is right.

Q. Now, take the Petroleum Heat & Power Company.

A. I have it.

Q. Will you testify as to what bracket you put that account.

A. Bracket number 5.

Mr. Haycraft: May we go off the record?

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: There will be a five minute recess.

(A short recess was taken.)

Trial Examiner Sheppard: You may proceed.

By Mr. Haycraft:

Q. Take the account of Anchor Post and Fence Company, Mr. Johannsen, and first tell me what bracket you placed his sales expense in.

2420 A. Bracket number 4A.

Q. And what salesmen called on him and what was the cost of the salesmen's calls?

A. F. Bell made ten calls and the total cost was $85.00.

Q. That is all the sales expense you have?

A. That is all that the record shows.

Q. And that, I take it, was made a part of your item of $11,681.29 on page 58 of Respondent's Exhibit 170, is that right?

A. Yes, under bracket 4, 4A, and 5.

Q. Now, on page 2,389 it appears that this firm bought 3,339 units. In what quantity bracket would that place him according to your exhibit there?

A. On the volume basis that would put him in bracket number 3.

Q. And so that if you figured these calls and expenses on volume basis, this item would have gone in the item of $9,736.89 rather than the $11,681.29, is that right?

A. It would have gone into bracket 3.

Q. That is the item, bracket 3. Now, will you take the account of Electral and first tell me what bracket he was placed in in your study.

A. Number 3.

Q. And who made the calls there and what was the expense?

2421 A. W. J. Brown made four calls at a cost of $70.00; Chapler made one call at a cost of $45.30;

Jensen made two calls at a cost of $31.77; and Verstrate made five calls at a cost of $62.87.

Q. What is the total?

A. $209.94.

Q. Now, according to the testimony yesterday of Mr. Reese, at page 2,379, this customer purchased 1,118 units. Now, what bracket would that place him in on a quantity basis?

A. Bracket number 2.

Q. Now, this $209.94 is a part of the item of $9,736.89, according to page 58, Exhibit 170, is it not? That is bracket number 3?

A. That is part of bracket number 3.

Q. And if it had been allocated to bracket number 2, quantity bracket, it would have gone into this item of $4,731.17,—it would have been added to that?

A. It would have been added to the bracket 2.

Q. And deducted from bracket number 3?

A. That is right.

Q. Now, will you take the account of Fairfield Oil Company. What price bracket did you place him in in your study?

A. He was placed in bracket number 2.

Q. Who called on him and what was the expense?

A. W. J. Brown made two calls at a cost of $35.00; Patrick made eight calls at a cost of $94.72.

2422 Q. And what was the total, together?

A. $129.72.

Q. Now, according to the testimony of Mr. Reese yesterday, the Fairfield Oil Company purchased 858 units. That is on page 2,376 of the record. Now, what quantity bracket would that place him in?

A. On a quantity basis that would have placed him in bracket number 1.

Q. And from your testimony I understand that this $129.72 is included in your item of $8,536.09,—no, that is $4,731.17, which is bracket number 2, and if he had been allocated in bracket number 1, it would have been added to $8,536.09 and deducted from the other item, is that right?

A. May I have that question read?

(Question read by the reporter.)

A. It would have been added to the bracket number 1 total.

Q. And deducted from bracket number 2?

A. That is right.

Q. Now, are the illustrations that I have asked you about typical of the changes that would have to be made if the report was recast to conform to the quantity brackets, according to the testimony of Mr. Reese yesterday as to the brackets that these various accounts were placed in?

A. Just what do you mean when you say "typical"?

Q. Well, in all those instances where an account
2423 was placed in price bracket number 1, we will say, and according to the quantity bracket and his actual purchases he would have been placed in the Discount bracket. In order to make the change to put him in the Discount bracket, the changes that you have already testified to are illustrative of what would have to be done with respect to reallocating those expenses from a price bracket as given to you into a quantity bracket as developed in the testimony yesterday?

A. You are referring to salesmen's expense only?

Q. That is right; that is all I am talking about.

A. The salesmen's expense, if allocated other than it was allocated, would have to be taken out of the bracket in which it was placed and put into the bracket in which it will be reclassified.

Q. Referring back to page number 7 of this exhibit and the various items under distribution costs in the different price brackets, if the changes were made there on other items of distribution than we have referred to in your testimony this morning,—if they were changed from one bracket to another, what would it require in the way of changes in your distribution expenses? Can you determine that from the exhibit itself, or can you determine it from your work sheets?

A. I would like to have you repeat that. If I didn't misunderstand you, you said "other expenses", and
2424 I thought the testimony here was confined to salesmen.

Q. It was. I am now asking you the general question, using the salesmen as an illustration; that is, what I want to find out with respect to the other expenses, other than salesmen's expenses,—would your distribution costs be reallocated from one price bracket to another following the quantity bracket basis rather than the price basis?

A. All of the expenses that have been allocated ac-

cording to the bracket classifications that were used were based on factors, I think, that have been covered in his testimony and if any of the factors were changed it would mean recasting the allocation of these expenses on the basis of the new classifications.

Q. Now, this item that we have been talking about this morning of "Selling Salaries and Expenses" of $40,239.28 as assigned to total oil burner manufacturers is a part of the items listed in the column entitled "Applied To Cost Differentials Affecting Oil Burner Manufacturers" of branch expenses on page 34 of this exhibit and represents manufacturers' selling expenses, salesmen's salaries, salesmen's expenses, commissions, and is the principal item of that particular column, is it not, as branch office expense?

A. You are referring now to the $40,239.28?

Q. That is right.

A. That is the part applied to cost differentials
2425 affecting oil burner manufacturers of lines 23 through 36 on that same page.

Q. Those were the ones that I just read, were they not?

A. That is right.

Q. Now, scattered across this same page under the respective price brackets may be found the amounts set forth on page 58 about which I have questioned you, this $2,602.94 for Discount column, $8,536.09—price bracket number 1, $4,731.17—price bracket number 2, $9,736.89—bracket number 3, $2,950.90—bracket number 3A, and $11,681.29 in the last column, which is a combination of bracket numbers 4, 4A, and 5,—isn't that correct?

A. Well, I think your question, unless I misunderstood you, is have I located the figures?—yes.

Q. Well, I say, the information on page 58 about which I questioned you this morning is set forth on page 34 under the respective bracket numbers?

A. Those figures are the same.

Q. And if you made the changes that I questioned you about this morning with respect to these different salesmen's expenses, those changes would have to be made, of course, on these other items in page 34,—in other words, the same changes would be made there under their respective price brackets?

A. I believe your thought is, would any changes
2426 made in the detail be reflected in the summary—

Q. That is right.
A. The answer is yes.
Mr. Haycraft: That is all, Mr. Examiner.
Trial Examiner Sheppard: Redirect examination.

Redirect Examination by Mr. Gilpatric.

Q. Mr. Johannsen, when you were discussing Gold Star Oil Burner, you described how the cost per call of Mr. Ammon, one of the salesmen, was figured out. Can you tell us whether or not your records show the actual number of calls made by Mr. Ammon during the year 1941 on all customers?
A. Yes, they do.
Q. And how are those divided up on your work sheets, those calls?
A. Those are divided up by oil burners, and other manufacturers, and all other customers.
Q. Now, from what record were those figures taken that go to make up the total number of calls made by Mr. Ammon?
A. From the company's record on the salesmen's call reports.
Q. As reported by the salesmen?
A. As reported by the salesmen.
Q. In arriving at the total number of calls, you didn't make any estimate?
A. We made no estimates. These were salesmen's figures.
2427 Trial Examiner Sheppard: In other words, everyone of them worked on those days, as I understand it?
The Witness: That is right. These are actual calls reported by Mr. Ammon.

By Mr. Gilpatric:

Q. The only estimate, therefore, that was made was the number of calls on contract manufacturers that could be made in one day?
A. That is right, the number of calls that he could make on contract manufacturers in one day.
Q. But the actual calls made over the year were taken directly from the company's records of calls actually made?

A. That is right.

Q. In the case of calls made by a supervisor like Mr. Michelson, there was no supervisory charge against his calls, was there?

A. In the case of Mr. Michelson, who is the zone manager, there was no supervision; as far as branch expenses were concerned, it was charged to him. With other supervisors, depending upon their position, some of them did receive a charge for supervision from men above them. Mr. Michelson's time was charged against those men over which he had supervision, and the other supervisors' time was charged against the men over which they had supervision, but none of it was applied against a man over which they had no supervision.

2428 Trial Examiner Sheppard: I have one question to ask you. It seems to me, gentlemen, that all that I have been listening to here is minutiae of business administration—salesmen's expenses, how many calls they have made, and all that sort of thing. Of course, that is necessary matter to take into consideration in any cost accounting by any concern doing business anywhere. All I am interested in knowing in that respect is whether or not in making your bracket, your quantity brackets as shown in the record here, those things were taken into consideration. That is the question before us here, and really the only one of any importance. If these things were taken into consideration in making your quantity brackets, okay; if they were not, as Mr. Haycraft indicates there, it is an important item to be considered.

Now, my question to you: Were those things taken into consideration? Did you gentlemen get that information and consider it and count it in, and does it show in the quantity brackets as before us in this case? All the salesmen's salaries, the days they worked, and all that minutiae of business administration,—was that taken into consideration here by the respondent in fixing their quantity bracket proposition?

Mr. Haycraft: If I may interpose an objection, Mr. Examiner,—this witness doesn't know because he

2429 is not a party of the respondent. All he has done is made a study, an after-the-act study. I agree with you as to your point, as to what the issues are here, but I don't believe that the question you have propounded would be properly propounded to this witness. You might

ask that of Mr. Lockrae, or some other official of the Respondent.

Trial Examiner Sheppard: If you cannot answer the question, just say that you cannot.

The Witness: I may not have interpreted your question properly. If your question was, did we allocate every item of expense to brackets?—

Trial Examiner Sheppard: That is right.

The Witness: The answer is that every item that could be readily allocated we did, but there are many items that weren't.

Trial Examiner Sheppard: Well, I don't see any reason at all for you gentlemen getting it if you weren't going to use it, don't you see, and I assume that what you did get was used there in the making by the respondent of the quantity brackets.

The Witness: If that is your question, that is covered in our report in detail as to the expenses that were used, on page 5 of our report.

Trial Examiner Sheppard: Page 5 of Exhibit 170?

The Witness: That is right.

2430 Trial Examiner Sheppard: Now I may tell you gentlemen that of course it will be my duty to make a detailed study of that exhibit, but I wanted to be sure of that one question. I am going to take this witness' testimony on that line, and if Mr. Lockrae or some of the gentlemen on the stand before are on again, I want to ask them the same question.

All right, now is there any other examination by you?

Mr. Gilpatric: Not of this witness.

Mr. Haycraft: There is one question I want to ask.

Recross-Examination by Mr. Haycraft.

Q. In arriving at the allocation of the expense of Frank Ammon to the Gold Star Oil Burner Company, where you have an $11.81 total there, do you give the same value, the same amount of expense to the work that he does, the calls that he makes on the Gold Star Oil Burner Company as those he makes on other customers, or was it a weighted average made there?

A. I think I covered that before in saying that we did weight the calls on contract manufacturers according to the best estimate of the time that it took him to make those calls.

Q. As compared with the time on other business?
2431 A. That is right.
Mr. Haycraft: That is all.

Redirect Examination by Mr. Gilpatric.

Q. Just to make that point clear: Wasn't it true that whether Mr. Ammon called on a customer in bracket 2 or whether he called on a customer in bracket 5, in each case confining myself to contract manufacturers, the charge per call was the same?
A. That is right.
Trial Examiner Sheppard: I would have thought that. All right, thank you, Mr. Johannsen.
(Witness excused.)
Now, gentlemen, we will have a brief recess.
(A short recess was taken.)
Trial Examiner Sheppard: Mr. Reporter, show Mr. William J. Warmack, Washington, D. C., of the Federal Trade Commission on the stand.

WILLIAM J. WARMACK was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Haycraft.

Q. Will you state your full name, please?
2432 A. William J. Warmack.
Q. What is your occupation?
A. Accountant.
Q. By whom are you employed?
A. By the Federal Trade Commission.
Q. Do you live in Washington?
A. Yes, sir.
Trial Examiner Sheppard: How many years, Mr. Warmack, have you been with the Commission?
The Witness: Since May, 1929.

By Mr. Haycraft:
Q. Are you a certified public accountant?
A. Yes, sir.
Q. Since when?
A. 1933.

Mr. Freeman: Why don't you give us the state while you are at it?

By Mr. Haycraft:

Q. While you have been with the Commission, what has been the nature of your accounting experience?

A. I worked in the power investigation—that is, the power and light investigation from 1929 until 1935 or '36. Since late 1936 I have been engaged principally on accounting work in connection with the administration of the Robinson-Patman Act by the Commission, par-
2433 ticularly Section 2(a) of the Act. In answer to Mr. Freeman's suggestion, I am a certified public accountant of Florida.

Q. Now, what has been the nature of your activities and what cases have you been engaged on in connection with Section 2(a) of the Robinson-Patman Act? What were your duties in that respect?

A. Reviewing cost reports and comparisons under cost data submitted to the Commisison in attempted justification of price differences by various companies; that is, attempted justification of price differences under the due-allowance proviso of Section 2(a) of the Robinson-Patman Act. In addition, why I have made considerable studies of companies' records, checking the figures that have been compiled and compiling figures myself or supervising the compiling of figures and statistical data, all of which had to do with the costs which were worked up generally by companies and offered to the Commission in justification of price differentials under Section 2(a) of the Robinson-Patman Act.

Q. And can you recall the particular cases that you have worked on in that connection?

A. Well, the largest case I guess was the Standard Brands case. One of the cases in which I did considerable work and acted as a witness for the Commission for some time was the Standard Oil case. It was a case that had grown on account of alleged discrimination down in
2434 Detroit. And various other cases—I could name many of them. A considerable part of the work was devoted to companies in which formal complaints were never issued by the Commission. Of course, I cannot name those.

Q. Well, have you examined Respondent's Exhibit 170 in evidence in this case?

A. Yes, sir.

Q. Will you explain the extent of such examination and any investigation you may have made of underlying records?

A. Yes, I studied the report in Washington and I had Mr. Charles Argus of the Commission's staff assigned to a study of the report also. In connection with our study, why Mr. Argus spent a good deal of time here in Minneapolis in reviewing the working papers of Ernst & Ernst, certified public accountants, who had prepared the exhibit, and also reviewed and studied some of the records of the company at its office here in Minneapolis.

Q. How much time have you spent, yourself, in addition to what Mr. Argus may have done in the study of this exhibit and the underlying records?

A. I would say all told probably about a month.

Q. Do you have a copy of that report before you?

A. Yes, sir.

Q. Will you turn to page 6 of the exhibit?

A. (Witness complies.)

2435 Q. (Continuing.) And testify as to what that page represents, your interpretation of it?

A. Well, that page is a statement which shows the manufacturing cost, total manufacturing costs applicable to products sold to customers other than oil burner manufacturers, the manufacturing costs applicable to products sold to oil burner manufacturers—

Mr. Gilpatric: Is this page 6 he is talking about?

The Witness: Page 7.

By Mr. Haycraft:

Q. I asked you about page 6.

A. I beg your pardon. Page 6 is a statement which shows the discount bracket classification of the Respondent; the annual unit volume applicable to each of the separate discount brackets; the prices applicable to each of the separate discount brackets; the distribution cost applicable to the Discount bracket, bracket 1, bracket 2, bracket 3, and bracket 3A, as developed by the Respondent in that line of figures, which is column 4 on page 6, as taken from the last row of figures on the bottom of page 7 of the exhibit.

Column 5 on page 6 of the exhibit shows the cost differential, the deduction of each figure; that is, the deduction of the next lower figure in each instance from the

figure just above it. The price differential is column 6,
and that is the difference between the prices of each
2436 lower bracket from the immediately higher price
bracket as shown in column 3. Column 7 shows the excess of reduction in cost over reduction in price from the next higher bracket, as marked as a header for that column.

Column No. 8 shows the excess of cost over the excess of price as between the Discount bracket and bracket 1, bracket 2, 3, and 3A. Column 9 shows the same as compared with bracket 1; that is, the excess in each instance as between bracket 1 and bracket 2, bracket 1 and bracket 3, and bracket 1 and bracket 3A.

Column 9 shows the same comparison between bracket 2 and bracket 3, and bracket 2 and bracket 3A.

The last column on the sheet shows the difference between bracket 3 and bracket 3A.

Q. Now, referring to page 7 of the exhibit, which you started to explain a while ago, will you complete your explanation as to page 7 and then testify as to the relationship between the two pages?

A. Yes. Well, I had explained that the top line showed the total manufacturing costs, and that it shows that $1,282,833.84, manufacturing costs, was applicable to the production of oil burners sold to all those manufacturers; and that figure, continuing on the line, shows the amounts of manufacturing costs that were applicable to the sepa-
rate discount brackets as worked up by the Re-
2437 spondent. Would you like those figures read into the record?

Q. The top line there?

A. Yes.

Q. Yes, broken down.

A. The figure shown in the Discount bracket, $6,196.14; bracket No. 1, $39,352.41; bracket No. 2, $60,831.88; bracket No. 3, $188,867.92; bracket No. 3A, $129,732.93; and for brackets 4, 4A, and 5 combined, the manufacturing cost is shown as $857,852.56. Distribution costs are likewise shown on page 7 of Respondent's Exhibit 170, and are classified into four general classes: Home office selling expenses, Branch expenses, Home office administrative expense, and Warehouse and shipping expenses.

I can give the total of all of the distribution expenses if you would like that for the record here, or the total of each of those classifications.

Q. Give me the grand total.

Mr. Gilpatric: Is it necessary to have Mr. Warmack read into the record figures that are all in evidence?

Mr. Haycraft: It is for the purpose of this examination.

Trial Examiner Sheppard: All right, go ahead.

Mr. Freeman: We object to it then as not the best evidence. The best evidence is the documents.

2438 Trial Examiner Sheppard: I will consider it in the nature of an explanation.

Mr. Freeman: Who pays for the printing of this record, your Honor?

Mr. Haycraft: We pay a little of it.

Trial Examiner Sheppard: Go ahead.

A. The total distribution cost shown on page 7 of Respondent's Exhibit 170 is $3,591,633.04.

Mr. Freeman: We object to that answer as secondary evidence. The document speaks for itself.

Trial Examiner Sheppard: All right, show the objection.

Mr. Freeman: If he wants to make any explanation of any of these figures as an expert, or give his opinion with respect to the figures, that is agreeable; but if he merely reads what is on the document, it is not good evidence. It is secondary. And I make that objection to each of the answers from here on, your Honor.

Trial Examiner Sheppard: Well, I am letting him do it because I think from what Mr. Haycraft indicates that he wants to go into it.

Mr. Freeman: It is already in the record, your Honor.

Trial Examiner Sheppard: I mean, some explanation.

Mr. Freeman: If he wants an explanation, then we

2439 do not object to it, but he is not asking for an explanation. He is asking what the figures are.

Mr. Haycraft: You do not know what I am going to ask until I get through.

Trial Examiner Sheppard: Go ahead.

Mr. Freeman: Well, up to now I am making my objection.

A. (Continuing.) There is shown on page 7 of Respondent's Exhibit 170 distribution costs of $3,423,608.10 which were not used in the calculations of price differences in the report.

Mr. Freeman: The same objection.

Trial Examiner Sheppard: All right. Have you got

anything to say in reference to why they were not used or applied?

Mr. Haycraft: He will have when I get through.

Trial Examiner Sheppard: Oh, all right.

Mr. Haycraft: This is all preliminary.

Trial Examiner Sheppard: All right; go ahead.

A. (Continuing.) It shows distribution costs which Respondents used in their cost defense in the amount of $168,024.94, and that item was separated between the quantity price brackets as follows: Discount bracket, $10,902.30; bracket No. 1, $37,708.81; bracket No. 2,
$23,247.15; bracket No. 3, $40,830.72; bracket No. 3A,
2440 $11,322.89; and brackets 4, 4A, and 5 combined,
$44,013.07. Line number 8 shows the ratio of the distribution cost to manufacturing cost of products sold, —that is for the separate price brackets as shown on the exhibit,—and those ratios represent the relationship of the distribution cost to the manufacturing cost. In other words, the manufacturing cost, as shown at the top, was divided into the distribution cost to arrive at those ratios. The ratios are as follows: The Discount bracket—1,760 per cent, that is 176 per cent; bracket No. 1—.958 per cent, that is 95 and 8/10ths per cent; bracket No. 2 is .382 per cent, and that is 38 and 2/10ths per cent; bracket No. 3 is .216 per cent, and that is 21 and 6/10ths per cent; bracket No. 3A is .087 per cent, and that is 8 and 7/10ths per cent.

The last line on the page represents the distribution cost per standard set of oil burners, and those figures were arrived at by relating the ratios just stated to the average production cost of a standard set of oil burners. Those are the figures which I just stated are carried over to column 4 of page 6.

By Mr. Haycraft:

Q. Does the exhibit in itself contain the average production cost of a standard set of controls on an oil burner?

A. It is not shown on the exhibit, no, sir, but that information was made available to us. I believe it
2441 is in the record.

Q. Do you subscribe to the accounting methods employed by Respondent in the preparation of this exhibit, as indicated by the relationship of these two pages and the pages that follow?

A. May I have that question again?
(The question was read by the reporter.)
A. No, sir, not entirely.
Q. What objections do you have?
A. Well, the costs set forth on page 7 have been assigned to price brackets and those price brackets do not, in many instances, follow the quantity brackets. In other words, the costs have ben set up here according to the prices at which the customers paid for the products which they purchased and not according to the quantities that the customers purchased.
Q. What effect, if any, would that have upon a cost study of this kind? What is the meaning of that?
A. Well, the results will mean that the figures as set forth here from the standpoint of quantities are greatly distorted.
Q. Will you explain that?
A. Yes. I might explain that by way of an example, if I may.
Q. Go ahead.
2442 A. If a customer were to purchase 1500 units, for example, which would place him in the No. 2 bracket according to the Respondent's annual unit volume brackets, and for which, according to their price schedule, he should pay $16.45,—well, if that customer were allowed to purchase at the price of $15.90, which would be bracket No. 3, his cost in that instance, according to the way that this cost report has been prepared, would be assigned to bracket No. 3. The quantity limits of bracket No. 3 are 3,000 to 7,499 units. Now that would mean this: that a customer purchasing, for example 1500 units,—it would assume that it cost the same to sell that customer per unit as it would cost to sell the customers who purchase within the quantity limits of the No. 3 bracket. That means 3,000 to 7,499 units instead of the bracket in which it should rightfully fall, which would be bracket No. 2, and the quantity limits set forth for that bracket, according to the Respondent's price schedule, are 1,050 units to 2,999 units. It would be that bracket that the costs of serving that customer should fall, and it would be that bracket that the cost of manufacturing that product that was sold to that particular customer should fall. But if you will refer to the top of page 7, the cost of serving that customer would be in the figure of $188,867.92—I mean the cost of

manufacturing the product that was sold to that cus-
2443 tomer—whereas, according to the quantity limits as established by the company, it should rightfully be added to the $60,831.88 in the report; that is, the manufacturing cost.

Now the cost of serving that same customer would be included in the $40,830.72, whereas it should rightfully be in column 2 and be added to the item of $23,247.15.

Q. Well, how much of this off-scale selling did you find —that is, not in the proper brackets?

A. Based on manufacturing cost, I believe about 43 per cent of the total was sold at off-scale prices.

Trial Examiner Sheppard: What per cent?

The Witness: About 43 per cent, I believe, your Honor.

By Mr. Haycraft:

Q. Well, do you have the actual figures on that? Can you give us the number of accounts and the amount of money involved in the respective brackets?

A. Yes, sir. The figures with respect to the total manufacturing cost of the goods sold at off-scale prices—I don't think I have them added up right here. I have that, I believe, at the hotel. I could bring it up and give you that. But I do have the names of the customers here, as a matter of fact the names of all of the customers, and I have the quantities, the number of units, and the manufacturing cost of the goods sold to each of the customers
2444 who were sold at off-scale prices.

Q. Well, yesterday you heard the testimony of Mr. Reese and that of Mr. Johannsen this morning. Now, taking those accounts, do they correspond to the accounts that you have in mind from your study?

A. Yes, they are the identical accounts.

Q. And taking those accounts then as a basis, will you testify as to the number of accounts in each bracket that are off-scale,—that is, the total amount of such accounts, the brackets into which they should go if they had been properly allocated according to the exhibit, and the resultant changes that would take place in the various cost items of each account?

A. May I have the question again, please?

(The question was read by the reporter.)

A. Yes, I can do that. I might call your attention to this: I cannot tell you what the difference in the distribution cost will be, but I can tell you the difference in the

manufacturing cost and the number of units in each instance.

Q. Why is it that you cannot tell me what the difference would be in the distribution costs?

A. Because that represents just exactly what these accountants have done. They have gone out and have compiled these distribution costs in retrospect. They had
2445 to go back and build them up for 1941. They have had to separate them on the best measuring factors that they were able to get together, and there is no distribution cost set forth as such for any one account; that is, the total distribution cost, as was testified by Mr. Johannsen this morning. You can ear-mark and positively identify a few of the items of distribution costs applicable to a single customer, but you can't do that in the case of all of them and for this reason, among others: For example, some of the costs were separated in whole or in part on the basis, for instance, of numbers of invoices, or numbers of invoice lines, and those would be separated in the total number of lines according to the customers which had fallen in one of these price brackets according to the way that the accountants had separated them, and it would just be an enormous task to take the customers one by one and go back and make the separation. So I can't tell you what the difference in the distribution costs—that is, the total difference will be.

Q. But you can do it as to the manufacturing cost?

A. Yes, sir.

Q. Well, will you proceed to do that, beginning with the accounts that were listed in the Discount bracket by the witness Reese yesterday?

Trial Examiner Sheppard: Mr. Warmack, I want
2446 to get something straight in my mind. Your reference to 43 per cent,—is that 43 per cent of the 88 customers of the Respondent that we have had so much testimony about?

Mr. Haycraft: It has nothing to do with the 88, Mr. Examiner.

The Witness: No, your Honor. If you will refer to page 7 of Respondent's Exhibit 170, in the column headed "Manufacturing Costs Applicable to Products Sold to Oil Burner Manufacturers", and the figure is $1,282,833.84?

Trial Examiner Sheppard: Yes.

The Witness: 43 per cent, or about 43 per cent of that

total cost of production represents the cost of the oil burners which were sold at off-scale prices.

Trial Examiner Sheppard: I see.

Mr. Haycraft: The figure, if I may refresh your recollection, is $563,550.74.

Mr. Freeman: You will have available the work sheets of the Commission in connection with these figures that you are now giving?

Mr. Haycraft: All that he is referring to.

The Witness: Most of those are down at the hotel.

Mr. Freeman: You get them this noon.

The Witness: I can give you those figures, that is the off-scale and selling, if you would like it.

By Mr. Haycraft:

2447 Q. Well, is that the figure of $563,550.74?

A. Yes, sir, that is correct.

Q. All right. Now then, we will go to your study of these accounts. Take the Discount bracket first.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

A. In the Discount bracket we have two accounts that were sold at off-scale prices, or were classified as off-scale, classified in the Discount bracket and the quantities showed that they apparently were sold at off-scale prices. First, we have one account which purchased 1,009 units and another one that purchased 198 units. Of course, the volume limits were from 1 to 149 units so naturally they are off-scale. The two accounts total 1,207 units and the manufacturing costs applicable amounted to $2,639.57.

Mr. Gilpatric: That is for both?

The Witness: Yes, sir. Now, there is shown under the Discount column on Respondent's Exhibit 170, page 7, the manufacturing cost of $6,196.14. When we deduct the cost applicable to these two customers from that, we have remaining $3,556.57 that would be left in that particular column; and that assumes, of course, that there will be nothing coming back, but there is a cost of manufacturing back from other columns, or from other discount brackets.

2448 By Mr. Haycraft:

Q. First, what did you do with this $1,207? What bracket did that go in?

A. It wasn't $1,207. It was 1,207 units.

Q. 1,207 units.

A. And the manufacturing cost of that was $2,639.57, and that should be added to $39,352.41, manufacturing cost applicable to bracket No. 1, in Respondent's Exhibit 170, page 7.

Q. All right, go ahead. Take bracket No. 1 now.

A. Now, in bracket No. 1 we have total number of units, 18,798, and those are applicable to $39,352.41, which is shown as manufacturing cost under bracket No. 1 on page 7 of Respondent's Exhibit 170. Now, I count 30 instances of off-scale selling out of, I believe, 79 customers.

Mr. Gilpatric: What was that, 13 out of—

The Witness: 30 out of 79.

Trial Examiner Sheppard: That is in bracket 1?

The Witness: Yes, sir, that is in bracket 1. Now the total number of units applicable to those was 3,526 units and the total manufacturing cost applicable to those 3,526 units was $8,501.66. Now when that figure is deducted from the figure of $39,352.41, shown in bracket No. 1 on page 7 of Respondent's Exhibit 170, we have the remaining figure applicable to the manufacturing costs of
2449 those customers which were properly classified within the quantity limits. In bracket No. 1 we have a manufacturing cost applicable to that of $30,850.75 instead of $39,352.41.

Trial Examiner Sheppard: A difference of—

The Witness: (Continuing.) Of $8,501.66.

By Mr. Haycraft:

Q. What did you do with this item of $8,501.66?

A. Well, there was 1,072 units of it that was not properly classified. And 1,072 units purchased by one customer, of course, under the company's annual volume price schedule, would rightfully fall within quantity limits applicable to the No. 2 bracket, which has quantity limits of 1,050 units to 2,999 units. The manufacturing cost applicable to the 1,072 units is $2,659.36. That item of cost should be added to the item $60,831.88 of manufacturing cost as shown in the first line of page 7 of Respondent's Exhibit 170. All of the other off-scale selling in the No. 1 bracket represented sales which, under the quantity price schedule of the company, would rightfully fall in the Discount bracket. That was 2,454 units, the cost of which was $5,849.30, and that figure should rightfully be added to the

$6,196.14 item of cost on page 7 of Respondent's Exhibit 170 and representing the manufacturing cost of the Discount customers—that is, manufacturing cost of products sold to the Discount customers.

2450 Q. Now, your total then of off-scale units, is 3,526?

A. That is correct; and deducting those from the total of 18,798 units leaves 15,272 units which were properly classified, and leaves a manufacturing cost of $30,850.75 properly classified.

Q. Instead of what?

A. Instead of $39,352.41 as shown on page 7 of Respondent's Exhibit 170.

Q. All right, proceed now then to bracket No. 2.

A. In bracket No. 2 we have listed 17 customers, of which it appears that 7 were sold at off-scale prices. The total units in this bracket as shown by the working papers of Respondent's accounts was 30,193 and the total manufacturing cost which, of course, is shown at the top of page 7 of Respondent's Exhibit 170, under bracket No. 2, is in the amount of $60,831.88.

Mr. Gilpatric: Mr. Warmack, all the way through here you are excluding mixed manufacturers?

The Witness: Yes, sir, I am not including mixed manufacturers because time wouldn't permit us to go in and get it, and, as a matter of fact, this represents the major part of the business. That is, I could give you the percentages on that if you would like but we didn't go into that particular part of it.

Trial Examiner Sheppard: Mixed manufacturers?

2451 The Witness: Mixed manufacturers.

Trial Examiner Sheppard: What I mentioned yesterday?

The Witness: Yes, sir. I didn't have time to go into that particular phase of it.

Trial Examiner Sheppard: Well, were those few in number in comparison to the other?

The Witness: Well, your Honor, their sales, their cost —I could give you one of them and you could judge it as to the relative relationship.

Trial Examiner Sheppard: All right. I don't want to interrupt the examination here. We will take that up later. I may have some questions on that.

A. (Continuing.) Six of the customers classified in

the No. 2 bracket purchased in quantities which were within the quantity limits applicable to the No. 1 bracket. The total number of units purchased by those customers was 4,720 units, and the total manufacturing cost of those units was $10,204.58. Now, one of the customers in this bracket No. 2 purchased in a quantity limit which would entitle him to the prices applicable to the No. 3 quantity bracket classification, and although it is not in the record, it is my understanding,—I have not actually determined that this is true—

Mr. Haycraft: I object to it then. I don't want
2452 anything to go in here that hasn't been checked by yourself and you know it.

Mr. Freeman: How can you object to it? We have the right to object; you can't object.

Mr. Haycraft: I can if I want to.

Mr. Freeman: You can move that it be stricken as not responsive, but you can't object to his testimony.

Trial Examiner Sheppard: Go ahead.

Mr. Freeman: Certain rules of evidence ought to be followed here, your Honor.

Trial Examiner Sheppard: What is that?

Mr. Freeman: Certain rules of evidence ought to be followed.

Trial Examiner Sheppard: Absolutely; you have a right to object.

Mr. Freeman: But we are not objecting. He can move that it be stricken as not responsive.

Trial Examiner Sheppard: That is correct.

A. (Continuing.) That particular customer who purchased 5,131 units, and which was classified in this No. 2 bracket, should rightfully be placed in the No. 3 bracket. The manufacturing cost applicable to the 5,131 units was $13,020.10. The total manufacturing cost applicable to the off-scale selling in this particular bracket was
$23,224.68, and that applied to 9,851 units. That
2453 figure of $23,224.68, when taken from the manufacturing costs under bracket 2 on page 7 of Respondent's Exhibit 170, of $60,831.88, leaves $37,607.20, and it leaves properly classified 20,342 units instead of 30,193.

By Mr. Haycraft:

Q. Now, what was done with these off-scale—

Trial Examiner Sheppard: Wait a minute; I want to know what was improperly classified?

The Witness: 9,851 units, your Honor, were not properly classified, and according to our figures here $23,224.68 represented the cost—

Trial Examiner Sheppard: All right.

The Witness: (Continuing.)—of those units that were not properly classified and leaving $37,607.20 of those which were properly classified in that bracket.

Trial Examiner Sheppard: No. 3, wasn't it?

The Witness: That was No. 2 bracket.

By Mr. Haycraft:

Q. What was done with the off-scale items? What did you do with those costs, or have you already answered that?

Mr. Gilpatric: He has given us the figures on each, where they belong.

By Mr. Haycraft:

Q. Did you divide it as to how much went into bracket 3 and how much went into bracket 1?

2454 A. Yes, I believe I gave that; I am sure I did.

Q. All right, go ahead.

A. Next we have bracket 3. It appears that there are 27 customers in that bracket, of which 14 purchased in quantity limits which in every instance were lower than the quantity limits applicable to the No. 3 bracket. Two of the customers in this instance purchased 1,837 units, which had a manufacturing cost of $3,343.50. They should be in bracket 1 and that figure should be added to the figure of $39,352.41 under the No. 1 bracket classification of manufacturing cost on page 7 of Respondent's Exhibit 170.

The next item is the customers who should have properly been classified, according to the quantity limits in which they purchased, in the No. 2 bracket. They purchased a total of 23,200 units—

Mr. Freeman: Is that 12 customers?

The Witness: 12 customers, yes, sir. And the manufacturing cost of those units was $42,542.92, which should be added to the item of $60,831.88 of manufacturing cost under bracket No. 2 on page 7 of Respondent's Exhibit 170. All of this off-scale selling—that is, the manufacturing cost of it—in bracket No. 3 amounted to $45,886.42. The total manufacturing cost applicable to the No. 3 bracket is set forth on page 7 of Respondent's Exhibit

170 as $188,867.92. Now, deducting the $45,886.42 from
that figure, we have $142,981.50 of manufacturing
2455 cost which is properly classified, your Honor, according to the Respondent's quantity price brackets and $45,886.42 not properly classified.

Now we go to bracket 3A and there we have 7 customers, of which 5 purchased in quantity limits which were different than the quantity limits applicable to this bracket. The quantity limits for this bracket are 7,500 units to 14,999 units. We have in that 1 customer who purchased 2,031 units, which falls within the quantity limits of the No. 2 bracket. The cost of those 2,031 units was $3,703.42 and, of course, that should go back and be added to the item of $60,831.88 at the top of page 7 of Respondent's Exhibit 170.

Mr. Gilpatric: What is that cost figure again?

The Witness: $3,733.42. We have 3 customers classified in the 3A bracket which purchased in quantity limits that would fall in the No. 3 bracket. They purchased a total of 18,271 units at a manufacturing cost of $31,858.88, and that item of manufacturing cost should be added back to the item of $188,867.92, representing manufacturing costs applicable to the No. 3 bracket on page 7 of Respondent's Exhibit 170.

We have 1 customer in bracket 3A who purchased in quantity limits applicable to the No. 4 bracket, sir. In
other words, he was classified here as having paid a
2456 price higher than what he would have to pay, according to the quantity that he purchased.

Trial Examiner Sheppard: In other words, he paid a price 4 bracket when he ought to have paid a price 3A?

Mr. Hayeraft: Just the other way around; he paid a 3A price when he should have been allowed the 4.

Trial Examiner Sheppard: I see.

Mr. Gilpatric: You understand, Mr. Examiner, that all of this "properly" and "should have been" business is definitely disputed by the Respondent?

Trial Examiner Sheppard: Oh, yes.

The Witness: (Continuing.) That represented 18,056 units and the manufacturing cost of the same was $28,716.62, which should have been added to the item of $857,852.56 on page 7 of Respondent's cost report that was classified, your Honor, in the limits applicable to the proper quantity price bracket.

Now, the total cost of the off-scale selling in this bracket

is $64,308.92. That is the manufacturing cost. That figure, when deducted from the figure of $129,732.93, representing the manufacturing cost of the 3A bracket, as set forth in Respondent's Exhibit 170, page 7, leaves a balance of $65,424.01 of manufacturing cost applicable to the units and the customers' purchases which were properly classified within the quantity limits of the Re-
2457 spondent—that is, the quantity limits of this bracket 3A.

Next is bracket No. 4. There we have 10 customers, 10 customers in bracket No. 4, not a single one of which were classified in the proper quantity brackets. That is, not a one of the customers purchased within the quantity limits as set forth by Respondent, in Respondent's price schedule applicable to bracket No. 4.

Trial Examiner Sheppard: Have you got the number of those customers there in bracket No. 4?

The Witness: Yes, sir. I was going to tell you now where they should go, or where they would have been properly classified, sir.

Trial Examiner Sheppard: Go ahead.

The Witness: One of the customers should have been classified, according to the quantity limits, in bracket 2. He purchased 1,267 units and the manufacturing cost of those units was $2,288.16. That figure should be added to $60,831.88, which represents the manufacturing cost as set forth on page 7 of Respondent's Exhibit 170 for the bracket 2 customer classification.

They have two customers who purchased in bracket No. 4 whose purchases fell within the quantify limits applicable to bracket No. 3. They purchased a total number of 10,814 units, with a manufacturing cost of
2458 $19,709.90, and that figure should be added to the figure of $188,867.92, the manufacturing cost for bracket 3 customers on page 7 of Respondent's Exhibit 170.

They have 6 customers—

Trial Examiner Sheppard: Have you got there how much of that was properly allocated?

The Witness: I will have to give it to you in total, your Honor.

They have 6 customers who purchased at prices applicable to bracket No. 4 and whose purchases fell within the quantity limits applicable to bracket No. 3A. The total purchases amounted to 62,592 units and the manufac-

turing cost of which was $102,166.23, which should be added to the figure of $129,732.93. That is the manufacturing cost applicable to bracket No. 3A, page 7, of Respondent's cost report.

We have 1 customer here who purchased in quantity limits applicable to bracket No. 4A. He was classified in Respondent's cost report—

Mr. Gilpatric: You have already counted 1¢ out of 10. Is this 11?

The Witness: I beg your pardon?

Mr. Gilpatric: You have given us 1 that belongs in 2, 3 that belong in 3, and 6 that belong in 3A, which accounts for all 10 in this bracket.

2459 The Witness: I gave you 1 who purchased in the 2 bracket, 2 who purchased in—

Mr. Freeman: You said 3.

The Witness: I am sorry. I will read it into the record, your Honor, so we will have it straight. One of the customers who purchased at prices applicable to the No. 4 bracket purchased within the quantity limits applicable to the No. 2 bracket, 2 of the customers purchased within the quantity limits applicable to the No. 3 bracket, 6 purchased within the quantity limits applicable to the No. 3A bracket, and 1 purchased within the quantity limits applicable to the 4A bracket. That accounts for the total 10.

Trial Examiner Sheppard: All right.

The Witness: (Continuing.) The total manufacturing cost applicable to the No. 4 bracket was $175,507.59, and that is a portion of $857,852.56, as shown for the 4, 4A, and 5 brackets on Respondent's Exhibit 170, page 7.

By Mr. Haycraft:

Q. Did your last answer refer to 4 or 4A?

A. It referred to No. 4 bracket. I believe I stated that the total manufacturing cost of heat controls sold at the No. 4 price amounted—that is, the manufacturing cost was $175,507.59. The total customers that we have been talking about, purchasing in this bracket, purchased

2460 goods which cost $164,078.28, leaving what would appear to be properly classified a cost of manufacture of $11,429.31. Now, your Honor, that figure would be applicable to mixed manufacturers, which we did not cover here. Whether they are classified right or wrong, I don't know. But we did not cover it and it would appear

that that figure is properly classified. In other words, $164,078.29 is improperly classified and $11,429.31 is properly classified, according to quantity limits.

Trial Examiner Sheppard: All right.

A. (Continuing.) We only have 1 customer in the No. 4A bracket, and that 1 purchased within quantity limits applicable to the No. 3 bracket. The total manufacturing cost for other customers—that would include the mixed manufacturers, or customers who were not wholly engaged in the manufacture of oil burners—amounted to $17,669.31. The manufacturing cost of the products sold by this 1 customer—

By Mr. Haycraft:

Q. You didn't give the quantity.

A. And applicable to 3,339 units. The total manufacturing cost was $6,336.95, which should properly be added to the $188,867.92 of manufacturing cost applicable to bracket No. 3 on page 7 of Respondent's Exhibit 170.

Mr. Gilpatric: What does that leave mixed manufacturers in this class?

2461 The Witness: That leaves a figure of $11,332.36, and it appears, for your units, that a total of 8,674 units were sold in this bracket; and that left 5,335 which apparently were properly classified, or at least we didn't look into them.

Now in the No. 5 bracket, it appears here that we have 11 customers. Out of the 11, 3 purchased within quantity limits applicable to the No. 5 bracket classification—that is, 30,000 units or over. We have 1 which purchased within quantity limits applicable to the No. 3 bracket classification. That was 6,992 units, at a manufacturing cost of $13,649.30. That item should properly be added to the figure of $188,867.92 applicable to the No. 3 bracket on page 7 of Respondent's Exhibit 170. We have 2 customers who purchased at prices applicable to the No. 5 bracket but who purchased within quantity limits applicable to the No. 3A bracket. The total purchases amounted to 25,602 units, and the manufacturing cost of which was $53,391.85. That figure should properly be added to the item of $129,732.93, representing the manufacturing cost applicable to the 3A bracket on page 7 of Respondent's Exhibit 170.

We have 3 customers who paid the No. 5 bracket price who purchased in quantity limits applicable to the No. 4

bracket. Their total purchases were 55,675 units and
2462 the manufacturing cost was $99,257.06. That figure, of course, is included in 4, 4A, and 5.

Mr. Freeman: It stays where it is at now in the report?

The Witness: Yes; if there was a breakdown between 4, 4A, and 5, it should move back and properly be added to the amount applicable to the No. 4 bracket, which is shown as $175,507.59.

There are 2 customers who paid a price applicable to the No. 5 bracket but who purchased within quantity limits which fell within the 4A bracket. The total units amounted to 52,095, and the manufacturing cost amounted to $82,276.05. Of course, that cost figure is included in the combined cost figure of $857,852.56 on page 7 of Respondent's Exhibit 170. If that were broken down, it should properly be added to the cost figure developed by Respondent's accountants applicable to the 4A bracket, the manufacturing cost figure of $17,669.31. In this bracket No. 5 we have a total manufacturing cost of $664,675.66—

Mr. Gilpatric: Does that include mixed manufacturers?

The Witness: Yes, sir. I had to take the total figure in each instance, and the total units amounted to 356,492. We find that 140,305 of those units were misclassified, according to the quantity brackets, leaving 216,187 units
2463 properly classified. And, of course, that assumes, your Honor, that the mixed manufacturers were properly classified that I didn't go into, and it means that $248,574.26 was not applicable to bracket No. 5 from the standpoint of quantity limits. This left $416,101.40 of manufacturing cost which was applicable to bracket No. 5.

Trial Examiner Sheppard: All right.

The Witness: Now, I have not given you what the adjustments to the brackets would be from the standpoint of numbers of units and what these figures here would be carrying them out to 4, 4A, and 5 after giving effect to all these changes. If you desire that, I will be glad to give it to you.

By Mr. Haycraft:

Q. What is that—4, 4A, and 5, you say?

A. 4, 4A, and 5. I have carried them out to show each one separately.

Q. Can you give us the total?

A. I can give you what the total should be, or I can give you the breakdown of this, or both.

Q. What do you mean "both"?

A. Do you want the proper total for all of them?

Q. Yes, I want the proper total for all of them.

Mr. Gilpatric: This is manufacturing cost or units?

2464 The Witness: I will give you both.

By Mr. Haycraft:

Q. Manufacturing cost and units.

A. Discount bracket,—the proper number of units classified according to quantity limits would be 3,750 units, with a manufacturing cost of $9,398.87. Bracket No. 1,—the total number of units would be 23,036 and the total manufacturing cost would be $47,038.40. Of course, that $47,038.40 in this instance is comparable to $39,352.41 on the report. Bracket No. 2 would be 47,912 units. That is compared with 30,193 which are applicable to the figures shown in the report. The manufacturing cost would be $88,831.06 as compared with the manufacturing cost of $60,831.88. Bracket No. 3 would be 117,694 units and not 98,184 units. The manufacturing cost would be $227,556.63 and not $188,867.92 as shown by the cost report. Bracket No. 3A would be 120,284 units and not 70,445 units, and the manufacturing cost applicable to 3A would be $220,982.09 and not $129,732.93.

Now the next three figures are totaled in the report. I will give you the figures which should add to that total. For bracket No. 4 it is $175,507.59; for bracket 4A it is $17,669.31; and for bracket No. 5 it is $664,675.66. And those three figures should total to $857,852.56.

Q. Now then, what were your figures—what should they be?

2465 A. The manufacturing cost applicable to the quantity limits in bracket No. 4—that is, if the quantity limits to customers were properly allocated—would be $139,402.99 and not $175,507.59.

Mr. Freeman: He doesn't have to put this argument in. The question was, what should the figures be?—and he makes comparisons and argues these figures, and that is why we are having trouble in following what his figures are.

Trial Examiner Sheppard: Well, I didn't know that it was argument.

Mr. Freeman: Well, when he says they are and they

should be, the whole thing is argument. The question was directed to, What should the amount be?—and it is confusing—

Trial Examiner Sheppard: That is what I thought he gave us. The amount should be what he just said.

Mr. Freeman: And then he turns around and says it shouldn't have been the figure that he gave us before.

Trial Examiner Sheppard: That is a comparison, Mr. Freeman,—it should be this and not that. I will let that stay in just as it is. It is a comparison.

The Witness: I was just trying to do that for your benefit, your Honor, when you read this record in the end; that was the only purpose. I am not arguing.

Trial Examiner Sheppard: All right.

2466 By Mr. Haycraft:

Q. Go ahead.

A. The units applicable to bracket No. 4 are 79,451 as compared with the units allocated to that bracket by Respondent's accountants of 103,194.

Mr. Freeman: Now will you repeat those numbers so we can follow it?

The Witness: 79,451 and 103,194.

By Mr. Haycraft:

Q. What about the factory cost?

A. I have given that before. In bracket 4A the manufacturing cost should be $133,522.40 instead of $17,669.31. The number of units should be 80,169 and not 8,674. In bracket No. 5 the manufacturing cost is $416,101.40 and not $664,675.66. The number of units are 216,187 and not 356,492.

Trial Examiner Sheppard: That was 5?

The Witness: That is bracket 5.

By Mr. Haycraft:

Q. Now the combined 4, 4A, and 5?

A. The total for those would be $689,026.79—that is the total manufacturing cost—and not $857,825.56 shown on page 7 of Respondent's Exhibit 170.

Q. Now I believe you stated that you could not make a similar reallocation of the costs to the distribution

2467 costs set forth on page 7 of the exhibit, is that correct?

A. That is correct, sir.

Q. I will ask you whether or not the changes indicated in the manufacturing cost would have any effect upon the distribution cost?

A. Yes, sir, they certainly would.

Q. What, as an accountant, would you say that effect would be primarily?

A. Well, it would have the effect of changing the cost per unit, as set forth in the last line of page 7 of Respondent's Exhibit 170. The extent of the change I could not say.

Q. Would it have any effect upon the ratio figures that you gave in your testimony a while ago—that is, 1.760, and .958, and .382, and .216, and .087?

A. Yes, sir, those figures would be changed.

Q. Then would there necessarily be a change in the resultant figures at the bottom of the exhibit—$9.40, $5.12, $2.04, $1.15, and $.46?

A. Yes, sir, they would be changed.

Q. Can you tell what the nature of those changes would be without making a recast of the report?

A. No, sir.

Q. In your study of Respondent's cost exhibit 170 and the underlying records which support that exhibit,
2468 do you have any other objections to the way in which the exhibit was prepared?

A. Well, the principal objection, of course, is the one just stated. That is, the costs were assigned to the quantity price brackets not on the basis of the quantity limits within which customers purchased but on the basis of prices, and that objection was because of the fact that there was extensive off-scale selling. In order to answer your question, it would be necessary to state generally the methods employed in the separation of costs by Respondent's accountants. The costs were separated largely on the following bases: The number of sales invoices and credit memorandums; the number of billing lines: the number of invoice lines; the number of salesmen's calls—and those calls were weighted to give effect to the estimated time spent in making calls on separate classes of customers but particularly on the contract customers; and other statistical information was gathered from the files which were used to some extent to separate the separate costs.

I understand that Respondent is not manufacturing and is not merchandising its regular line of products at the

present time as it would under normal peace-time conditions. This means that the Respondent's accountants could not inaugurate a study when they started this thing of the time and effort expended by individuals engaged in
2469 the normal selling activities in order to develop the most accurate measuring factors for the separation of these distribution costs which were used in the company's cost report. Therefore, they had to develop measuring factors as stated above.

Mr. Freeman: Was that your second objection?

The Witness: I will have to state, Mr. Freeman, what was done in order to talk about it, if I may.

By Mr. Haycraft:

Q. Go ahead.

A. Respondent, as I understand it, had never made time studies during prior years when they were operating normally to develop what I would consider to be the most accurate measuring factors which could be used in the separation of distribution costs. That is, based, as far as it could be based, on effort expended. I feel that Respondent's accountants made an honest and diligent effort to analyze their distribution costs and I think that they probably established the best measuring factors possible for use in the separation of costs under the existing circumstances. That is, they had a job here that they had to do in retrospect. I have always contended in previous cases before the Commission that nothing short of time studies of selling activities and related activities should be considered as proper support for measuring factors to be used in separating those costs which are closely related to effort expended by the separate employees.

2470 Now, as I stated, my principal objection is the classifying of the costs according to the prices in view of the fact that there was extensive off-scale selling.

The next thing that is questionable, of course, is the measuring factors, or at least some of the measuring factors used for the separation of the costs by Respondent's accountants. The correctness of some of the measuring factors is questionable and this is in view of the fact that the company did not avail itself of past opportunities, as I just stated, during years of normal operations to develop the most accurate measuring factors possible. I feel, however, from a review of the studies and efforts made by Respondent's accountants in their attempt to separate the

costs that they probably did the best job that they could. I rather think that the procedure followed was probably the best that could be followed under existing war-time conditions, except for the fact that I certainly do not subscribe to the separation of costs to the quantity brackets on the basis of prices paid, in view of this off-scale selling.

Now, we have quite a few of the costs which were separated on the basis of estimates. I address myself particularly to home office selling. We have on page 22 of this exhibit, Respondent's Exhibit 170, a list of executives and others in the home office who engaged in
2471 home office selling, and the expenses and costs in connection with the activities of these individuals are separated, I believe, on the basis of estimates made. The best evidence, in my opinion, Mr. Haycraft, would be, of course, to follow some manner of measuring the time and effort expended by these people, and there is always a question in my mind in going back and estimating what time was expended on certain work some year or two years back. I am positive I could not estimate mine with any degree of accuracy.

Q. Would that apply to any other than the home office expense?

A. Well, yes.

Q. How about the branch offices?

A. Well, in the branches I believe the principal cost is the salesmen's salaries and sales manager salaries and expenses, and in that the Respondent's accountants made as thorough a review and study as they could of the salesmen's records. They weighted the salesmen's calls as best they could. There is certainly some estimating that had to go on there and a better job could be done if a study of time and effort were made—that is, the time and effort expended by some of these individuals. In the case of branch offices, I think the accountants did the very best job they could do.

2472 Of course, there are some other expenses other than those, and those are shown on page 34 of Respondent's Exhibit 170. But the principal expenses used in the cost report here—that is, the expenses incurred at the branches—represented the salesmen's salaries and expenses. I might say that the total of the costs used in the branches was $66,135.88, of which $40,239.28 represented the salesmen's salaries and expenses. That is in-

cluding supervisory salaries. There are some classes of expense there that should be separated, in my opinion, on the basis of some studies of time and effort. For example, office salaries in the branches. Office salaries and other office expenses are shown in the amount of $10,250.08. That was the only portion of that expense that was used in the cost defense.

Mr. Freeman: Over how many branches was that ten thousand dollars distributed, if you happen to know?

The Witness: That is shown here in the report. We had that page yesterday, but I don't remember at this moment. I will try to locate it. (Witness checks report.) That is shown on page 11, and it shows 6 separate branches, I believe.

Mr. Gilpatric: You mean six billing areas, don't you, —not 6 branches?

The Witness: Well, I assume that that is correct, 2473 sir. With respect to that $10,250.08, I think that the accountants employed the best means possible for the separation under existing war-time conditions, and in the case of some of those expenses, why they followed as good as you could use under any conditions.

Does that answer your question, Mr. Haycraft?

Mr. Haycraft: Yes.

Trial Examiner Sheppard: We will adjourn until 2 o'clock, gentlemen. That will give you time to get anything that Mr. Freeman may want.

(Whereupon, at 12:45 p.m., a recess was taken until 2:00 p.m., this day.)

2774 Afternoon session, 2:00 p.m.

Trial Examiner Sheppard: Mr. Reporter, you may convene the hearing, pursuant to our adjournment for lunch.

WILLIAM J. WARMACK resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Haycraft.

Q. Mr. Warmack, Mr. McAnly in testifying in this proceeding for the Respondent, at page 2,308 in referring to data on page 12 of Respondent's Exhibit 170, and items on page 22 of the same report, made this statement—that is, I was calling his attention on cross-examination to the statement in the exhibit at page 12 and also the tabulation on page 22. The statement to which I called attention was: "In this report we have utilized only those items affecting distribution cost differentials which were readily allocated to the respective quantity brackets." I directed his attention to the items on page 22 of the report and asked him whether the figures on that page came within that definition of readily allocable, and he said they did. He admitted, however, that they were based upon opinion but stated that they were a direct selling cost. He said the only cases where opinion enters into it is in the
2475 division between oil burner and other manufacturers.

Do you agree with Mr. McAnly's opinion, as expressed in pages 2308 and 2309?

Trial Examiner Sheppard: May I have just the last part of that read?

(The last portion of the question was read.)

A. Well, Mr. McAnly's opinion as set forth on page 2309 seems to cover the situation that you referred to I believe a little better than over on page 2308.

By Mr. Haycraft:

Q. Well, you read what you refer to and then give your opinion.

Trial Examiner Sheppard: Take your time and read it, Mr. Warmack. We want to give you all the time you need.

The Witness: Your Honor, I think that it would be well to read a part of this right into the record so that I might give my opinion with respect to it, if I may be allowed to do that, sir. Mr. McAnly and Mr. Haycraft were speaking with respect to tests and with respect to items of cost which were readily allocable to the quantity price brackets, and Mr. McAnly stated in part: "I contend that the test that was used as determined by the total volume makes it a pretty reasonable allocation." He was addressing himself directly to the separation of costs as set forth by the percentages as shown on
2476 page 22 of Respondent's Exhibit 170. Mr. Haycraft asked, "Question: You would not contend for a moment, though, that it is accurate when it is not based on time records, would you, as an accountant?" And Mr. McAnly answered: "I can point out to you many cases where time records are not necessarily accurate either. In other words, because there is a time record supporting something does not make it accurate. My opinion is that an individual that is an executive can give you a better idea of how his effort is devoted than anything he could put down in the form of a time record. In fact, in cost accounting today we have very little use for so-called actual time records. We work on what is called the required time as determined scientifically. If they take more time than that, we do not call that cost to the item. It is a cost that is thrown out."

Mr. Haycraft asked: "Is that the policy you followed in preparing this report?" Mr. McAnly stated: "In preparing the report as applied to the basis of allocation where it is used."

There is one point there that I don't exactly know what Mr. McAnly meant when he stated, and I quote: "We work on what is called the required time as determined scientifically." Well, we would have to know just what was meant by that. His statement, "My opinion is that an individual that is an executive can give
2477 you a much better idea of how his effort is devoted than anything he could put down in the form of a time record."—I do not subscribe to that. I rather think that accurate, or reasonably accurate time records could be kept by any individual if he desired to keep his time records. As to whether or not an estimate is more accurate than that is anybody's guess, your Honor. Mr. McAnly stated: "I can point out to you many cases

where time records are not necessarily accurate either." Well, they are not pointed out. Of course, I couldn't question that.

He states, "In other words, because there is a time record supporting something does not make it accurate." Well, it may not make it accurate,—I mean, right to the most exact thing,—but I think it does make it more exact and more accurate than an estimate could make it.

Does that answer your question, Mr. Haycraft?

By Mr. Haycraft:

Q. Well, would that be true particularly where the estimate was made three years after the performance of the duties took place?

A. Well, I don't see how it could be as accurate as it could have been if records had been kept of the time and effort expended at the time that it was expended. I feel that the Respondent has made every possible test and check in retrospect to determine that the esti-
2478 mates as set forth on page 22 of Respondent's Exhibit 170 were or may have been fairly reasonable, although we have no time records to show that they were accurate or inaccurate. I think that the accountants have done everything possible within reason to determine the reasonableness of those estimates.

Q. I think that has to do with the office expenses, doesn't it,—on page 22 was that?

A. On page 22 is a part of the home office selling expenses, and it represents the compensation and expenses of the individuals listed on that page. That is officers and others working out of the home office.

Q. Do you have any criticism of the report other than you have already expressed, Mr. Warmack?

A. Well, we have over on page 62 a similar situation which has to do with what you might call similar classes of expense, maybe slightly or somewhat removed from those expenses we have been talking about. Over on page 62 and carrying forward for a page or two there, we have officers' salaries, and a part of those salaries have been apportioned to that group of costs which was applied to the oil burner manufacturers and then separated over to the quantity price brackets. That is shown in detail on page 61; the portion that was assigned to oil burner manufacturer business and then a separation of that particular portion on to the quantity price brackets,

—that is through the 3A bracket. The costs as-
2479 signed to the 4, 4A, and 5 brackets were lumped.

I might call your attention to the salary and compensation expenses of the vice-president in charge of sales, who it is stated has direct supervision over the entire sales organization, including the home office, branches, and foreign offices. This gentleman estimated his time and that time was then separated between branch offices, foreign offices, heating control sales, refrigeration sales, and air conditioning sales on the basis of the best estimates that this individual could furnish. I might call attention to this also that the accountants I don't think left many things unturned in trying to establish the reasonableness of those percentages as far as they were able to do so, as I say in retrospect, looking back, to a prior year for which the estimates covered. The salary of this individual was then separated between oil burner manufacturer business and other business and, of course, according to the separation just made here on the basis of his estimates. Then that portion which was assigned to the oil burner manufacturers was separated on the basis of the salesmen's calls as they had been weighted, as we talked about previously.

Q. As testified to by Mr. Johannsen and Mr. Reese, is that what you mean?

2480 A. Yes.

There is one other question here. As to some manner of measuring this man's time currently,—inasmuch as that could not possibly be done when this report was prepared and these accountants made this study, why the only thing they could do, Mr. Haycraft, was to get these estimates and then test them the best they could if they were going to use this class of expense. If a study could have been made in prospect rather than in retrospect, it could have more definitely been determined how far removed from the actual activities of the salesmen the functions of this individual would have been. That follows through to a greater or lesser degree, the comment made there, with respect to the other individuals that are named on page 63 of Respondent's exhibit, whose titles are shown on page 63 of Respondent's Exhibit 170.

Q. Now, Mr. Warmack, with respect to the matter of the accounts that you discussed this morning that were off-scale, it was stipulated or understood that with respect

to the Master Oil Burner Company, which was allocated in the Discount bracket and should have been in No. 1, that a refund was made by the manufacturer so that he was—

Mr. Freeman: That is a retroactive credit as distinguished from a refund.

By Mr. Haycraft:

2481 Q. (Continuing.). That a retroactive credit was granted to this customer so that he would be placed in bracket No. 1, and with the Jackson Oil Burner Company the same is true,—both of those being the only concerns that were off-scale in the Discount bracket; that on the Ace Engineering Company, which was in bracket No. 1, a retroactive credit was given, and also the Enterprise Engine & Foundry Company which was in bracket No. 2, the Ray Oil Burner in No. 3A, and the Korth Oil Burner in No. 4. In your opinion, what effect would that have upon the tabulations that you were discussing this morning as set forth on page 7 of the exhibit?

A. Well, it would not change the figures given you this morning; that is, the figures adjusted to the brackets in accordance with the quantities purchased rather than the prices which were charged and which procedure was followed in the preparation of Respondent's Exhibit 170. But it would mean this: It would mean that Master Oil Company was actually sold at prices applicable to the No. 1 bracket; that they purchased in quantities applicable to the No. 1 bracket, within the quantity limits of the No. 1 bracket, but that the cost of serving him was contained in the Discount bracket. And to me that distorts the Discount bracket as well as the No. 1 bracket.

2482 It means that the Jackson Oil Burner was sold in quantity limits of the No. 1 bracket, they were given a price applicable to the No. 2 bracket, but the cost of serving that customer are in the No. 1 bracket and not in the No. 2 bracket. Whatever cost that was serves to overstate the cost applicable to the No. 1 bracket and to understate the cost as shown in the No. 2 bracket.

The Enterprise Engine & Foundry Company was sold at prices applicable to the No. 3 bracket, his purchases were within the quantity limits applicable to the No. 3 bracket, but in Respondent's Exhibit 170 the cost of serving this customer, whatever it is, is in the No. 2 bracket and not in the No. 3 bracket. Those two brackets are distorted by whatever that cost may have been.

The Ray Oil Burner Company was sold at prices in the No. 4 bracket, his purchases were within the quantity limits prescribed for the No. 4 bracket, his costs are in the 3A bracket in Respondent's Exhibit 170, and by whatever the costs were of serving this customer, Ray Oil Burner Company, those two brackets, bracket No. 3A and bracket No. 4, are distorted by whatever that cost is.

The Korth Oil Burner Company purchased in the 4A bracket at prices applicable to the 4A bracket, purchased in quantities prescribed for the 4A bracket. His cost, of course, is as shown in Respondent's Exhibit 170, properly classified inasmuch as the 4, 4A, and 5 brackets were combined. If that were carried out and the costs of those
2483 were separated, his cost under the accountants' study would fall in the 4 bracket and not in the 4A bracket.

Does that answer your question?

Q. I merely want to ask you again as to whether or not you can be sure that it would not distort your last column which contains a combination of the three—4, 4A, and 5? In other words, would not the fact that the 4 and 4A, columns were distorted make a change in your totals?

A. Oh, indeed yes. In the case of the Ray Oil Burner, why that is shown on page 7 of Respondent's Exhibit 170 under the column 3A, and the manufacturing cost, in whatever quantity of oil burners were sold or heat controls were sold to the Ray Oil Burner Company, is shown in the $129,732.93. Whatever that cost is would properly be assignable to the next bracket—that is, added to the $857,852.56, which is the total of the 4, 4A, and 5; and the distribution cost shown on page 7 of Respondent's Exhibit 170 under the 3A bracket is $11,322.89. That figure would be reduced by whatever it cost to serve that customer and whatever that cost is should then properly be added to the next bracket.

Does that answer your question?

Q. Yes. Would the distortions that you have just described so affect this exhibit that it could not be corrected without recasting? I am having particular reference to your distribution costs.

2484 A. Mr. Haycraft, we don't know how much it would affect it because we don't know how much the cost is. We could come to some idea on those by determining what the manufacturing cost was, and that would serve as some criterion on which to maybe form some idea;

but as to what the distribution cost is applicable to all of these, or any one of these, we don't know.

Q. Could that be determined without recasting the entire exhibit?

A. Oh, yes, that could be determined, but it would be a pretty difficult task to determine it.

Q. Why is that true?

A. For the reason that the costs have been separated by Respondent's accountants Ernst & Ernst, certified public accountants, on several different bases. That is, different costs were separated on different bases and sometimes on a combination of bases. I might say, for example, on costs separated on the basis of numbers of invoice lines, you would have to go back and take out the number of lines and determine then what each invoice line cost and then assign that cost, that particular item of cost to the proper bracket. And those things,—I think they run into many, many thousands probably, on several different items, and that is quite an enormous task.

Mr. Haycraft: That is all.

2485 Trial Examiner Sheppard: Cross-examine.

Cross-Examination by Mr. Freeman.

Q. Mr. Warmack, a moment ago you said it was rather difficult to do a job in retrospect that should have been done in prospect. That is correct, is it not?

A. Do you mean that I stated that, or that that statement is correct?

Q. That is the statement that you made and I am now asking you whether you made that statement?

A. I think I made that statement, yes.

Q. Now, what do you mean by "in prospect"?

A. Currently, sir.

Q. Now, you understand that Minneapolis-Honeywell when it enters into its contracts extends to the particular customer a price for the next twelve months, do you not?

A. That is my understanding.

Q. And is that what you call "in prospect"?

A. I did not have any current group of contracts, or any particular contract in mind when I made that statement, and I don't think that one is exactly running along in the same thought or meaning as the other is. We were talking about an accounting study and now you are talking about selling something.

Q. Well, I am asking you whether or not the
2486 particular transaction that was engaged in by Honeywell when it entered into a contract with the customer,—as to whether or not you consider that a transaction in prospect?

A. I have no idea.

Q. Now, turning to page 62 of Respondent's Exhibit 170, I am going to ask you how you would have allocated the vice-president in charge of sales, his time, to the various departments that he served, to-wit: Branch offices, Foreign offices, Heating control sales, Refrigeration sales, and Airconditioning sales?

A. For what purpose, sir?

Q. What?

A. For what purpose, sir?

Q. For the purpose of making the study; or I want your explanation, since you registered some sort of a complaint against the way it was done and you are an expert in this field. All we are asking you now is to tell us what you would have done in allocating the vice-president's time, and I am speaking about the vice-president in charge of sales.

A. Well, before I can answer your question, Mr. Freeman, I would have to have a considerable amount of information with respect to the different and varying functions of this individual much more than is set forth here, or that has been explained to me. I could not answer your question without having full and complete in-
2487 formation with respect to the daily, weekly, monthly, and yearly activities of this individual.

Q. Well then, as a matter of fact, when you criticized page 62 of Respondent's Exhibit 170 as to the allocation of time, you had no personal knowledge as to whether or not the time allocated is correct or otherwise?

A. Not of my own knowledge, no. I do know that it is an estimate made in retrospect, and I do know this, Mr. Freeman, that I could not make an estimate that would be very accurate of my own time for two years ago.

Q. Who would be the best judge of your own time two years ago?

A. I imagine that I would.

Q. And, therefore, the vice-president in charge of sales, with whom Ernst & Ernst consulted, in your opinion was the best judge of his time as to how it was allocated during the year 1941; correct?

A. Yes, sir, I certainly think that is true.

Q. Now in the tabulations that you gave us this morning, in reaching your conclusions as to accounts which you said were off-scale and should have been in other brackets, did you take into consideration orders on hand with shipping instructions for such orders where the orders were received in December and shipped early in January, and applicable to the 1941 contract?

2488 A. I didn't make any tabulation of those.

Q. You do concede, as an accountant, that any orders received during 1941, applicable to the 1941 contract and shipped say in January of 1942, do apply as against the quantity provided for in the 1941 contract or agreement?

A. May I have that question again?

(The question was read.)

Mr. Haycraft: I object to that question, Mr. Examiner, as being outside the record here—

Mr. Freeman: This man is an expert.

Mr. Haycraft: Just a moment, please, until I state my objection. This exhibit that we are talking about,—now, as I understand it, this refers to sales of these products within that year, 1941. Now, I say it is not proper cross-examination to prospect into the deliveries in 1942. That simply is outside of this exhibit and outside of the direct examination.

Trial Examiner Sheppard: I think some of these contracts sort of overlap.

Mr. Haycraft: Yes, but this exhibit doesn't overlap. This exhibit, as I understand it, represents only sales in 1941 regardless of whether it was under contract or what.

Mr. Freeman: Your Honor, in any of these contracts that we gave them a price, if that contract ran into

2489 the following year, we can't be criticized because they took 90 per cent of their contract quantity over a period of 11 months of one year and completed the next 10 per cent of their quantity the following year. They are still entitled to the quantity and they are still entitled to the price which that quantity entitled them to.

Trial Examiner Sheppard: I think so.

Mr. Freeman: And I am merely asking whether, in making his conclusions this morning as to off-scale accounts, he did take into consideration that possibility, and he can say yes or no.

Mr. Haycraft: Well, Mr. Examiner, I make the further objection that whether he took it into consideration would have no bearing whatever upon the exhibit, which does not go into the 1942 transactions. What difference does it make? Furthermore, there is absolutely not one bit of evidence to base the assumption on. There is not a bit of evidence from the testimony of any witness that that fact existed.

Mr. Gilpatric: We are talking about what Mr. Warmack is trying to do to the exhibit here. He is shifting accounts around. Now we are asking him whether he took that into account.

Mr. Haycraft: Even then, Mr. Examiner, they should in the examination of this witness only refer to the
2490 facts developed in this case and which is a matter of record here and could be relied upon.

Mr. Gilpatric: It is in the record in the form of contract exhibits which you put in, Mr. Haycraft.

Mr. Haycraft: But the record doesn't show and there is no testimony in there to support the statement made in the question.

Trial Examiner Sheppard: Well, as I understand Mr. Freeman's question, it could apply to December, 1942 and on over to 1943 just as well.

Mr. Haycraft: What of it? What has that got to do with this exhibit?

Trial Examiner Sheppard: I will let you answer that, Mr. Warmack, on that basis.

The Witness: May I hear the question again and also hear your statement on which basis I am to answer.

(The question was read.)

Trial Examiner Sheppard: Now that can be answered for 1942, December, 1942, and over into 1943 just as well. In other words, it is an overlapping proposition.

The Witness: Well, your Honor, a yes or no answer to that is not a complete answer. I would be happy to explain, if I may.

Trail Examiner Sheppard: That is right.

The Witness: Thank you. I did not determine
2491 what the amounts of those orders were. In the calculations I took the figures that the accountants had and I certainly did not go to the company's records myself to determine what orders were on hand and what orders were not shipped for December, 1941. Neither did I determine or even make any effort to determine what your

overlapping was, or your unshipped orders at the beginning of the year; and if you are going to consider one, you have got to consider both.

By Mr. Freeman:

Q. Well, you considered neither?

A. I took the figures your accountants had and that is all.

Q. Well then, when you put a customer in your so-called off-scale classification, you do not know, as a matter of fact, whether that customer rightfully belonged in your off-scale classification, is that not correct?

A. I could not know of my own knowledge, no. But may I explain that, your Honor?

Trial Examiner Sheppard: Yes, I want you to explain as you go along.

The Witness: We drew this list off,—we notified Mr. Reese and Mr. Johannsen. We asked for a conference with Mr. Lockrae. We were granted the conference with Mr. Lockrae and Mr. Johannsen attended. Mr. Wernicke attended; and Mr. Argus of the Commission's staff
2492 and myself attended that conference. That was a day or two before Thanksgiving, I believe, in 1944 at Mr. Lockrae's office here in Minneapolis. We showed him the list that we had of these customers, and I do not—well, I am positive of the fact that Mr. Lockrae did not point out one single one to us that we asked him, were these sold at off-scale prices? And he did not say that any single one of them that we had on the list were sold at off-scale prices that I remember.

By Mr. Freeman:

Q. In fact, Mr. Lockrae said nothing to you with respect to the accounts that you call now off-scale accounts?

A. Well, he talked all afternoon about them; I rather think he said quite a bit.

Q. But I am asking you, when you made your recast and transferred, as you call it, units and manufacturing costs from one column to another column,—did you in making your transfers, as an accountant, take into consideration any orders received in December and shipped in January of the following year, or did you take into consideration the date of the contract and the date of the termination of the contract in connection with any of your reallocation of costs?

A. I considered those things at some length, yes. I discussed them as I explained just now with Mr.
2493 Lockrae and asked him, "Were they or were they not sold at off-scale prices?"—and he said that they were. So if they were sold at off-scale prices, then I did not examine the contracts as to the dates. I did not examine into when the shipments were made but accepted this as a year's run of business, the figures that the accountants had.

Q. Well now, did you examine any of the contracts as to their date of execution and their date of termination, which contracts are in this record as Exhibit 4, in behalf of the Commission?

A. I have seen some of them.

Q. Well now, obviously if a contract started in May of 1941 and continued for a period of 12 months, when would it expire?

A. Twelve months after it was entered into.

Q. May, 1942, correct?

A. Did you say it was entered into in May, '41?

Q. Yes; in May, '42, correct?

A. '42, yes.

Q. And obviously in the 1941 business it would cover only a period of 8 months; correct?

A. Certainly.

Q. Now, if during that 8 months a customer bought two-thirds of the amount that entitled him into the bracket of his price, according to your figures you would
2494 have had that customer in an off-scale account classification?

A. Not necessarily, no.

Q. Well, isn't that, as a matter of fact, where you put him?

A. I don't understand your question.

Q. Now, even at the sake of repetition, a customer that entered into a contract on May 1st, 1941 had eight months more to go in 1941; correct?

A. Yes, but may I inquire right there—I don't mean to be arguing with you, Mr. Freeman—

Q. I don't mind any argument; you go right ahead.

A. Is this a new customer that you have never sold before?

Q. Yes, just a brand new one.

A. Is it the renewal of a contract?

Q. No, just a brand new customer.

A. I see, thank you.

Mr. Haycraft: I am going to object to any such question unless counsel will name the customer. If there are such customers, let's have them.

Mr. Freeman: You didn't name any of them.

Mr. Haycraft: What good is it going to do to go into the testimony and get the answers if there aren't any customers in that category?

Trial Examiner Sheppard: It would be much more interesting to the Examiner if customers were named,
2495 as we did this morning. We had definite customers.

Mr. Haycraft: Take any one of those that began in May and ran in that category.

Trial Examiner Sheppard: Take some one customer—there are dozens on our list here—to illustrate your point instead of A, B, and C. Off the record.

(Discussion off the record.)

Mr. Freeman: Well, put it on the record now. I am getting tired of this off-the-record stuff as between the Commission's expert and the Examiner.

The Witness: Well, I certainly do not object to having every word I speak put on the record, but I just thought we would shorten it a little.

It was that very thing that I went and presented these names to Mr. Lockrae for, to find out if that thing existed, and he didn't mark a single one.

Mr. Freeman: Was he there as counsel for the Commission, or what was he there for?

The Witness: I was there seeking information, sir.

Mr. Gilpatric: We are trying this case before the Examiner and not while you go around and talk to people on the side. We don't expect to make our explanations to you in private. That is what this court-room is here for.

Trial Examiner Sheppard: Go ahead, gentlemen.
2496 He is ready to answer your question and I am going to let him answer it.

By Mr. Freeman:

Q. Will you just answer my question?

Mr. Haycraft: He has answered it, Mr. Examiner.

Trial Examiner Sheppard: I want real definite accounts, as we had this morning, from both sides.

The Witness: Mr. Examiner, with reference to Mr. Gilpatric's remark, when I made my investigation out here I understood that all records would be made available

to me and every record that I asked for was made available to me. And now am I to understand that I was not supposed to go and talk to Mr. Lockrae to get him to enlighten me on these things?

Mr. Gilpatric: The point of my remark, Mr. Examiner, was this: Mr. Warmack is now trying to use something that Mr. Lockrae may or may not have said as binding on the Respondent in this case. That was never any understanding between us. Whatever Mr. Lockrae may have done in the absence of counsel, or may not have done, is not to be taken as binding on Respondent here. That is all I am saying.

The Witness: I was only seeking information, gentlemen.

By Mr. Freeman:

2497 Q. Mr. Warmack,—perhaps I can shorten it,—you were given every document and work sheet that you asked for by the Respondent and likewise by the accountants for the Respondent, is that not correct?

A. Yes, sir, and I would like to add—

Q. Now, did you ask for any of the contracts as to their date of execution or date of termination when you began making your study, recasting figures that were given to you by Respondent's Exhibit 170?

A. Mr. Argus—

Q. You can just answer that yes or no, whether you asked for them or not.

A. Well, I happened to have a man out here that was working under my direction and supervision, and that is what I was trying to tell you, that he asked for and did review some contracts.

Q. Now these work sheets that you were working from this morning and from which you were testifying, were they made by yourself or by Mr. Argus?

A. They were made by both of us jointly.

Q. They do not show anywhere that consideration was given to contracts that didn't necessarily coincide with the calendar year?

A. There is no such notation on those sheets. That was what I tried to find out, secure information along
2498 that line. There is nothing like that in this Respondent's report, or Respondent's Exhibit 170. Here is exactly what happened, if I may explain: I studied these accountants' working papers as best I could and

Mr. Argus studied them. The Respondent and all of its representatives extended every courtesy that anybody could extend to help us to expedite our review of these papers and the work and data that we were studying—that is, the underlying data of this Respondent's Exhibit 170. When I came across the situation which appeared on its face to represent extensive off-scale selling, I was not sure whether that was true or not. I didn't know and I did want to know. So I asked for a conference with Mr. Lockrae; I was told that he could tell me better than anyone else. In that conference we had these lists, and I asked Mr. Lockrae if any of them there were wrong, and Mr. Lockrae did not mark, or point out, or call attention to a single one, except this is what he did do: He called attention to the fact that although classified in a customers' classification codebook in one bracket, that some particular customers would be given later credits or refunds which would in effect move them to the other bracket. We called his attention to these names. He looked up many of them on records that he had at his disposal right in his desk, and he did not call our attention to a single one that we thought was being sold off-scale, that he
2499 thought we were in error on. That was the information I wanted, Mr. Freeman.

Q. And Mr. Lockrae did tell you where certain customers belonged in other brackets and received retroactive credit. You asked him about that?

A. Oh, we asked him about the whole works, Mr. Freeman, every question.

Q. Now how does it happen with respect to the six accounts which did belong in different brackets and which we have since learned actually did receive retroactive credits, that you did not take that into your calculations when you made your recast?

A. I most surely took it in.

Q. You knew that they belonged in other brackets?

A. That is right where I put them, where they belonged.

Q. But you didn't know whether or not the company actually had received retroactive credits?

A. I couldn't know it of my own knowledge, Mr. Freeman.

Q. I thought that was some of the information you were asking Mr. Lockrae for?

A. Well, I say, he told me but I couldn't know it of my own knowledge. I had it by information, sir.

Q. Well now, this meeting that you had with Mr. Lockrae was several months ago and yet today you had no way of knowing whether or not these six companies had 2500 or had not received proper retroactive credits?

A. I don't know it now; but I certainly do not disparage your statement that they did.

Q. Now as an expert I am going to ask you, when a price is extended to a customer in bracket 3 and that customer has a contract dated as of the first of the year, so we have a calendar year coinciding with the contract year, and at the end of 9 months that customer has taken exactly three-fourths of the controls called for and then that customer goes out of business,—you would consider that customer an off-scale account in accordance with the tabulations you made this morning, is that correct?

Mr. Haycraft: Here again, Mr. Examiner, I object and for the same reason as before. If he has such a customer, name him.

Mr. Freeman: This man is an expert. I am entitled to test his ability to answer.

Mr. Haycraft: Ask him if he put any such in there. That is the way—

Trial Examiner Sheppard: If you have got a real case, Mr. Freeman, I would rather have it; if not, I am going to let Mr. Warmack answer that question for you but I am going to give it the probative value whatever I think it is worth, as it doesn't refer to any definite account.

Mr. Freeman: Well, I am interested in determin-
2501 ing this man's qualifications, because he has stated several times that he was an expert with respect to Section 2(a) of the Robinson-Patman Act and I am trying to find out what it means and get an expert's opinion on it.

Mr. Haycraft: I don't know, Mr. Examiner,—I haven't said anything before, but I do wish to call attention to the fact that Mr. Freeman is the only man who has used that word "expert" with respect to this witness. The witness himself certainly did not and I did not. Now counsel for the Respondent, if he wishes to accept him as an expert—

Mr. Freeman: Well, I thought the qualifications that you gave him certainly put him there.

Mr. Haycraft: If you accept him as such, all right.

Mr. Freeman: Well then we are both agreed, Mr. Haycraft, that he is an expert and we will proceed from there.

Trial Examiner Sheppard: All right, Mr. Warmack, I

am going to let you answer that question for Mr. Freeman.

The Witness: May I have the question read?

(The question was read.)

The Witness: What bracket was that,—you said bracket 3, did you?

By Mr. Freeman:

2502 Q. You can put him in any bracket.

A. If he were in bracket 3 and he had a contract to buy 3,000 units and he purchased 3,000, lacking one-fourth of 3,000, that would drop him down to bracket 2. But if he had a contract to purchase 7,500 and purchased three-fourths, he would still be in bracket 3. It was just that sort of thing that I asked Mr. Lockrae: Did he have any such thing as that, and if he did I wanted to put him in the right bracket. But he didn't mark a single one.

Q. Just a minute. If he had a contract to purchase 7,500, he wouldn't have been in bracket 3A. He would have been in bracket—

A. 7,499, that was the limit.

Q. That is bracket 3?

A. That is bracket 3.

Q. And if he had a contract to purchase 7,500, he would have been in bracket 3A, correct?

A. Yes, just one more unit.

Q. Well now, will you answer my question, taking this nine months' period—

A. What what I do, or what did I do?

Q. What would you do?

A. I would take it out to Mr. Lockrae and ask him, was it right? And if he said "Yes", I would put him where his quantity fell, which I did do.

2503 Q. And even though he bought only three-fourths of the amount?

A. Oh no, oh no.

Q. (Continuing.) You would move him back?

A. If such a case existed, that was the information I was seeking, sir.

Q. Well, what would you have done with that kind of information had such a case existed? Just give us your opinion.

A. I would have let that customer remain in the quantity that he was buying in if the quantity and the price bracket in which he bought coincided according to your

price schedule, in the absence of information which would indicate to me that he should be otherwise classified.

Q. So you concede that there might be occasions where a man didn't reach his bracket—

Mr. Haycraft: I object to that question. He didn't make any such concession at all. That is just why I insisted at the beginning that he give him some concrete illustrations. He used a hypothetical question. Now he says "you concede it might have existed".

Trial Examiner Sheppard: Mr. Freeman understands that all questions that are not actual cases I give probative value to.

Mr. Haycraft: It isn't entitled to probative value; it shouldn't be regarded at all.

2504 Mr. Freeman: I hadn't finished my question—

The Witness: Did I answer your question, Mr. Freeman?

Mr. Freeman: We were interrupted.

The Witness: I beg your pardon.

Mr. Haycraft: I have an objection to the form of the question, Mr. Examiner. Here he asks a hypothetical question and then based upon his answer, he says, "You concede this might have happened", which is an entirely improper deduction from his answer.

Trial Examiner Sheppard: Well, I prefer to have this examination as free from objections as possible, so we can get a connected story on this. So, Mr. Reporter, I think if you will read that question—

Mr. Freeman: No, I am going to ask another because I was interrupted before I had finished my question.

Trial Examiner Sheppard: Go ahead.

By Mr. Freeman:

Q. Now, did you take into consideration any customer where Mr. Lockrae has testified that he extended to that particular customer a price because he had to meet competition?

A. I didn't even consider the competitive angle at all. I was dealing in quantities.

Q. Well now, you understand the other exception, 2(b) of the Robinson-Patman Act, do you not?

2505 A. Well, I would rather that the Act stand for itself.

Q. Well, you understand it, do you not? Do you understand it?

A. I might ask you, do you understand it, sir.

Q. Listen, you just answer my question, do you understand?

Trial Examiner Sheppard: Yes, just answer the question. Don't go into arguments.

Mr. Haycraft: I don't think, Mr. Examiner, that this witness has qualified as a lawyer yet. I object to the form of the question, whether he understands another section of the Act when we are talking about 2(a) in this exhibit.

Mr. Freeman: Now, Mr. Examiner, I am asking him, when he made this reallocation and when he testified this morning that certain customers were off-scale customers,—I am asking him, as a matter of fact, whether or not he took into consideration any of those customers which Mr. Lockrae specifically testified to that he extended certain prices because of competitive conditions. This witness can answer that question with a yes or no answer.

Mr. Haycraft: If you will name the account, he can answer it. I have been trying to get this witness to know what Mr. Lockrae testified to a while back.

By Mr. Freeman:

Q. First I want to know whether you did or did
2506 not take that into consideration?

A. Take what into consideration.

Q. The fact that certain customers received certain prices because of competition?

A. I was told that they did. As far as why they received it, I have no care. That is the company's business. I thought you asked me just now, Did I understand that section of the law?—and I asked you as an attorney if you understood it.

Q. I first asked you whether or not you took that into consideration in making your report, or your recast of figures?

A. I don't understand what you are talking about. If you can tell me what that has to do with accounting, then I will answer any question on accounting you will put to me, or try to. But you are asking me something here that moves away from accounting, and I don't think I have been qualified to answer anything here except accounting questions.

Q. Did you consider Williams Oil-O-Matic as an off-scale account?

A. I do not know.

Q. Well, that is a name or a company that I think you referred to. You have your work sheets with that name on, and I am giving you a specific company.

A. I can find out for you.

2507 Q. Will you take a look?

(Witness checks records.)

A. Williams Oil-O-Matic Corporation was given the price applicable to bracket 5, and the quantities we found in the records appeared to be applicable to quantity bracket No. 4.

Q. Now, answering my question: When you recast Williams Oil-O-Matic from bracket 5 to bracket 4, you did not take into consideration the fact that Honeywell, the Respondent, extended to Williams Oil-O-Matic a price which happens to coincide with the bracket 5 price because of competitive conditions, did you?

Mr. Haycraft: That is objected to as irrelevant and immaterial, Mr. Examiner, and not proper cross-examination, and not a proper question to ask an accountant. As a matter of fact, it assumes testimony which was put in by another witness, which had nothing to do with this particular defense. They are trying to mix potatoes and watermelons here.

Trial Examiner Sheppard: I think you are right, Mr. Haycraft, but I want to give Mr. Freeman some latitude.

If you can answer that, you may do so; if you cannot, you may so state.

The Witness: I don't understand what he is talking about.

Trial Examiner Sheppard: We will take a brief

2508 recess, Mr. Reporter.

(A short recess was had.)

Trial Examiner Sheppard: On the record. You may proceed.

By Mr. Freeman:

Q. Referring now specifically to the Cleveland Steel Products Company, in your recast this morning you put that company in bracket 4, is that not correct?

A. I will look it up. Do you know what bracket it was in before?

Q. Originally it was in bracket 5.

A. That is correct.

Q. And I now ask you whether or not in making your recast you took into consideration that Honeywell, or the

Respondent, extended to the Cleveland Steel Products Company a price better than the bracket 4 price because of competitive conditions?

Mr. Haycraft: I am going to object to that, and so I won't be doing it all the time, to all similar future questions on the ground that it is not proper cross-examination. It takes into account facts which are not within this witness' knowledge and were not a part of the working papers, and should not be taken into consideration. It is irrelevant and immaterial whether he took it into account or not. It has no basis in this study.

2509 Trial Examiner Sheppard: I agree with you, but I am going to—

Mr. Freeman: Your Honor, I think you are wrong, and for this reason—

Trial Examiner Sheppard: I am going to let you answer, if you know, just as I did before.

Mr. Freeman: Your Honor, will you hear me for just a minute? I do not mean to be argumentative or discourteous. We are entitled to know the basis upon which he recast his figures, and all I am asking him is. Did he or did he not take that into consideration? All he has to say is, I did not, and that is the answer. It is proper cross-examination and we are entitled to know what he used as the basis for making his figures. That is all I am asking; I think it is proper.

Mr. Haycraft: No, Mr. Examiner, he is not entitled to ask him whether the moon is made of green cheese, if he took that into account. The point is that he is only entitled to ask in this question facts which were called to the witness' attention during the process of the study, or that he might have found or should have found from the working sheets of the Respondent or its accountants. He is not entitled to go outside of that and see how this man's mind might possibly work under a given set of circumstances, because it does not exist.

2510 Trial Examiner Sheppard: I am going to let you answer, Mr. Warmack. If you know, just tell Mr. Freeman what you know about that.

The Witness: May I inquire, your Honor—you say taking into consideration,—considered with respect to what? I just don't get your question exactly, Mr. Freeman. I am sorry.

By Mr. Freeman:

Q. You disregarded any other conditions other than the fact that in accordance with a particular number of units the Cleveland Steel Company fell into a particular bracket; is that correct?

A. No, sir, that is not correct.

Q. Well then, what did you consider when you moved—in making your recast—Cleveland Steel from bracket 5 to bracket 4?

A. I considered the possibility with respect to that account and all other accounts that there could be certain situations or conditions that would arise whereby the quantity would not be the only guiding factor for making the separation and resetting these costs, the manufacturing costs. The manufacturing costs are the only ones I was able to take off. In view of that I asked the Respondent's representative to tell me just which accounts
2511 should be left as is although the quantities did not measure up to the quantity limits applicable to each bracket. Inasmuch as not any accounts were designated as having certain factors related to them which would enable me to set them in a more proper bracket than the quantity itself would call for, I set them in the brackets according to the quantities. That is what I considered and that is what I did, sir.

Q. Did you recognize that there might be factors other than quantity that would change the bracket situation?

A. Now are you speaking of quantity brackets, or of price brackets, please?

Q. The same bracket that you talked about when you said a moment ago you took into consideration something other than quantity alone.

A. I will try to state that again, your Honor, as to exactly what I did, if counsel doesn't understand, or I would rather that my answer be read to counsel.

Trial Examiner Sheppard: That you didn't take anything into consideration except the quantity?

The Witness: I took into consideration the points that I just enumerated.

By Mr. Freeman:

Q. Well, what were those points that you enumerated?

Trial Examiner Sheppard: I don't remember myself, Mr. Warmack.

2512 Mr. Haycraft: Let the reporter read it. The answer is rather long and I suggest in the interests of brevity—

Trial Examiner Sheppard: We want to get you exactly on the record, and I would like for you to state again for the benefit of all of us what you took into consideration in these matters that you say are off-scale.

The Witness: I will tell you exactly what I did, your Honor.

Trial Examiner Sheppard: That is right.

The Witness: I took off a list as best I could and I tried to take them off as accurately as possible of the numbers of units sold to each customer. If you will remember, when Mr. Reese testified with respect to those things, he would have to refer to a number of pages sometimes. We had to take those and add them up. That is, they sold 400 units on one page to a customer and to the same customer the next page showed 458, and another page showed that—

Trial Examiner Sheppard: You would add all those up?

The Witness: We had to add those up. Now, when we got them added up for everyone of the customers, then we extended those which appeared to be outside of the quantity limits of the quantity bracket in which
2513 they had been placed. They were so numerous I was very uncertain as to whether or not even our figures could be correct, because I couldn't imagine that much off-scale selling, sir.

I contacted Mr. Lockrae, or Mr. Wernicke, or both of them—I think both of them—and I asked for a conference with them. Mr. Argus and I went out. I notified Mr. Reese and Mr. Johannsen and Mr. Johannsen sat in on that conference. I called it to Mr. Lockrae's attention and showed him how extensive it was. I asked Mr. Lockrae if he could tell me in any instance why any single one of the customers should be classified in a quantity bracket other than the bracket where the quantity limit would coincide with the quantities purchased by that customer. For example, if a customer were to enter into a contract, a new customer, in November of 1941 and only purchase a few units during the latter part of the year, it would show on those figures that he prorably should fall in the Discount bracket whereas rightfully he may fall in the No. 3 bracket, or something like that.

Not one of those was pointed out to me. Therefore, I had to drop back and let the quantity follow the quantity limit, and that is what I did do in every instance.

Now, if there is anything that is mysterious about that, I would certainly like to know what it is.

Trial Examiner Sheppard: Well then, I am going
2514 to ask you another question that may clear up a whole lot of talk there and get it straight from the start: When you had that chat with Mr. Lockrae in reference to those specific contracts which you wanted to make inquiry about—

The Witness: I didn't have any particular one in mind, sir.

Trial Examiner Sheppard: Didn't you?

The Witness: No, sir.

Trial Examiner Sheppard: Well, those that you saw were going to result in being off-scale; that is what you were talking to him about?

The Witness: Yes, sir, customer sales.

Trial Examiner Sheppard: Did Mr. Lockrae tell you of any special arrangements in reference to prices to meet competition in that category?

The Witness: Oh, yes, sir. He stated that he had told Mr. Haycraft that there was off-scale selling to meet equally low prices of competitors.

Trial Examiner Sheppard: All right.

By Mr. Freeman:

Q. Now all I want to know is whether, when you made your recast, you did not take those accounts into consideration?

Trial Examiner Sheppard: Now, do you understand that?

Mr. Freeman: You ask it, Major.

2515 Trial Examiner Sheppard: I will just ask that question again so we can have a little picture of the whole situation here. When Mr. Lockrae told you about the matter of the competition and when you then resumed your work on the proposition, did you take that matter of competition into consideration in reference to these firms or corporations here, these manufacturers, that would otherwise be off-scale without the question of competition being involved?

The Witness: Well, the question of competition, your Honor, has nothing to do with an accounting study at

all, and the fact that a customer's purchase will fall within the quantity limits of a bracket and that customer is given a preferred price,—in other words, at a price that doesn't fall there,—I would want to, if I were making a study, know what it cost to serve that customer; and that is the way that I made the segregation to the best that I could.

Trial Examiner Sheppard: I understand you fully and completely. You used the figures involved instead of taking into consideration the matter of competition at all.

The Witness: That is not an accounting question, so I did not try to answer something that was not an accounting question.

Trial Examiner Sheppard: That is right.

By Mr. Freeman:

2516 Q. How would you take into consideration the cost of distribution with respect to the customer that was given a preferred price on account of competition?

A. Will you please explain that? I don't exactly understand your question.

Trial Examiner Sheppard: Just read that to him, Mr. Reporter.

(The question was read.)

A. Will you please explain your question?

By Mr. Freeman:

Q. Well, by way of example and further explanation of my preceding question—

A. Thank you.

Q. (Continuing.)—let's take the Cleveland Steel Products Company, which did receive a preferred price. Where would you put the cost of distribution applicable to Cleveland Steel Products Company—in bracket 5 in accordance with price, or in bracket 4 in accordance with quantity?

A. In making your cost defense?

Q. Yes.

A. I think I would leave it out completely, assign a cost to it and then move it out.

Q. Then it is your position as an accountant that in connection with any costs applicable to particular accounts where those particular accounts received a preferred
2517 price on account of meeting competition, that those costs should actually be removed from any cost study where you try to justify differentials between brackets?

A. In the first place, may I answer and explain—I think this will answer your question.

Q. All right.

A. In the first place, I rather think for the purpose, and only for the purpose of this cost defense, that if it were possible it would be well to remove those costs entirely and show the costs applicable to the serving of those customers where you were trying to prove that the cost differential was equal to the price difference under the due-allowance proviso of Section 2(a) of the Robinson-Patman Act. Now if that is impossible, Mr. Freeman, and sometimes it is—maybe oftentimes it is—or if you were making a similar study to see just what you could do, on the average within certain quantity limits and price brackets, they would have to be left in then. But they would be placed in the group where the quantity applied, not what you paid for them.

For example, in a study of that kind you would want to know how you could set your quantities and how you could set your prices, and by way of further example, on page 6 of Respondent's cost report, we have there the bracket classification in the first column, the quantity 2518 or annual volume in the second column, and the prices in the third column. Now, if you wanted to determine,—if you could justify the $16.45 price against some other price—I look at bracket 2 applicable to quantities of 1,050 to 2,999—in a cost study of that kind, you wouldn't pick up one customer and just say, "well, here is a Discount customer up here that buys 25 sets" and drop him down and put him down in there and say "we are going to justify that." You are justifying by quantities, which is what the due-allowance proviso says, "different quantities".

Q. But you do agree with me, and I think I understand your last answer, that when you make a preferred price in order to meet competition, that you cannot use the figures applicable to that particular account in connection with justifying any differentials as between brackets, based upon quantities?

A. No, I wouldn't say that. I would say you would remove it, if you could. It would be better if you could, but you can't always do it. Accounting is not an exact science, sir, and sometimes why some people think that you just write down a bunch of figures and add them up

and divide by something and you have it, but that is not the answer and that is not it. By way of further example, if you have a customer on which you have made a study

and you determine that you can serve that customer 2519 in a No. 2 bracket who purchases 1500 units and selling for $16.45, and justify that against other prices that you have applicable to other quantities, and then you say because of competition, "I will sell that customer at the 3A price under the classification," which is $15.35, or in other words, give him a $1.10 better price,—well, that doesn't mean now that you are going to drop his quantity down in here and camouflage the whole picture up at all. If you are going to do anything like that, you distort your cost picture. Leave his cost up there; you want to know what it costs to serve him.

Q. Well then, it is your thought where you give someone a preferred price in order to meet competition that you may perhaps put his cost into a particular quantity bracket applicable to the quantity that he purchases, or throw him out altogether with respect to justifying costs under the due-allowance section of the statute?

A. If I understand your question, I think you have stated what I think about it. I would be glad to restate that. I think this, that in the preparation of a cost report to determine that price differentials do not exceed cost differentials, you have got to follow quantities.

Q. But when you sell in order to meet competition, then you do not have to justify the differential?

A. That is for the lawyers to find out amongst 2520 themselves. That is not an accounting question.

Q. Well then, isn't it a fact that when you get into that kind of a situation where you extend a better price, or a preferred price,—I think that is the term you used,—in order to meet competition, then the particular cost applicable to that account should not be taken into consideration or mixed up with other accounts that come properly within proper brackets,—is that not so?

A. If I understand your question, I think that is true. But let me state it and then we will see if I understand it. If a customer is buying within quantity limits applicable to your $16.45 price at we might say 1500 units, and because of some competitive reason you gave him, or because of any reason, or if you were just big-hearted—

Q. Well, let's not be big-hearted; let's just meet competition.

A. $15.35, you gave him that price,—then you couldn't pick his cost up out of the quantity limits applicable to No. 2 and drop him down into 3A. You will distort 3A and you will distort No. 2 also.

Q. Well, if he is left out of both brackets, then clearly there is no distortion of any kind?

A. If you can make the separation, you have done a good job. A lot of times it can't be done, not with any degree of certainty or accuracy.

2521 Q. Well then, you agree with me that in setting any price structure in accordance with brackets, that prices are made in anticipation,—correct?

A. I didn't follow you just exactly; I am sorry.

(The question was read.)

A. In anticipation of what, sir?

Q. In anticipation of the quantities actually purchased by the individual customer?

A. I think we better get Mr. Lockrae to testify on that. He is the sales manager for the company.

Q. Well, you know, as a matter of fact, that customers are extended prices, say on January 1st, which are to be applicable during the year? You know that, do you not, from your own experience and investigations made from time to time?

A. I have known of such things, yes, sir.

Q. Just what do you mean by time and effort studies?

A. Accounting studies to determine the length of time and the amount of effort expended by individuals.

Q. Do you think that any executive in charge of sales could allocate his time down to the minutes, as to which belonged in one classification and which belonged in another classification?—and I am specifically directing your attention to page 62, where the time of the vice-president in charge of sales of Honeywell, the Respondent, was

2522 broken down.

A. It would be a rather difficult task. He could currently keep some kind of records from which later he could establish reasonably some information with respect to cost. That is, if he kept some kind of records currently, then he could do it better than by a couple of years later going back and guessing at it.

Q. Well, doing it in prospect instead of retrospect, what do you say the vice-president in charge of sales should do in order to allocate his time?

A. Have Mr. Reese and Mr. Johannsen work him up some kind of a record for him to keep and let him keep it.

Q. And just what would he allocate his time to when he went out during the day and took a haircut?

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record. Is there a question before us, Mr. Reporter? Just answer, Mr. Warmack,—just give the best answer you can to that and we will go on.

By Mr. Freeman:

Q. I will add to that question:—or if the man was sick for a day?

A. In questions of that kind, Mr. Freeman, you are picking up a drop of water out of the ocean and want to know what we would do with the drop in the event
2523 the tide went in or out. That is about what it might be comparable to. So we would have to have all of the facts coming forth, all of the functions and everything, and then perhaps the questions could be answered. But you can't—

Q. (Interposing.) Well then, in making an allocation in order to determine what price you are going to extend, you have to do that at the close of the year as distinguished from at the outset of the year, is that not so?

A. Have to do what, sir?

Mr. Freeman: Read the question, Mr. Reporter.

(The question was read.)

A. Not necessarily. You would have had to have done that if you were following the due-allowance proviso of Section 2(a) subsequent to June 19, 1936.

By Mr. Freeman:

Q. But you recognize that prices change from time to time and the cost of distribution changes from time to time, and prices are usually made on a yearly basis. Now what I am asking you is, is it your thought that you have to anticipate at the outset of the year how much time the vice-president in charge of sales is going to devote to branch offices, and how much time he is going to devote to heating, refrigeration, and air conditioning, or do you wait until the end of the year when you have records, because all the records in the world made during the
2524 year wouldn't tell you exactly, or even give you a

good guess as to how much time you were going to spend next year.

A. I don't think that question is at all even appropriate here. That is not the way you make time studies, in the first place. It doesn't even follow accounting thought, in the second place, and for many other reasons. Why you would have to come down and make a time survey if you want to determine anything, or develop any information of any value, or of value in the fitting of a situation of this kind. But from an accounting standpoint,—and I did 't say time study meaning that the only thing to study is time,—there are many other things as these gentlemen have studied here. But it has always been my feeling that a study of time and effort expended in selling activities and related activities for the purpose of determining cost differentials which, under the due-allowance proviso, would justify price differentials,—you don't have to make the study for a whole year. You might have to make it for longer,—the kind of industry, the buying habits of your customers, if you are doing seasonal business,—why there are so many factors, Mr. Freeman, that enter into those things until you can't make any answer that is all-inclusive, all exclusive. That is an enormous task in any industry.

Does that answer your question?

Q. Yes, and we agree 100 per cent with you. Now 2525 in these time and effort studies that you are talking about, you agree with me that you have to take into consideration what was done yesterday in order to anticipate what you are going to do tomorrow,—using today and yesterday, or tomorrow and yesterday by way of example?

A. Well, we generally look back and see what the past has produced in order to try to plan our course for the future, if that is what you mean. I mean, that is not necessarily only in accounting and price fixing. It might be in sailing a ship, or an airplane, or in shooting a gun, or most anything.

Q. Now, do you agree with the report of Ernst & Ernst that the over-all differential between the Discount bracket and bracket 5 is more than accounted for under the due-allowance section of the statute?

A. I think you will have to elaborate on your question a little. Do you mean that their figures are mechanically

wrong, or do I subscribe to the accuracy of the figures, or just what do you mean, sir?

Q. Well, the figures that we have here more than justify the differential between the Discount manufacturer and the price extended to a bracket 5 manufacturer?

A. I believe if you will show me that calculation, why I could maybe answer your question.

Q. Will you take a look at Exhibit A, page 6, of
2526 Respondent's Exhibit 170?

A. Yes, sir, I am looking at that.

Q. Do you agree with the statement therein contained, "From the costs which we have been able to allocate, the overall reduction in price between the discount bracket and bracket number 5 is more than justified."?

A. According to their figures, why it would be justified, but I do not subscribe to the figures.

Q. Now, I understand that what you did this morning in recasting figures was merely shuffling from one column or bracket into another bracket, but you didn't change the cost, the overall spread between the discount manufacturer and bracket 5?

A. What do you mean by "overall"?

Q. The difference between the two. You didn't change the over-all cost any? You merely shuffled from one column into another, and all I am asking you now is whether or not the overall—

A. (Interposing.) I don't know what you are talking about, Mr. Freeman; I am sorry.

Q. You say you do not know?

A. No, sir.

Q. Do you know what is meant by the overall reduction in price between a Discount manufacturer and bracket 5?

A. I think so.

2527 Q. Well, do you or do you not know?

A. I can tell you what I think it is and then you may judge.

Q. All right.

A. My understanding of it is that it is the difference between $20.25 and $13.75, or a difference of $6.50.

Q. And in accordance with the distribution cost of Respondent's Exhibit 170, as shown on page 6, the distribution cost is $9.40—

A. Is that a question?

Q. And that is more than the spread or differential be-

tween the Discount manufacturer and the bracket 5 manufacturer?

A. I wonder if you would tell me if you can show me in the report what the cost is applicable to the No. 5 bracket?

Q. Well, according to your recasting, what do you consider the distribution cost applicable to the Discount manufacturer?

A. I do not know. It is based entirely upon the relationship, or based largely upon the relationship of the manufacturing cost to the distribution cost, and as to the mechanics of the way this figure is arrived at, according to the figures that I put in this morning, why the manufacturing costs applicable to the Discount bracket are materially changed.

Trial Examiner Sheppard: Did you make any
2528 change in that figure, Mr. Warmack, of $9.40?

The Witness: I couldn't get that far, Judge. Before you can do that you would have to change all of your distribution cost figures. If I may show you, this $9.40 is here (indicating). You relate this $6,196.14 of manufacturing cost to this $10,902.30 of distribution cost to arrive at 1.760, or it means that this figure is 176 per cent of this figure (indicating). Then you take your average cost per set of controls and multiply it by that factor and arrive at the $9.40. Now, I did show that this figure here should be materially changed, but I did not change this figure here (indicating).

Trial Examiner Sheppard: I see.

By Mr. Freeman:

Q. Well, you took out two accounts from the Discount manufacturers, correct?

A. Yes, sir, and put them in No. 1 bracket.

Q. And you don't know, do you, whether that change would make the distribution cost reach a figure less than $6.45, which is the difference between the Discount manufacturer and the bracket 5 price, do you?

Mr. Haycraft: I object to the form of that question, because it does not include the witness' testimony this morning. He not only took out those two, but he put a lot more in, so the whole thing has been juggled up.

2529 Trial Examiner Sheppard: You said $6.40. You meant $9.40, didn't you?

Mr. Freeman: $9.40 is the distribution cost, your Hon-

or, and $6.45 is the difference that we passed on to customers.

Trial Examiner Sheppard: I see.

Mr. Freeman: And I am asking him whether these changes that he made would have reduced the $9.40 down to $6.45.

Mr. Haycraft: But he didn't give him all the changes, that is the point. He only gave part of it, and I object to the form of the question.

Mr. Freeman: I will ask another question.

By Mr. Freeman:

Q. With all the changes that you have made, would it reduce the distribution cost from $9.40 to a figure below $6.45?

A. I certainly do not know.

Trial Examiner Sheppard: We will take a five minute recess.

(A short recess was had.)

Trial Examiner Sheppard: On the record. You may proceed.

By Mr. Freeman:

Q. Mr. Warmack, if Ernst & Ernst had omitted 2530 from its report all costs applicable to what you call off-scale accounts, would the resulting study and report, as made by Ernst & Ernst, accord with proper cost accounting principles what would, in your opinion, comply with the due-allowance proviso of Section 2(a)?

A. That is, of course, a question for the Commission to decide. It has always been my opinion, feeling in these things, that nothing short of time studies of selling activities and related activities should be considered as proper support for measuring factors to be used in separating those costs which are closely related to the effort expended by the separate employees. I will state this, however, inasmuch as that could not be done, that the accountants, Mr. Reese and Mr. Johannsen of the Ernst & Ernst firm of certified public accountants, made an honest and diligent effort to analyze the distribution costs of the Respondent and they probably established the best measuring factors possible for use in the separation of those costs under existing war-time circumstances. That was necessary in view of the fact that the Respondent did not avail itself during prior years when they were operating

normally of the opportunity to develop what I would consider to be the most accurate measuring factors which could be used in the separation of distribution costs.

Does that answer your question?

2531 Q. Well, I think it does. I am just trying to get this straight, Mr. Warmack: Your objection to this report, aside from the fact that it was made in retrospect instead of in prospect, without time studies, over and above such objection or criticism of the report,—the other criticism is directed to the fact that there are off-scale accounts which have been put into brackets where they did not belong?

A. That is my principal objection, sir, that latter.

Mr. Freeman: That is all.

Trial Examiner Sheppard: Redirect.

Redirect Examination by Mr. Haycraft.

Q. Let me ask you whether or not in your opinion the removal of those off-scale accounts that were, according to the testimony of Mr. Lockrae, to meet competition, whether that could be made without distorting the remainder of the exhibit,—that is, the remainder of the cost study as to the other accounts?

A. If I follow you, Mr. Haycraft, you want to know if you could take out the cost applicable to the off-scale selling and then set up the remaining costs in the same form as they are set up here; and in that event they would, of course, follow directly the respective quantity price brackets, is that correct?

Q. That is right.

2532 A. I feel that probably that could be done. I believe that Mr. Johannsen could tell us more about the difficulty that would be experienced in such an endeavor than I could. If you wouldn't mind, I would be happy to have his expression on that from a professional standpoint.

Q. Well, could it be done without recasting the whole report with respect to the costs of distribution items that are in there?

A. No, sir, I think you would have to have a new report entirely. It might be possible that you could go through and just throw those out and then leave the rest as is, but that would be an extremely difficult problem. It would

virtually go to the point of recasting the report, in my opinion. As I stated, I would like to hear Mr. Johannsen on that from a professional standpoint, or Mr. Reese, or both of them.

Q. What, if any effect, or what consideration should be given to those accounts in your opinion where the retroactive credit memorandum had been given?

A. Well, the costs should be placed in the proper quantity price bracket and removed from the bracket in which they appear at present.

Q. Well now, with respect to page 6 of Exhibit 170 and your questions with respect to that $9.40 item there which is compared to a difference of about six dollars and
2533 something,—that is the difference as between $20.25 and $13.75,—you were asked on cross-examination whether or not the changes that you would make in the exhibit would change the $9.40 sufficiently to wipe out or to overcome the difference between that and the six dollars?

A. Yes, sir.

Q. You said in your answer that you did not know. Now I am asking you why you made that answer? What is the reason for making that answer?

A. The reason is this, Mr. Haycraft: If these costs, as set forth on page 7 of Respondent's Exhibit 170, were reset, which would mean that the cost report would have to be recast, we know now what the manufacturing cost would be, or about what it would be,—I think the figures I put in this morning were correct and accurate, reasonably so,—but I have no idea what the changes would be in the distribution costs; that is, those costs that would be assigned to the separate quantity price brackets if they were reset in accordance with what I advocate here. Therefore, I couldn't possibly tell what the resulting costs would be per set, per bracket. No one could tell that unless those distribution costs were actually reset and then we would know just what they would show and not until then.

Q. Now, Mr. Warmack, when you discussed this matter of off-scale prices, off-scale selling, and the different
2534 concerns that you found were outside of the brackets that they had been allocated to in this cost study; and talked this matter over with Mr. Lockrae, did he indicate to you at that time that all of these concerns were sold at off-scale because of competitive conditions or com-

petitive demands, or did he just simply say that some of them were, or what explanation did he give of the off-scale selling?

A. Well, he indicated to me that off-scale selling, and I took it from what he said, that he meant that all off-scale selling was done because of competitive situations. That was what I took from his conversation. I don't remember that I asked him that positive question. What I was mostly interested in, if I may go a little further there, was to know if there were any of those customers that I had listed as being sold at off-scale prices that in fact were not being sold at off-scale prices. There were so many of them until I was quite concerned about it, and we went down the lists. I do remember that he stated that one customer should not have been in that at all. I don't remember and I am sure that Mr. Lockrae did not mark any one customer that I should leave in a bracket inasmuch as the quantity of that customer did not measure within the quantity limits prescribed for that quantity bracket. That was what I was interested in particularly. And another thing which was discussed at that meeting was
2535 whether or not I was asking the company to recast the report. I had no right to do that and I did not do that. I only pointed out, and did that very freely with Mr. Wernicke, Mr. Lockrae, Mr. Huff was in there—at least for a while, Mr. Johannsen was there, Mr. Argus of our staff and myself were there, and I don't recall any others at the moment who attended; but as a result of that discussion I was under the impression that the company wanted to have the accountants recast the report, and Mr. Lockrae was to discuss that with Mr. Freeman in Chicago the following day. That was the intention at the moment and that was the occasion for my calling you over the phone about the situation. I went to Mr. Lockrae to find out if I was right myself or if I was wrong. I only wanted to get the right answer, if I could to this situation.

Q. Now, Mr. Warmack, in your experience of making studies of this kind, would it be, in your opinion, a complete study to make a selection of a number of the accounts, make a study on that basis and leave out others for the alleged reason that they were put in different brackets because of competitive conditions?

A. Mr. Haycraft, that would be a pretty difficult question to answer without being confronted with all of the

factors and situations involved and seeing them written down on paper, and then you could evaluate the situation, and I don't hardly believe you could before-hand.

2536 Mr. Haycraft: That is all.

Trial Examiner Sheppard: Is there anything else, Mr. Freeman?

Mr. Freeman: No.

Trial Examiner Sheppard: Mr. Warmack, in your study of the study compiled by the Ernst & Ernst people, referred to in this case as Respondent's Exhibit 170, were there any elements that entered into the study of the business of Respondent made by those gentlemen that you didn't consider?

The Witness: No, sir, I don't think so. There may have been some little trivial account that amounted to nothing that I didn't study, or didn't look into thoroughly.

Trial Examiner Sheppard: Second, their study resulted in that $9.40 that we have been talking about here—

The Witness: That $9.40 is the cost per set of controls, the distribution cost per set of oil burners sold to discount customers,—in the discount bracket, I mean.

Trial Examiner Sheppard: Now, did your study, or would your study change that figure at all one way or the other?

The Witness: Yes, sir.

Trial Examiner Sheppard: Would it change it materially?

2537 The Witness: I couldn't tell you that, your Honor, for the reason that the only thing that I was able to do was to determine that the manufacturing cost, as set forth at the top of page 7, Respondent's Exhibit 170, for each of the separate brackets would be materially changed. If we were to use those, which would be the wrong thing to do, and relate them to the distribution costs as set forth here, those figures—and $9.40 would be one of them—would be materially changed. But before we could get a correct answer, the distribution costs would have to be reset in the manner that I outlined for the manufacturing cost, because one relates closely to the other inasmuch as the way the accountants have arrived at these distribution costs per unit is by relating the total manufacturing cost in a given bracket to the total distribution costs in the same bracket, to arrive at a ratio or a factor

which, when multiplied by a standard set of controls, gives the distribution cost per standard set of controls.

Trial Examiner Sheppard: All right. Is there anything else?

By Mr. Haycraft:

Q. And when you say a standard set, you mean the cost of a standard set?

A. The manufacturing cost of a standard set.

Q. I understood you to say a moment ago, and I
2538 want you to check me if I am wrong, that taking into consideration the changes you have made in the discount figure, when applied to the distribution figures as they now stand, there would be a substantial change in your $9.40?

A. Oh, yes.

Q. In other words, if you didn't make any change in the distribution costs.

Trial Examiner Sheppard: Did you say it would be material?

The Witness: I can tell you in a minute exactly what it would be, if you would like.

Trial Examiner Sheppard: I would like to know.

Mr. Gilpatric: Except that he said it would be wrong to do it that way.

The Witness: Yes, sir, it would.

Trial Examiner Sheppard: Well then I don't want it.

Mr. Haycraft: The reason it would be wrong, if your Honor please, is that you can't make the comparable readjustment in your distribution costs that he has made in his manufacturing costs. He doesn't know. We just haven't any way of knowing, and your guess or anybody's guess is as good as another one.

The Witness: I could give you exactly what it would be in the way it is set, but that would be conjecture
2539 as to whether it would be right or wrong. I rather think it would be wrong.

Trial Examiner Sheppard: All right, is there anything else, Mr. Haycraft, that you have on rebuttal?

Mr. Haycraft: No.

Trial Examiner Sheppard: Is there anything else you gentlemen have?

Mr. Haycraft: I have a motion to strike the exhibit.

Trial Examiner Sheppard: Which exhibit?

Mr. Haycraft: 170.

Trial Examiner Sheppard: You haven't made it.

Mr. Haycraft: I am making it now.

Trial Examiner Sheppard: I am going to deny that and give it study and let the Commission have the benefit of passing upon it and studying it, too. I think it has a place in this record.

Mr. Haycraft: We close our case then.

Trial Examiner Sheppard: All right.

Mr. Gilpatric: May we go off the record for a minute?

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record. Mr. Freeman and Mr. Gilpatric, Mr. Haycraft informs me 2540 that he has no further rebuttal to offer in this case and his case is closed. Now what can I do for you gentlemen further?

Mr. Gilpatric: We would like an opportunity to put in surrebuttal, and in view of the engagements of counsel and yourself that have been discussed, we would like to have this hearing adjourned on the basis that you will set a new date on five days' notice to the parties after we let you know, and you clear with Mr. Haycraft a suitable time.

Trial Examiner Sheppard: Is that satisfactory, Mr. Haycraft?

Mr. Haycraft: That is all right.

Trial Examiner Sheppard: The Examiner, in view of the status of things as stated above, will adjourn this case, to be reconvened again at the convenience of all concerned, subject to five days' notice to the parties.

(Whereupon, at 4:33 p.m., January 10, 1945, the hearing in the above-entitled matter was adjourned.)

2541 Room 1123, New Post Office Building,
Chicago, Illinois.
September 18, 1945.

Met, pursuant to notice, at 2:00 p. m.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

E. F. Haycraft, Attorney for the Federal Trade Commission.

Wayne & Moore, by R. L. Gilpatric, 15 Broad Street, New York, New York, and Bair & Freeman, by Will Freeman, 135 South LaSalle Street, Chicago, Illinois, appearing for Respondent.

2542 Proceedings.

Trial Examiner Sheppard: We will begin the hearing, gentlemen. In the matter of Minneapolis-Honeywell Regulator Company, No. 4920, ordered by the Commission to be convened in Chicago at 2 o'clock p.m. this date, the 18th of September, 1945.

Let the record show Mr. Everett F. Haycraft appearing for the Commission and Mr. Will Freeman and Mr. Gilpatric appearing for the respondent.

All right, gentlemen, I am ready.

Mr. Gilpatric: We will recall Mr. Johannsen.

A. F. JOHANNSEN was thereupon called as a surrebuttal witness for the Respondent and, having been previously duly sworn, testified as follows:

Direct Examination.

Trial Examiner Sheppard: You have been on the stand before, haven't you?

The Witness: Yes, sir.

Trial Examiner Sheppard: Show this gentleman having been previously sworn in this case. He appears on the stand at the request of the respondent.

All right.

By Mr. Gilpatric:

Q. Mr. Johannsen, since the last hearing in this proceeding on January 10th, have you made any changes
2543 in the cost study which was previously introduced in evidence in this proceeding as Respondent's Exhibit 170?

A. Yes. We have prepared a supplement in accordance with the suggestions and criticisms that were set forth by the Commission at the meeting in Minneapolis, I believe it was in January.

Q. Have you a copy of that supplement?

A. Yes, sir.

Mr. Gilpatric: I would like to have this marked as Respondent's Exhibit 186 for identification.

(The paper referred to was marked Respondent's Exhibit 186 for identification.)

By Mr. Gilpatric:

Q. Will you describe as briefly as you can for the Major in the record just what this supplement comprises, what you have done in preparing this supplement?

A. In preparing this supplement we have recast the entire cost distribution on the basis of moving the customers, so-called off-bracket customers, into the brackets in which they fall, based on volume alone, and there were four companies in going through our working papers, there were four companies that have been eliminated because they were not oil burner manufacturers and had been included in the original report in error, in our original study in error. In addition, we eliminated one
company, the Braden Everedy Company which, in
2544 this case there were returns which exceeded purchases, and that company was eliminated from our study.

Q. In other words, that company was really not a customer at all in 1941?

A. That is right.

Q. Will you name the other four companies that you excluded?

A. The Gasconaire, the Mayflower Air Conditioning Company, the Olson, and the U. S. Radiator Company.

Q. Now, Mr. Johannsen, in recasting your cost study to put, as you have said, each of these so-called off-bracket accounts into the brackets where their actual quantity of controls purchased put them, rather than the brackets

which were assigned to them in the contracts placed at the beginning of the year 1941, how did you proceed? In other words, will you explain, what did you actually do in arriving at the end results shown in this supplement, Respondent's Exhibit 186 for identification?

A. We recast the whole study. That is, we started from the beginning and recast them on the same basis as the original study had been compiled, only moving these customers into the brackets in which their volume placed them.

Q. In referring to these customers, where did you get the accounts? What did you go by in reallocating these so-called off-scale accounts?

A. The original statistics that we had worked up 2545 from the previous study.

Q. But what was the guide in determining which was an off-scale account and which wasn't?

A. The number of customers and the names of the customers were arrived at in working with Mr. Warmack of the Federal Trade Commission, exceptions that they had taken at the time of the previous hearing.

Q. You mean the ones that were referred to in Mr. Haycraft's examination of Mr. Reese at the last hearing?

A. That is right, that is off-scale customers.

Q. In preparing this supplement, did you adhere to the same accounting procedures and methods that you filed in your original report?

A. Yes, sir.

Q. Did you introduce any changes in your principles of allocation or distribution of costs?

A. No, sir. They were exactly the same as in the original study.

Mr. Gilpatric: Respondent offers in evidence the supplement of correspondence study as described by Mr. Johannsen, as Respondent's Exhibit 186.

Trial Examiner Sheppard: Do you want to have time to study that, Mr. Haycraft?

Mr. Gilpatric: I should add, Major, that we sent copies of this about a month ago to Mr. Haycraft or 2546 Mr. Warmack.

Mr. Haycraft: Not to me.

Trial Examiner Sheppard: You can have time to study it.

Mr. Haycraft: I haven't had time to study this, but Mr. Warmack has, and it is my understanding that the

exhibit does make the changes it purports to make. However, I do have the same objections to this exhibit that I had to the previous exhibit from a standpoint of it being a study in retrospect, if you recall the time Exhibit 170 was offered in evidence, that the different objections were raised. One of the objections is that while it may be good to be made at this time and probably is in accordance with the criticism that was made by Mr. Warmack, the other objection still stands, that is to say, as to the fact that it was in retrospect and it could not be based upon actual sales, current records, and it does contain, as I understand from the previous examination of this witness and other witnesses previously, that there are certain necessary estimates that had to be made because of the fact that it was made in retrospect, and for that reason I still have that objection to the exhibit.

Mr. Gilpatric: Do I understand, Mr. Haycraft, then, that your objection as to this is, in a word, because it was made after the event, rather than contemporaneously with the transactions.

Mr. Haycraft: Yes, I make that objection at this 2547 time.

Trial Examiner Sheppard: The Respondent's Exhibit 186 is admitted into the record.

(The paper refered to, heretofore marked for identification RESPONDENT'S EXHIBIT 186, was received in evidence.)

Mr. Gilpatric: I have no further questions.

Trial Examiner Sheppard: Now, Mr. Hacraft, if you don't want to examine now, I am perfectly willing to give you time to look over that tonight and have this gentleman come back in the morning when you will be more prepared.

Mr. Haycraft: I think I could ask a few questions now at the present time and then I would like, Mr. Examiner, to reserve the right to cross-examine further tomorrow.

Trial Examiner Sheppard: All right. Go as far as you can with it.

Mr. Haycraft: In other words, will you be able to have him available tomorrow?

Mr. Freeman: Well, he has a reservation on the plane this evening, but it is up to you and the Major when you will be through with him. I guess he can stay if he has to. He would like to be released.

Trial Examiner Sheppard: Probably if some other man —can one of these gentlemen here—

Mr. Freeman: Mr. Reese is here.

2548 Trial Examiner Sheppard: Mr. Reese, yes. He may be able to give you what information you want and we will excuse this gentleman.

Mr. Gilpatric: I might make this statement, that any of the working papers or any of the data which is behind this Respondent's Exhibit 186 is fully available in the future as it has been in the past to the Commission, and it can always be examined and copies taken.

Cross-Examination by Mr. Haycraft.

Q. Well, I would like first of all to ask Mr. Johannsen if he can testify as to the difference that it made, or—put it this way. Are the figures that were used as the basis for the computations in 186 exactly the same as were used in 170? I notice here in the first page of this exhibit there is a reference to the total distribution costs on a revised basis from $166,182.62, instead of $168,024.94, allocated to the various quantity price brackets for oil burner manufacturers in the original report. Now, will you explain why there is that difference in your basic figure?

A. Well, that difference represents the amount which applied to those customers which have been eliminated from the portion applied to oil burners which was used in that capacity in our original study.

2549 Q. Now, on the first page there are certain results of your reallocation, summarized. Now, what is the figure that would correspond to that in the Exhibit 170? (Handing document to witness.)

Mr. Gilpatric: Will it help you if you follow my copy in this?

Trial Examiner Sheppard: Yes, sir.

The Witness: That is shown on the bottom of Page 8 in the original.

By Mr. Haycraft:

Q. Then I take it that the result of your reallocation made a change in the fourth column, Distribution Cost, the fifth column, Cost Differential, and the last column, Excess of Reduction in Cost over Reduction in Price.

A. That is right.

Q. Then according to the Exhibit 186, or the new exhibit, the Bracket Classification 3-A, there is no excess re-

duction in cost over reduction in price, but rather there is the contrary, is that right?

A. The excess there is two cents in the red, which would be that there is no excess.

Q. So that it does change the results of your 3-A classification from a fourteen cent excess to a two cent deficit?

A. That is right.

Q. On that 3-A?

2550 A. That is right.

Q. The 3 remains the same, is that right, that classification?

A. The 3 remains the same, thirty-four cents.

Q. And your 2 changed from $2.18 to $1.42 excess, is that right?

A. That is right.

Q. Now, that discount, that discount is one as compared with the list price. Do you notice it goes from $1.38 up to $4.20?

A. That is right.

Mr. Gilpatric: Bracket 1.

By Mr. Haycraft:

Q. Is that correct?

A. I didn't understand your question.

Q. Your excess on your discount—strike that. Your excess on Bracket 1, classification of change from $1.38 to $4.20.

A. That is right.

Q. Is that due to the fact that the comparison is made with your Bracket 1 price with the discount price and that Bracket 1 cost and the discount cost?

A. Yes, that is right.

Q. In other words, that is due to the fact that your cost of distribution on your discount—or is that your list

2551 price when you say discount? Is that your list price?

A. That is the first price bracket.

Q. From $9.40 up to $11.22, in other words, your cost of distribution?

A. The distribution cost has changed from $9.40 to $11.22 in the discount bracket.

Q. That is the first bracket?

A. That is the first braeket.

Q. Then your cost differential was changed from what, $4.28 to $7.10?

A. $4.28 to $7.10.

Q. And that accounts for your changed excess in that column?

A. That is right.

Q. Now, in your own language will you explain, the same language that we can all understand, will you explain that increase in excess as to that discount bracket, how you accounted for it and the result of your recasting?

A. Well, in recasting, there was a movement of customers from the Bracket 1 to the discount bracket and from other brackets to the discount bracket, and some from one bracket upward, and as a result that affected all the factors that were used in the distribution of these expenses, and this is the result, as evidenced in the supplemental report, that net result.

2552 Q. Now, will you explain just what steps you took in recasting your report to determine which bracket an account would go in as a result of your recasting? Just what steps would you take?

A. We analyzed all of the customers that were used in the previous study and made a review with the accountants of the Federal Trade Commission and decided that we were in accord on what brackets they were to fall in, based on volume, unit volume. After the customer had been placed in this bracket according to volume, all the factors which were used in this study were also placed in that bracket. By factors, there is invoices, billing lines, total invoice lines, salesmen's calls and what other factors were used.

Q. Now, turning to your first exhibit, Exhibit A—

A. Which is Exhibit A? Is that the supplement?

Q. Yes. I will ask you to indicate the corresponding page in Respondent's Exhibit 170. Exhibit A is a part of Exhibit 186. Now, what is the corresponding exhibit in 170?

A. That is also Exhibit A on page six.

Q. Now, then, turning to Exhibit B of your supplement, Respondent's Exhibit 186, will you indicate which page or exhibit that it corresponds to in Exhibit 170?

A. That is Exhibit B on page seven.

Q. Now, at the top of Exhibit B in Exhibit 186, under manufacturing cost of products sold by price brackets, I notice you have opposite the first line, manufacturing

2553 cost of products sold, amounts that differ from those indicated in Exhibit B of the original Exhibit, 170. I will ask you where those figures came from, that is, what is the basis of the new figures on the new exhibit?

A. In the original report under manufacturing costs applicable to products sold to oil burner manufacturers, were included those customers that I mentioned just a few moments ago. In our supplement those costs have been moved into the preceding column, which is manufacturing costs applicable to products sold to other customers.

Q. All right. Now, then, go on and explain your explanation of the other figures following on manufacturing cost of products sold by price brackets. There you started with discount and number 1, 2, 3 and 3-A and so on.

A. Well, the change in the distribution of the manufacturing costs applicable to products sold to oil burner manufacturers is included in the following columns, that is under Discount 1, 2, 3, 3-A; 4, 4-A, 5. Now, in placing these customers representing this cost of products sold into different brackets, the cost of products sold follow those customers, making a change in the distribution of those costs.

Q. And are these figures, do these figures that you have on that exhibit correspond to the figures suggested by Mr. Warmack when he testified in criticism of the original Exhibit 170?

2554 A. Yes, they do.

Q. Now, then, following on down the exhibit, the distribution costs which you have set forth in Lines 2, 3, 4, 5, 6 and 7, what explanation do you have of the different figures in those columns in the new exhibit as compared with the old one?

A. Well, the same thing applies there. In the original report the amounts applied to cost differentials affecting oil burner manufacturers represented amounts including the customers that I mentioned heretofore, and in making changes on that, affected the expenses included in the distribution cost headings, that is, lines 3, 4, 5, 6.

Q. In other words, those two columns not applied and applied to cost differentials, you made the changes which account for changes in the amounts represented in those columns?

A. That is right.

Q. And then over in the discount, under the price brackets there you have your distribution costs set forth there. Is your explanation of the changes there the same as you made with respect to the manufacturing costs, or does it vary?

A. That is true. It is the same as it was in the manufacturing costs.

Q. Well, then, you mean by that that you applied the different factors that were applicable to the distribution costs?

2555 A. That is right. The factors on which these distribution costs were distributed over the price brackets were changed as between the brackets, and the recast or the supplement represents the factors used after the customers had been allocated to the brackets in which they had fallen, based on volume only.

Mr. Haycraft: May we have a five minute recess?

Trial Examiner Sheppard: Yes, we will recess for ten minutes.

(A short recess as taken.)

Trial Examiner Sheppard: All right, come to order, gentlemen. We will proceed.

By Mr. Haycraft:

Q. Do you have before you there, Mr. Johannsen, some of the work sheets that you used in making this recast of the old Exhibit 170?

A. Yes, sir.

Q. Will you first identify those work sheets which you used in connection with the preparation of Respondent's Exhibit 170 which were the bases of your recast?

A. Well, I have here a summary of the salesmen's calls showing the total calls, those calls made on other customers, calls made on oil burner manufacturers and the distribution of the calls made on oil burner manufacturing customers over the brackets.

2556 Mr. Haycraft: I ask that sheet be marked Commission's Exhibit No. 214 for identification.

(The paper referred to was marked Commission's Exhibit 214 for identification.)

By Mr. Haycraft:

Q. Now, the one you just identified as 214 is the work sheet used in the preparation of Respondent's Exhibit 170, is that correct?

A. That is right.

Q. Now, what is the corresponding work sheet used in the preparation of Respondent's Exhibit 186, do you have that there?

A. Yes, sir, we also have a summary of the salesmen's calls which is used in compiling the supplement.

Mr. Haycraft: I would like to mark the next exhibit number 215.

(The paper referred to was marked Commission's Exhibit 215 for identification.)

By Mr. Haycraft:

Q. Now, take the next factor. Take the old one first.

A. We have a summary of the billing lines showing the total lines, those on all other customers and those applying to oil burner manufacturers, and the distribution of those applied to oil burner manufacturers over the price brackets.

Mr. Haycraft: I ask that be marked Commission's 2557 Exhibit 216.

(The paper referred to was marked Commission's Exhibit 216 for identification.)

By Mr. Haycraft:

Q. I take it that which you just identified refers to your work sheet in connection with Respondent's Exhibit 170.

A. That is right.

Q. Now, the corresponding work sheet used in the preparation of Respondent's Exhibit 186.

A. Yes, sir. We have a similar summary that was used in compiling the supplement.

Mr. Haycraft: I ask that be marked Commission's Exhibit 217.

Trial Examiner Sheppard: Mark it 217 for identification.

(The paper referred to was marked Commission's Exhibit 217 for identification.)

By Mr. Haycraft:

Q. Now, the next factor that you took into consideration in the work sheet.

A. Summary of the total invoice lines, showing the same columns, total, other customers, oil burner manufacturers and the oil burner manufacturers as distributed on the price brackets.

Mr. Haycraft: I ask that be marked Commission's 2558 Exhibit 218 for identification.

Trial Examiner Sheppard: Let it be so marked.

(The paper referred to was marked Commission's Exhibit 218 for identification.)

By Mr. Haycraft:

Q. That is the one used with the original Exhibit 170?

A. Yes, sir.

Q. Now, will you identify the corresponding work sheet used in the preparation of Respondent's Exhibit 186?

A. A similar schedule was used, a similar summary was used in compiling the supplemental report. I would like to make a correction, if I may, Mr. Haycraft. The Exhibit that is marked Exhibit 217 is a summary of the invoices and not of the billing lines. It is comparable.

Mr. Gilpatric: Off the record.

(Discussion off the record.)

By Mr. Haycraft:

Q. Now, I take it from what you said a moment ago that you made the correction of the exhibit now marked as 217 as the one that corresponds to 216. Now, will you give us the corresponding exhibit to 218, the one you used in the preparation of your original Exhibit 170? Now, I want the one that corresponds to that used in the Respondent's Exhibit 186.

A. Exhibit 218 is a summary of the total invoice lines, and we have a similar—

Q. Well, that is a similar summary of which you just now said should be marked Exhibit 219.

2559 Trial Examiner Sheppard: Mark it 219.

(The paper referred to was marked Commission's Exhibit 219 for identification.)

By Mr. Haycraft:

Q. Now, do you have another summary that was used?

A. We have a summary of the total invoices.

Q. Used in the old exhibit?

A. Used in the old exhibit.

Mr. Haycraft: I ask that be marked Commission's Exhibit 220.

Trial Examiner Sheppard: Let it be marked.

(The paper referred to was marked Commission's Exhibit 220 for identification.)

By Mr. Haycraft:

Q. Now, do you have a corresponding summary used in the preparation of Respondent's Exhibit 186?

A. Yes, sir, we do.

Mr. Haycraft: I will ask that be marked Exhibit 221 for identification.

Trial Examiner Sheppard: Let it be marked.

(The paper referred to was marked Commission's Exhibit 221 for identification.)

By Mr. Haycraft:

Q. Now, are those summaries that you used all summaries that you used in the preparation of the two exhibits?

2560 A. I think they are, sir.

Q. And I take it you are willing to leave those or have them made available so that Mr. Warmack and Mr. Argus can refer to them in their testimony?

A. Yes, sir.

Mr. Haycraft: Off the record.

(Discussion off the record.)

Mr. Haycraft: I am willing, Mr. Examiner, to excuse this witness, providing the work sheets can be left here and some one can identify them. I don't want to call Mr. Warmack, and probably Mr. Argus tomorrow and show the check that was made, if a check has been made, of these various work sheets, and at least we want to lay the foundation for it. I don't know for sure about that, but I do want to have access to them. I don't want to put them to too much inconvenience, but in excusing this witness I would like to have some one that can identify the work sheets and have the work sheets available tomorrow.

Mr. Gilpatric: Well, we can have these work sheets here. We will hold them and produce them. They have been marked by the stenographer. Do you need any more than that?

Mr. Haycraft: I don't think so. I understand those are the ones that we will need. Off the record.

(Discussion off the record.)

Mr. Gilpatric: The respondent will produce at the
2561 request of Mr. Haycraft the work sheets which have been identified as Commission's Exhibits 214 through 221 for identification, and will also furnish photostatic copies of those work sheets to Mr. Haycraft and Mr. Warmack, with appropriate markings to show any red figures, if there are such.

Trial Examiner Sheppard: Is that satisfactory to you, Mr. Haycraft?

Mr. Haycraft: That is right.

Mr. Gilpatric: I would like to ask just one question on redirect, or two questions.

Redirect Examination by Mr. Gilpatric.

Q. Mr. Johannsen, as now recast to reflect putting each of these oil burner manufacturers into brackets where there are actual quantities called for, does the supplement, 186, now meet the criticisms that Mr. Warmack made in his examination, other than the objection which Mr. Haycraft made today that the study was made in retrospect?

A. Yes, it does.

Q. Now, as to that last objection, would it be possible, in your opinion, to make up a report such as this supplement, Respondent's Exhibit 186, based on actual quantities, except after the event? Could you make it up before 1941, in other words?

A. I don't see any way possible that it could be
2562 made up before the minute it actually happened. It was the report of sales, and the calls were actually made. I don't see how we could make it up before 1941.

Q. I am talking about now using the basis of distribution between the brackets, actual quantities.

A. Yes, I understand. We couldn't make it before.

Q. Couldn't you know what the actual sales were for the year 1941?

A. That is right.

Mr. Haycraft: By that, Mr. Johannsen, you don't mean that a study could not have been made in 1941 or 1942 that could have been based on actual current sales figures and costs?

Mr. Freeman: Mr. Haycraft, when you say 1942, are you talking about the 1941 sales or are you talking about sales that remained in 1942?

Mr. Haycraft: 1941 or 1942.

Mr. Freeman: I still don't—

Mr. Haycraft: In other words, there were sales records available in 1941 based upon actual sales, were there not?

The Witness: The same records—the sales, the actual sales, are recorded in our figures now, Mr. Haycraft.

By Mr. Haycraft:

Q. Well, the actual expenses, I mean, of time
2563 studies or time records of the salesmen who sold these products were available in 1941?

A. I don't know whether they were available in 1941 any more than they were available in 1944.

Q. Well, are you sufficiently familiar with the records of Minneapolis-Honeywell Regulator Company to know whether or not they keep records of salesmen's calls in 1945?

A. Yes, they keep records of salesmen's calls.

Q. And the time spent by salesmen in calling on different accounts?

A. No, time spent is not recorded.

Q. But the name of the call is recorded?

A. Yes, sir.

Q. And do you know whether or not that same record was kept in 1941?

A. That record was kept in 1941. That is the record that I was speaking of, sir.

Q. Were there time records available of each salesman for 1941 the time you prepared it, Respondent's Exhibit 170?

A. When you say time records, there were records of the calls that they made.

Q. Well, did those records show the length of time that the salesmen called on the different accounts?

A. No, sir.

Q. And that time was estimated, is that right?

2564 A. That time was weighted after discussion with the salesmen, their supervisors, and taking into consideration the type of customers that they called on, we arrived at what we considered a reasonable weighting of salesmen's calls.

Q. As I understand, there has been no change in the method of preparation of that feature of it in your new exhibit.

A. No, sir, there has not.

Q. Well, how about the records of the supervisory personnel? Did you base that on the time records, or was that estimated? It is on page 22 of the original exhibit.

Mr. Gilpatric: What exhibit are you referring to now, Mr. Haycraft?

Mr. Haycraft: 170.

Mr. Gilpatric: Well, if we go into all that, Major, maybe we don't have any time records.

Mr. Haycraft: You opened it up on your redirect examination as to this particular point.

Mr. Gilpatric: No, we are talking about actual quan-

tities of control purchases, not expenses at all. We admit we have no time records. We don't keep a stop watch on salesmen. There is no basis for that, either 170 or 186.

Trial Examiner Sheppard: That was estimated in 170 just like it was in the other, wasn't it?

Mr. Haycraft: 186, you mean.

The Witness: That is right.

2565 Trial Examiner Sheppard: That is my understanding of it.

The Witness: That is right.

Mr. Haycraft: Off the record.

(Discussion off the record.)

Mr. Haycraft: Will you read my last question?

(The reporter read the question as follows:

"Well, how about the records of the supervisory personnel? Did you base that on the time records, or was that estimated? It is on page 22 of the original exhibit.")

Mr. Freeman: I say counsel for Honeywell has already stated on the record that neither the salesmen's time nor the supervisors' time was ever timed by the use of a stop watch or any other time element.

By Mr. Haycraft:

Q. Referring to page 22 of the original Exhibit 170, I will ask the witness whether or not it would have been necessary to have made the estimates that were made there if the exhibit had been prepared in 1941, or the close of 1941.

Mr. Freeman: What do you mean by the close of 1941, Mr. Haycraft?

Mr. Haycraft: Before the year 1942.

In other words, Mr. Examiner, the position that we take on this is that the law was passed in 1936. It con-

2566 templated that studies of this kind would be made currently in order to justify differences in cost of distribution and cost of manufacturing and so on with respect to the commodities. Now, our position is that an exhibit prepared many years after cannot meet the requirements of the law, that it must necessarily be based on estimate, not upon actual costs.

Now, the question that I am asking from this witness is whether or not if this exhibit had been prepared at the time, that is, in 1941, based upon current records in the offices of the respondent, it would have been necessary to have made the estimates that were made.

Trial Examiner Sheppard: Can you answer that, Mr. Witness?

The Witness: Well, I am sure that I don't quite understand Mr. Haycraft's question.

By Mr. Haycraft:

Q. Well, here on page 22, Mr. Johannsen, it says the division of time was ascertained by direct consultation of respective individuals and by correspondence when direct consultation was impossible. Division of time was determined by review of the division sales manager, then there was an apportionment made of oil burner manufacturers on the basis of the time devoted to each upon this estimate. Then you say the resultant total ap-
2567 portionment representing the approximate amount of home office heating control and so on. Now, the question is whether those figures couldn't have been gotten exactly or reasonably exactly if it had been obtained at the time the work was done.

A. Well, I think, as Mr. Gilpatric said, that they do not keep stop watches on these executives' time, so I don't know that it would have been available then except through the same method that we have used here.

Mr. Haycraft: That is all, Mr. Examiner.

Trial Examiner Sheppard: Anything else, Mr. Gilpatric?

Mr. Gilpatric: Not from this witness.

Trial Examiner Sheppard: You are excused, then, Mr. Johannsen.

(Witness excused.)

Trial Examiner Sheppard: Anything else you gentlemen want this afternoon? Otherwise, we will go over to ten o'clock tomorrow morning.

Mr. Gilpatric: Well, we can.

Mr. Freeman: We have got another witness here. We might just as well keep on going.

Trial Examiner Sheppard: Yes.

Mr. Gilpatric: I want to recall Mr. Lockrae.

Trial Examiner Sheppard: Show Mr. Lockrae has been previously sworn and is on the stand at the request
2568 of the respondent.

A. H. LOCKRAE was thereupon called as a surrebuttal witness for the Respondent and, having been previously duly sworn, testified as follows:

Direct Examination by Mr. Gilpatric.

Q. Mr. Lockrae, are you familiar with the list of the 77 so-called off-scale accounts which were brought out during the testimony at the hearings in Minneapolis on January 9th and 10th?

A. I am.

Q. Are you prepared to explain for the record the considerations which in each case accounted for the fact that those customers were, to use that phrase, off-scale?

A. Yes, sir.

Q. Now, I will go down the list of accounts as they appear in the record at that hearing and the first I will ask you is whether you have any preliminary general explanation or statement to make with regard to them.

A. Well, before starting an individual explanation of the so-called off-scale accounts mentioned by Mr. Warmack in his testimony in the last hearing, I think it would be helpful to you, Major, if I made this preliminary statement.

As my testimony will develop, more than half of
2569 the 77 off-scale accounts mentioned by Mr. Warmack represented instances where, on the basis of the information which we had at hand at the time, we issued our 1941 contract; the quantities on which the price brackets were based were fully justified, either by the oil burner manufacturer in past performances, or by his future prospects.

As I have testified before, and has been brought out by what other control manufacturers have said here, it has been the practice of our company and of the control industry generally over a period of years to issue its contracts for a particular year either during the preceding December or in the early part of January of that year.

This practice, which was followed in 1941 as in prior years, has not necessarily been one of our choosing. It is essential that the oil burner manufacturers know what the prices of their components are to be before they can figure their costs and put out their own price lists and selling literature for the year. We, like other control

manufacturers, have therefore been confronted with the necessity of telling our customers early in the year what they will have to pay for controls, and that decision on our part has to be made on the basis of foresight.

As has already been explained on the record, if the manufacturer exceeds his contract quantity in the course of a year and earns a better price, we are compelled
2570 not only by competition, but in fairness to our customer to give him the benefit of his larger volume through a retroactive credit. On the other hand, it would obviously be impossible for us or any other control manufacturer at the end of a year to go back and try to collect higher prices on controls furnished months before because a particular customer did not have as good a year as he expected or as he had had the year previous.

As will be seen from the individual explanations which I am going to give, each account is analyzed on its own merits and in the light of its own facts at the time we issue our contracts and determine our bracket prices for the ensuing year. Nevertheless, there sometimes exists throughout the industry a condition which is so general that it affects many of the oil burner manufacturers. That was true in 1941 when it became evident, in the late spring of 1941, that there were going to be governmental restrictions on us of fuel oil. The effect of this condition on the oil burner industry began to be discussed in the trade papers along about June, with the actual impact on sales coming later.

The publicity over the fuel oil situation, the prospect of rationing and planning, the discontinuance of the manufacturing of oil burners, had the combined result of reducing the volume of many oil burner manufacturing
2571 sales below their expectations for the year 1941, and was undoubtedly a contributing factor in many of them not purchasing the quantity of controls they had agreed to take, a circumstance which we had no way of predicting at the time we issued our 1941 contracts at the end of 1940.

Q. Well, now, the first account that was brought out by Mr. Haycraft's examination of Mr. Reese was the company known as Master Oil Burner Company, which was originally shown as a discount bracket. Will you explain why that was treated that way?

A. Master Oil Burner started in 1941 with a discount contract, and up until May 1st of that year had purchased

just one instrument. Then they secured orders for oil burners for several Army camps in the Northwest. Our Seattle office requested a Bracket 1 contract, which we prepared and submitted to them on April 25, 1941. This contract was executed on May 5th, was returned to our home office, and we have a letter in our files written by our Mr. Neby of our sales department to Mr. Scheimo of our order department, advising the new Bracket 1 contract superseded the discount contract previously signed.

Master Oil Burner Company actually received our Bracket 1 prices throughout the year.

Trial Examiner Sheppard: All right. Take up the next one.

2572 Mr. Gilpatric: Just for the record, now, I want to state the references to the testimony previously on Master Oil Burner Company was at page 2360 and 2362. The next one is Jackson Oil Burner Company, referred to on page 2363.

By Mr. Gilpatric:

Q. What have you got to say about that?

A. Jackson Oil Burner Company had a discount contract in 1940 and started off with a discount contract in 1941. Our records show they purchased 198 instruments in 1941. Our records show that our order department was instructed to issue a retroactive credit by our Mr. Neby on November 26, 1941.

Trial Examiner Sheppard: He was in a discount?

The Witness: He earned a Bracket 1 contract and got the benefit of Bracket 1 prices.

By Mr. Gilpatric:

Q. So that he really was a Bracket 1 account?

A. He was a Bracket 1 account for 1941.

Trial Examiner Sheppard: Go ahead.

By Mr. Gilpatric:

Q. Now, the next account operated was B & W Oil Burner Service Company, mentioned on page 2366 of the record, Bracket 1.

A. Well, this company succeeded the Berryman Oil Burner Company, and we give them a Bracket 1 con-
2573 tract April 1, 1940, calling for 150 units. Incidentally, the Bracket 1 price was $18.10 a set. In the last nine months of 1940, B & W purchased 85 instruments,

and although they did not fulfill their contract, yet we gave them a Bracket 1 contract in 1941 because Mercoid Corporation was still our competition, as they had been at the Berryman Oil Burner Company. It was felt we could not get any business from B & W if we increased their set price.

Now, then, the highest manufacturer's price given by Mercoid in 1940 that we knew of was to the Fairfield Oil Heating Company, and reported by our Mr. Patrick on June 6, 1940. This price was $15.25 a set. It was quite reasonable to assume that our price to B & W in 1941 of $17.35 a set would not be as low as prices which would be quoted by Mercoid.

Q. The next account mentioned was Braden Everedy. That was referred to before on page 2367 of the record. Now, the next one was Carlson Brothers Tool & Machine Company, mentioned on page 2367 of the record.

A. In 1939 we had a Bracket 1 contract with this company calling for 150 instruments, and their purchases amounted to 195 that year. We gave them another Bracket 1 contract in 1940 calling for 150 instruments, and they purchased 119. Now, then, the total purchases for the two years amounted to 314 devices which would make 2574 their average purchase for the two years 157 instruments. We were, therefore, not hesitant to give them another Bracket 1 contract in 1941 calling for 150 instruments.

Q. C. F. M. Manufacturing Corporation, referred to on page 2368 of the record.

A. Our first manufacturer's contract with this company was executed in September of 1941 and they purchased 93 instruments in the remaining three and one-half months of that year. Our Bracket 1 contract calls for 150 units, and it would seem rather obvious if they could purchase 93 instruments in three and one-half months that they would have no difficulty whatsoever in fulfilling their contract had it been in force for a full year's time.

Q. Chalmers Oil Burner Company, page 2368 of the record.

A. Chalmers were given a Bracket 1 contract in 1941 calling for 150 instruments, and their direct purchases totaled 36. However, we knew Chalmers were purchasing burners equipped with our controls from the Aldrich Company in sufficient volume to make their combined usage of our controls in excess of 150 instruments per year.

Q. Is that the type of transaction that you referred to as a dual transaction?

A. Yes, sir.

Q. Columbus Metal Products, Incorporated, page 2369 of the record.

2575 A. This company had a Bracket 1 contract in 1939 calling for 150 instruments, and they purchased 256. In 1940 they were given a Bracket 1 contract calling for 150 instruments and they purchased 206. Having earned their contract the previous year, in fact, the previous two years, we naturally had no reluctance in giving them a Bracket 1 contract in 1941. Their purchases did fall off that year, however, to 139 devices.

Q. That was the case we had two years' experience with?

A. That is right.

Q. Drexel Manufacturing Company. That is page 2369.

A. Our first contract with this account was executed in 1941, but our records show that they did not purchase anything from us after November 1st of that year, and we knew they were out of business as of March 5, 1942. Whether their burner activities ceased because of the oil scare or if they were devoting their efforts to the war industry, we just don't know. We do know that they did business with us just a few months and then actually went out of the oil burner business a few months after the beginning of 1942.

Q. Goodrich Oil Burner Manufacturing Corporation, page 2369 of the record.

A. This company had standardized on Mercoid controls for a great many years, and used ours as optional equipment and sold them to their dealers at a premium

2576 price. In our 1940 negotiations it was decided that we would lower our prices in hopes that if we came closer to Mercoid's prices we would get a larger share of the business. The price of $17.25 a set was given Goodrich in 1940, which was still one dollar higher than our knowledge of Mercoid's prices in 1938. At the end of the year we found Goodrich had purchased only 343 controls from us, and in view of this record we put them on a Bracket 1 status in 1941, calling for 150 instruments.

Q. That is the case where Mr. Johnson testified in Philadelphia in this proceeding?

A. Yes, sir.

Q. Greenwood Engineering Company, page 2369.

A. We started this company in 1940 with a discount contract. They purchased 155 instruments, and were given a retroactive credit because these purchases exceeded the minimum of our first bracket, which called for 150 instruments. In view of their 1940 purchase record, we naturally gave them a Bracket 1 contract for 1941. Their actual purchases that year fell off to 133 instruments.

Q. So they were about ten per cent shy?

A. That is right.

Q. Hyle Oil Burner Company, page 2370.

A. This company were given a Bracket 1 contract in 1940 calling for 150 units, and actually bought 238. On the basis of their 1940 record we gave them a Bracket
2577 1 contract for 1941 calling for 150 instruments.

Q. Milwaukee Oil Burner Corporation, page 2370.

A. This company was given a Bracket 1 contract in 1940 calling for 150 instruments, and they purchased 135. Because their purchases were within ten per cent of the contract quantity, and in view of the much better business outlook at the beginning of 1941, we thought we were justified in again extending Bracket 1 prices for that year.

Q. This was again a case where you placed your contract at the end of 1940 or early in 1941?

A. Yes, sir.

Q. Oil Burner Exchange, Incorporated, page 2370 of the record.

A. Their company had a Bracket 1 contract in 1940 and bought 187 instruments. On the basis of their record in 1940 we gave them a Bracket 1 contract for 1941.

Q. Quiet Heet Oil Burner Company of Brooklyn, New York, page 2370 of the record.

A. This company was given a Bracket 1 contract in 1940 calling for 150 instruments, and they actually purchased 679. In view of their 1940 purchase record we naturally gave them a Bracket 1 contract calling for 150 instruments in 1941.

Q. R-S Products Corporation, page 2371 of the record.

A. We gave this company a Bracket 1 contract in
2578 1940 calling for 150 instruments, and they purchased 258. In view of their previous year's purchase record, we gave them a Bracket 1 contract in 1941 calling for 150 instruments.

Q. C. L. Rayfield Company, page 2371 of the record.

A. This company was manufacturing industrial oil burners primarily in 1941, but they had designed a burner which they expected to put into production during that year. They did not secure underwriter's approval on the new burner until November of 1941, and then after Pearl Harbor they started on war production. We gave them a Bracket 1 contract in 1941 calling for 150 instruments, and our record shows they actually purchased 141, only failing to fulfill the contract quantity by nine devices. As outlined in our Mr. Steyskal's report of January—

Mr. Hayeraft: I object, Mr. Examiner, to reading those records. This witness can testify as to what he did and what factors he may have taken into consideration, but I submit that he should not read the reports given to him by those who are not on the witness stand.

Mr. Gilpatric: Well, Mr. Examiner, may I make this explanation, that—

Mr. Haycraft: The witness can give his reasons, but should not be allowed to go in and quote from reasons given by third parties.

Mr. Gilpatric: Well, these reports were addressed
2579 to Mr. Lockrae, and he is simply giving the basis for his action at that time.

Trial Examiner Sheppard: I think it just makes a connected story.

Mr. Gilpatric: We don't intend to use those as competent evidence but simply showing the basis for this man's conduct of the business.

Trial Examiner Sheppard: All right. I understand. I will remember that when I go over the record.

The Witness: Well, this was interesting. That is why I wanted to read it. As outlined in our Mr. Steyskal's report of January 23, 1941, the Rayfield burner was at underwriter's laboratories going through both. M. H. and Mercoid control equipment.

Mr. Haycraft: I move to strike that, Mr. Examiner.

Trial Examiner Sheppard: That can go out. That last part can go out.

By Mr. Gilpatric:

Q. Did you have any knowledge of that yourself, Mr. Lockrae?

A. Not other than the report, although the underwriter's records are available here in Chicago and can be gotten in half an hour.

Q. Well, all right. Let me ask one further question. Whose are those reports, such as the one just referred to, received by—by you in the ordinary course of your
2580 business as in charge of the heating control sales?

A. Yes, sir. This is one of the customary call reports that our salesmen render after making a call on a manufacturer.

Q. Are they part of your regular records?

A. They are a part of our regular records.

Trial Examiner Sheppard: That is what I have been expecting, that you have those in your files at home in reference to each one of those.

By Mr. Gilpatric:

Q. In fact, you have them here?

A. As a matter of fact, I have photostats here.

Trial Examiner Sheppard: All right, go ahead.

By Mr. Gilpatric:

Q. Red Wing Oil Burner Company, referred to on page 2371 of the record.

A. These people had a bracket 1 contract in 1940 calling for 150 instruments, and they purchased 231. Obviously we gave them another Bracket 1 contract calling for 150 instruments in 1941.

Q. Swirling Heat, Incorporated, page 2372 of the record.

A. In 1940 this company was given a Bracket 2 contract calling for 1050 instruments, but they only purchased 122. In view of this 1940 record, we placed them in Bracket 1 in 1941, calling for 150 instruments.

Trial Examiner Sheppard: In other words, you
2581 went back from two to one?

The Witness: That is right. In our Mr. Bell's report—he called on this company in December 26, 1940—he stated this customer felt we were justified in placing them back in the first bracket in 1941 instead of giving them the second bracket prices.

By Mr. Gilpatric:

Q. The next account is Synchro Flame Burner Corporation, page 2372 of the record.

A. We gave this customer a Bracket 1 contract for 150 units in 1940, and they purchased 173. We naturally gave them a Bracket 1 contract again in 1941.

Q. For 150?

A. That is right.

Q. Wayland Machine Company, mentioned on page 2372 of the record.

A. This company had a Bracket 1 contract in 1940 calling for 150 instruments, and it was executed on April 2nd of that year, and the remaining nine months of the year they purchased 275 instruments. On the basis of their 1940 purchase record for nine months, we naturally gave them another Bracket 1 contract in 1941.

Q. Harry C. Weiskettel Company, page 2372 of the record.

A. This company started in 1940 with a discount contract, and their purchases were sufficient to warrant
2582 a retroactive credit.

Triel Examiner Sheppard: In other words, they exceeded 149?

The Witness: That is right. Our Mr. Swanson's letter to our order department on October 18, 1940, confirms this, and having earned the required quantity in 1940, we gave them another Bracket 1 contract in 1941.

By Mr. Gilpatric:

Q. Columbia Boiler Company, page 2373 of the record.

A. These people signed a Bracket 1 contract calling for 150 instruments on August 22, 1941. From that time until the end of the year, approximately five months, they actually purchased 121 units. It seems rather obvious if they had been purchasing from us throughout the entire year that they would have equalled or exceeded the contract quantity.

Q. Kienzle—

Mr. Haycraft: Mr. Examiner, I have made these objections before, but I think it should be made, and I don't want to have to indicate that I am not making the objections when they should be made. This witness on numerous times, in giving his explanation, has advanced argument which should not be a part of his testimony, "It seems obvious," or something of that kind. Now, as I understand it, he is to state actually what happened, rather than what might have happened or what should have hap-
2583 pened or what could have happened.

Mr. Freeman: Well, he is not a lawyer. He is trying to tell a running story here of what actually went through his mind or his makeup in extending to companies

in 1941 a particular bracket, and we are not arguing this case, Mr. Haycraft.

Mr. Haycraft: The witness is arguing the case, and that is what am objecting to. I want the last answer read, and I move to strike that portion of it beginning, "It seems obvious."

Trial Examiner Sheppard: Go back there and see.

Mr. Freeman: I think he is stating that as a fact.

Trial Examiner Sheppard: I don't object to your telling me what your records show, but if there is anything outside of that, don't comment on it. In other words, let me have what you have there that your records show.

The Witness: Comments that I have made anywhere, Major, have been simply those of a logical business man who handles five or six hundred of these transactions in the course of a year. They simply express my thinking in terms of logic as any business man would naturally think in analyzing a problem like this. If that is objectionable, why, that is one thing. If it isn't I do think it brings out my reasoning and my responsibility in the handling of these various transactions.

2584 Mr. Haycraft: I will ask that the last answer be read, and you will see what I mean.

Trial Examiner Sheppard: All right, go back and read the last answer.

(The reporter read the answer as follows:

"These people signed a Bracket 1 contract calling for 150 instruments on August 22, 1941. From that time until the end of the year, approximately five months, they actually purchased 121 units. It seems rather obvious if they had been purchasing from us throughout the entire year that they would have equalled or exceeded the contract quantity.")

Mr. Haycraft: That is purely argument.

Trial Examiner Sheppard: Yes.

Mr. Freeman: Major, would you rather have us say—which we can do in order to bring these facts out—that having purchased 121 units in five months, that would be exactly 24 units per month or 288 units in a year, and 288 units is far in excess of 150. Now, we can ask fifteen questions and bring that out. All this witness has said, having purchased 121 instruments in five months, had they purchased for the full year, then he uses the word, "It is obvious." Now, I think he is a layman. He is not a lawyer, but if you would rather have it in small questions,

we can bring it out, and had this customer operated
2585 for a full year this customer would have bought 288 units.

Mr. Haycraft: That is a matter of argument which counsel may argue to the Commission, but he certainly has no business in bringing it out from this witness. I really think it is a small matter.

Mr. Freeman: I do, too. We are not working before a jury here.

Trial Examiner Sheppard: What I want to do is get the entire picture. That is all I want. I think we used fifteen pages of the record right there in that little talk.

Mr. Haycraft: I move to strike that comment, that part of the answer, Mr. Examiner, that I called your attention to, and ask that the witness be instructed not to give matters of opinion of that kind, or argument.

Trial Examiner Sheppard: Well, I will let that stand this time, but don't do it any more, Mr. Witness. Go ahead. Just give us the record that you have without comment. All right.

By Mr. Gilpatric:

Q. The next account is Kienzle & Merrick, mentioned on page 2373 of the record.

A. We started to do business with this company on May 20, 1940. They had a Bracket 1 contract calling for 150 instruments, and they actually purchased 124.

Q. At what rate per month is that, Mr. Lockrae?
2586 A. That would be approximately at the rate of ten per month.

Trial Examiner Sheppard: Now, that would—

Mr. Gilpatric: Wait a minute—

The Witness: I beg your pardon. I was thinking that for the year, they actually purchased an average of ten per month for the year, considering the entire year, but their contract was signed on May 20th, so that would be about 15 units per month average.

By Mr. Gilpatric:

Q. How much is 15 times—

Mr. Haycraft: I object to that, Mr. Examiner. The Commissioner can certainly multiply.

Mr. Gilpatric: I think Mr. Haycraft's objection goes to the weight of the evidence and not to what we are trying to get as a running account here that tells a story, and why, when he had to decide what bracket into which

this account should be put, he put them into Bracket 1, and if it is plain to the Examiner without elaboration, we will let it go.

Trial Examiner Sheppard: I think I understand it. In other words, this particular account didn't come up to the requirements, and you gentlemen wouldn't feel justified in putting him into No. 1 again.

Mr. Freeman: He did come up, your Honor. The customer only owned it for a period of eight months, and during the eight months' period, purchased 124 units,
2587 which is far in excess, if you prorate 150, which is Bracket 1 quantity, in 12 months he should have purchased on the basis of about twelve and a half instruments a month, but during—

Trial Examiner Sheppard: If he had run that time.

Mr. Gilpatric: But he had a full twelve months.

Mr. Freeman: He started in May of 1940, and obviously when we are executing figures here for 1940, there is only eight months left, and this account bought in excess of the quantity prorated for the eight months' period.

Mr. Haycraft: Isn't that all a matter of argument? That is what I am contending.

Trial Examiner Sheppard: Well, a matter of explanation, anyhow. We all would feel justified, then, in giving him a No. 1 account.

The Witness: Yes, sir.

Trial Examiner Sheppard: On a showing of eight months.

The Witness: What would that customer say to me if I didn't do that? His argument would be, "Good heavens, in eight months I bought 124 instruments. You have got to give me your 150 quantity."

Trial Examiner Sheppard: I get your point.

By Mr. Gilpatric:

Q. The next account is Mechanical Products Company, referred to on page 2373 of the record.

2588 A. We gave these people Bracket 1 contract in 1941 calling for 150 instruments, and they actually purchased 129. However, as substantiated by our Mr. Farnes' report of September 27, 1941, this company was devoting 75 per cent of its effort to the manufacture of airplane parts for the war effort. The report further states we were getting all of this company's business and it should increase when his business resumed.

Mr. Haycraft: I move to strike the reference to their report.

Trial Examiner Sheppard: I think I will let it go on in, gentlemen, so we can have the connected account. Just go ahead in the way that you have been going. I think it is too small a matter.

By Mr. Gilpatric:

Q. Scholz & Stalder Company, page 2373, also, of the record.

A. We gave this company a Bracket 1 contract in 1939 calling for 150 instruments, and they purchased 179. They also had a Bracket 1 contract in 1940 calling for 150 instruments, and they purchased 139 because their two years previous purchase record averaged 159 instruments per year, so we again placed them in Bracket 1 in 1941.

Q. Koalamatic Combustion Company, page 2374 of the record.

A. In 1939 this company was given a discount contract, and they purchased 219 instruments. This gave them a retroactive credit and placed them in Bracket 1 for the 2589 year 1940. In 1940 they purchased 110 devices, and as stated, they purchased 219 instruments in 1939, or a total of 329 devices for the two years. In view of the fact that the two year average was 164 instruments, we gave them a Bracket 1 contract again in 1941.

Q. Pacific Automatic Heating Company, page 2374 of the record.

A. Prior to our extending the 1941 contract, our Seattle branch reports that they investigated the fire department record of the number of oil burner installations made within the city limits in Seattle, and it revealed that Pacific had installed 138 burners in 1940 within the city limits. They were also conducting an outside business through dealers in other localities of which there was no contract. If they were to sell 138 burners in a year, the three instruments to a burner, this would obviously be a greater quantity than would be required to justify a Bracket 1 contract.

Mr. Haycraft: I move to strike that again, Mr. Examiner. As I understand, the witness is supposed to be testifying as to what the sales were in previous years, and so on, and justification. Now, this is a matter which is going beyond that, and he is giving some argument not based upon his own experience, but on something that this

company may have done and could have done in another field.

Mr. Gilpatric: He is giving his reasoning and why
2590 he gave this account a lower price than it might otherwise have gotten.

Trial Examiner Sheppard: I think so, gentlemen. I am going to let you give that explanation. I will give the value of what I think it is worth. I think you have a right to give me the explanation that you have for putting these men in various accounts.

Mr. Gilpatric: He may have been wrong. He may have made a mistake, Mr. Examiner, but that is what his thinking was, and why he did it.

By Mr. Gilpatric:

Q. The next company is Liberty Airflo—

Trial Examiner Sheppard: I don't think you finished your explanation.

The Witness: Would you read the last?

(The reporter read the answer as follows:

"Prior to our extending the 1941 contract, our Seattle branch reports that they investigated the fire department record of the number of oil burner installations made within the city limits in Seattle, and it revealed that Pacific had installed 138 burners in 1940 within the city limits. They were also conducting an outside business through dealers in other localities of which there was no
contract. If they were to sell 138 burners in a year,
2591 the three instruments to a burner, this would obviously be a greater quantity than would be required to justify a Bracket 1 contract.")

Trial Examiner Sheppard: Does that finish it?

The Witness: Yes.

Trial Examiner Sheppard: All right. Take up the next one.

By Mr. Gilpatric:

Q. Liberty Airflo Burners, Incorporated, mentioned on page 2374 of the record.

A. This company had a Bracket 1 contract in 1940 calling for 150 units, and they actually purchased 759. They were given a Bracket 1 contract for 1941, but it is interesting to note that they went out of business in May of that year, according to Mr. Neby's memorandum to our Mr. Scheimo of June 3, 1941.

Q. Plymouth Engineering Works, Incorporated, page 2374 of the record.

A. This company took over the National Oil Burner Company of Whitman, Massachusetts, late in 1940 or early in 1941. During 1940 we sold National 534 instruments under a Bracket 1 contract calling for 150 or more units. Logically, when Plymouth Engineering Company offered their business, we gave Plymouth a Bracket 1 contract in 1941 calling for 150 instruments. We were informed that Plymouth had gone out of business the fore part of September in 1941, as outlined in our Mr. Neby's
2592 letter of September 4th to Mr. Hoyt of our Boston office, and by Mr. Neby's letter to our order department of September 16, 1941.

Q. Seal-O-Strain Corporation. It is on page 2375.

Trial Examiner Sheppard: These are all, gentlemen, as I understand it, these were all that Mr. Warmack took exception to?

The Witness: That is right.

Mr. Gilpatric: Yes.

Trial Examiner Sheppard: In his examination.

Mr. Gilpatric: These are the so-called off-scale accounts which Mr. Warmack called off and we are explaining.

The Witness: These people had a Bracket 1 contract in 1940 calling for 150 instruments, and our records show they purchased 187. Their previous year's purchases entitled them to Bracket 1 prices again for 1941.

Mr. Gilpatric: This is all of Bracket 1. Do you want to break off here today?

Trial Examiner Sheppard: You might as well finish.

Mr. Freeman: There will be quite a number.

The Witness: Don't let this scare you. It is mostly photostats.

Trial Examiner Sheppard: Finish up what you have got in front of you.

By Mr. Gilpatric:

2593 Q. Campbell Machine Company. This is referred to on page 2375 of the record.

A. This company has been doing business with us since 1925, and until the advent of natural gas in Minneapolis, the prices given them were justified on the basis of their volume purchases. With the advent of natural gas and the resulting keen competition, oil burner manufacturers

in Minneapolis were of necessity extremely price conscious of other components of other manufacturers and the prices of their burners. We knew competition was extremely active with all of our local oil burner accounts, and it was felt if we increased prices to Campbell, we would lose their prices to competition whose prices were lower than we had already been extending Campbell.

Q. The next account is Chandler Company.

Trial Examiner Sheppard: Let me have the name that you just laid down there.

The Witness: Campbell Machine Company.

Trial Examiner Sheppard: That was right in your own city?

The Witness: Minneapolis.

By Mr. Gilpatric:

Q. The next is the Chandler Company, referred to on page 2375 of the record.

A. Our first contract with this company was executed on May 3, 1940. It was a Bracket 2 contract and 2594 called for 1050 instruments. In the remaining eight months of 1940, Chandler purchased 876 instruments, and we gave them another Bracket 2 contract for 1941 calling for 1050 instruments.

Q. That was for twelve months, the new contract?

A. The new contract.

Q. Fairfield Oil Heating Company, Incorporated, page 2376 of the record.

A. These people had a Bracket 2 contract in 1939 calling for 1050 instruments, and they purchased 1146. We gave them another Bracket 2 contract in 1940 calling for 1050 units, and they purchased 937. In these two years, Fairfield bought 2,083 instruments, or an average of 1,041 per year, so we had no hesitance in giving them another Bracket 2 contract for 1941.

Q. Is there any competition in this account?

A. We also had Mercoid's competition to meet with Fairfield, and it is interesting to note our Mr. Patrick's report of June 6, 1940—

Mr. Haycraft: I object to that. There is no talk about a competitor.

Trial Examiner Sheppard: I don't think it is necessary to go into that. Objection sustained.

Mr. Gilpatric: I want to bring this out, though, that—

Trial Examiner Sheppard: You can bring out
2595 about competition. I think that is important.

Mr. Gilpatric: Because the Supreme Court has said—

Trial Examiner Sheppard: And name the competition, but the details is what I don't want. All right. Tie up the next one.

By Mr. Gilpatric:

Q. Well, I would like to ask you, Mr. Lockrae, what was your competition with this account?

Mr. Haycraft: He has already stated it.

Trial Examiner Sheppard: Mercoid.

The Witness: Mercoid was our competition.

By Mr. Gilpatric:

Q. And according to your records, what was the price which Mercoid was extending to this account?

Mr. Haycraft: That is objected to.

Trial Examiner Sheppard: I think that is important. I will let you state that.

The Witness: According to a report in our files rendered by our Mr. Patrick on June 6, 1940, he stated that Mercoid was selling Fairfield controls for about two dollars less per set than our prices.

Trial Examiner Sheppard: That is the detail I want.

The Witness: And our price to Fairfield that time was $17.25 a set.

By Mr. Gilpatric:

2596 Q. So that meant Mercoid's price was $15.25, according to your information?

A. Yes, sir.

Q. Now, when you got reports of this kind, Mr. Lockrae, relating to competitive prices, how did you treat them in your records?

A. Well, as I have testified, heretofore, we maintained what we termed a price file, and we collected all of the reports that came in from the field that had anything to do with our various competitors' prices in that file, and incidentally, this report I just mentioned bears a margin notation stating that "duplicate of this report placed in competitive price file."

Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. General Oil Heating Corporation, page 2376 of the record.

A. This company was given a Bracket 2 contract in 1940.

Trial Examiner Sheppard: Bracket 2?

The Witness: Bracket 2 in 1940, calling for 1050 instruments, and they purchased 1,201. In view of this record, we gave them another Bracket 2 contract calling for 1050 instruments in 1941.

By Mr. Gilpatric:

Q. Hi-Point Corporation, page 2376 of the record.

A. This company was given a Bracket 1 contract 2597 in 1939, and earned a retroactive credit in November of that year which is substantiated by a letter of our Mr. Swanson of November 8th, and they actually purchased 1512 instruments during 1939. They were given a Bracket 2 contract in 1940 calling for 1050 instruments, and our records show that they purchased 1,033. Because they missed their contract quantity in 1940 by only 17 devices and their previous two years' purchases averaged 1,272 instruments per year, a Second Bracket contract for 1941 calling for 1050 devices was extended to them.

Q. Todd Combustion Equipment Company, mentioned on page 2377 of the record.

A. This company had a Bracket 2 contract in 1940 and purchased 1140 instruments. On the basis of this history, they earned and were given a Bracket 2 contract in 1941. Their purchases that year, according to the audit and figures, amounted to 1,517 devices.

Q. Mr. Lockrae, in the record, according to Mr. Reese's testimony, Todd only purchased 972 units during 1941.

A. Those figures were reaudited according to my understanding, and actually they did buy 1,517 devices. Incidentally, our tabulating record which we use in our sales department and which is given to us by our accounting department monthly, showed that they had bought 1,488 instruments.

Mr. Haycraft: May I inquire there, then, if there 2598 was any change made? Was there any change made on that account?

The Witness: In what respect, Mr. Haycraft?

Mr. Haycraft: In the accounting that was made. Did you leave them in that same bracket you had them?

The Witness: Well, yes, because that is where they belonged.

Mr. Gilpatric: The accountants corrected that, as I understand, left them where they were.

Mr. Haycraft: Then I understand there was no change made on this particular account.

Trial Examiner Sheppard: My understanding is that he went again into a Second Bracket.

The Witness: That is right.

Trial Examiner Sheppard: All right, take up the next.

By Mr. Gilpatric:

Q. Enterprise Oil Burner Company, mentioned on page 2377 of the record.

A. Enterprise had a Bracket 2 contract with us in 1940 and purchased 3,451 devices. They were given another Bracket 2 contract in 1941, and they purchased sufficient controls to earn, and they were given, a retroactive credit. Again it will be remembered that a preponderance of Enterprise products consisted of industrial oil burners.

2599 Mr. Gilpatric: That completes all Bracket 2 accounts.

The Witness: Does it?

Mr. Gilpatric: Yes.

Trial Examiner Sheppard: We will excuse you until tomorrow morning.

(Whereupon, at 4:10 p. m., September 18, 1945, the hearing in the above-entitled matter was adjourned to 10:00 a. m., September 19, 1945.)

2600 Room 1123, New Post Office Building,
Chicago, Illinois.
September 19, 1945.

Met pursuant to adjournment, at 10:00 o'clock a. m.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

E. F. Haycraft, Attorney for the Federal Trade Commission.

Wayne & Moore, by R. L. Gilpatric, 15 Broad Street, New York, New York, and Bair & Freeman, by Will Freeman, 135 South LaSalle Street, Chicago, Illinois, appearing for Respondent.

2601 Proceedings.

Trial Examiner Sheppard: We are ready to proceed pursuant to our adjournment taken yesterday.

Show Mr. Lockrae on the stand and show the appearances of these gentlemen and we will go ahead.

A. H. LOCKRAE resumed the stand and testified further as follows:

Direct Examination by Mr. Gilpatric (Continued).

Q. Mr. Lockrae, the next account mentioned in the record in the testimony of Mr. Reese under examination of Mr. Haycraft on January 9th is the Atlas Manufacturing Company.

Mr. Haycraft: What page is that?

Mr. Gilpatric: Page 2378.

By the Witness:

A. In 1940 Atlas purchased 1,258 units under Bracket 2 contract calling for 1050. In 1941 they were given a third bracket calling for 3000 units. In 1941 we originally submitted Atlas a Bracket 2 contract based on our 1940 purchases and as outlined in our Mr. Meder's report of January 31, they decided to accept a Bracket 3 contract

calling for a thousand sets and promised to place an order with shipping dates for 350 sets.

Meder discussed this situation with his superior, W. J. Brown, and the latter called on Atlas on February 5,
2602 1941 to check into the situation further.

As Mr. Brown reports under that date, he explained our agreement and Atlas stated an order for 325 sets of controls to be delivered by April 16, would be made up and sent Mr. Brown.

In Mr. Brown's February 5th report he asked us to prepare a Bracket 3 contract, and on February 11th, being skeptical of what was going on, I wrote Mr. Brown questioning his transaction.

He replied on February 13th, explaining that Atlas was bidding on two building developments of 500 burners each and felt sure they would obtain at least one of them. If they were successful in this, then with their anticipated normal purchases it seemed possible they would fulfill the one thousand set out in our contract.

I acknowledge Mr. Brown's letter on February 17th, expressing my pleasure that he intended to hold up delivery of the contract until he was satisfied that Atlas could meet the quantity specifications.

The Atlas contract was signed on March 3rd, and the initial order for 350 sets was given us. Twenty-five sets were shipped and we were instructed to ship the balance by May 1st. Then apparently Atlas' promise did not materialize, for we never did complete the shipment of the original order. In fact, only 819 units were taken all year.

2603 It will be noted that we offered, and at last accepted, a Bracket 2 contract in 1942.

The manner in which this transaction was handled, I believe, shows that we were diligently trying to protect our price.

Mr. Haycraft: I move to strike that, Mr. Examiner.

Trial Examiner Sheppard: Yes. We do not want the argument. I just want the facts.

Mr. Haycraft: Beginning with that last sentence.

By Mr. Gilpatric:

Q. Well, Mr. Lockrae, would you say this transaction is typical of the way you looked into situations where customers were asking for contracts calling for higher quantities than they had purchased in previous years?

A. Yes, sir. All I am trying to do here is to substantiate what I have testified to previously to the effect that we did not go out and promiscuously give prices without justification to back them up.

Trial Examiner Sheppard: I think, Mr. Lockrae, if I heard you right you said something about a No. 3 bracket in that contract. Was that right?

The Witness: That is right.

Trial Examiner Sheppard: And you referred to that as calling for a thousand sets. Would that call for three thousand sets?

2604 The Witness: One thousand sets, three thousand units, Major.

Trial Examiner Sheppard: That is right. Well, my figures are three thousand units then on that.

The Witness: That is right.

Mr. Haycraft: I suggest, Mr. Examiner, that the witness translate that into units as we go along. Otherwise we will be confused. He uses "sets" one time and "units" another.

The Witness: I will be glad to do that.

Trial Examiner Sheppard: I think it is better. Most of these that you have testified on yesterday are plain to me because they are all—most of them I would say, ninety per cent of them you testified to yesterday were on the 150?

The Witness: That is right. We took these by the brackets where Mr. Warmack did as he went through and that is why they were all 150. Now we have stepped up into the next bracket which is our 1050.

Trial Examiner Sheppard: And that is individual sets?

The Witness: That is right.

Mr. Freeman: Individual units.

Trial Examiner Sheppard: Individual units?

The Witness: That is right.

And this particular man who had been buying in the 1050 unit bracket, due to the anticipated increase in

2605 business that he expected, wanted, and we gave him, a 3000 unit contract.

Trial Examiner Sheppard: That is right.

The Witness: Which condition subsequently pointed out they could not fulfill.

Trial Examiner Sheppard: I get you. All right.

The Witness: And I only wanted to use this as an example of what information I gave you and Mr. Hay-

craft before and you will remember that I testified that we were religiously upholding our policy wherever we possibly could and that no salesmen or anyone in the field was authorized to issue a contract or to make any price revisions. That is strictly under our control in Minneapolis. All of our contracts originate in Minneapolis and we have no blank contracts floating around in the field. No one in the field can make up a contract. No copies are ever sent out except when they are marked "Sample" with a stamp an inch high, because we will not take chances on any of our salesmen or our field organization quoting prices or quantities to a customer without the approval of the home office, and this was a specific instance of that that I came across, and I simply wanted to cite it to uphold what I have said previously.

Trial Examiner Sheppard: All right.

By Mr. Gilpatric:

Q. The next account mentioned in the record is 2606 the DeSoto Oil Burner Corporation, page 2378.

A. In 1940 DeSoto was given a Bracket 2 contract calling for 1050 instruments and earned a retroactive credit which was issued to them on February 25, 1941 and, incidentally, I have the photostat of that here.

Logically we gave them another third bracket contract in 1941, but their purchases dropped to 1977 instruments. This company, like others, that year suffered materially from the oil scare and shortage which curtailed the sale on oil burners and, as a matter of fact, they actually went out of the oil burner business the latter part of 1941. They have not manufactured any burners since that time.

Q. In other words, it was a case where you were predicating your 1941 contract on the 1940 purchases?

A. Yes.

Q. The next company is Diesel Oil Burner Corporation of New York, page 2378 of the record.

A. This company was given a Bracket 3 contract in 1940 which called for 3000 instruments and they purchased 3801. We gave them another Bracket 3 contract in 1941.

Q. The same as the previous case?

A. Right.

Q. The next company is Electrol, Inc., page 2379 of the record.

A. Electrol was given a Bracket 3 contract call-
2607 ing for 3,000 instruments in 1940 and their purchases totaled 2504. We were competing with Perfex in this case and our price to Electrol in 1941 was $15.90 a set; and to substantiate the fact that we knew what was going on price-wise I'd like to quote an excerpt from our Mr. W. J. Brown's report of June 13, 1939, and I quote:

"They, Electrol, Inc., are quoting $4.00 extra on our equipment over Perfex. Suggested to Mr. LaBahn that this be lowered about 50 per cent, which would give his dealers the same benefits his competitive manufacturers are giving to their dealers, which is approximately $2.00; and in many cases no extra difference in control sets of any one particular make.

"I further pointed out to Mr. LaBahn that he could increase his volume of business to obtain a lower price on our equipment. He stated he would take the matter into consideration."

Q. That was then a case in competition?

A. Purely competitive.

Q. Next is Gasconaire, but that's already been covered as being a case of not an oil burner manufacturer?

A. That is right. That was a natural mistake for the auditors to make, Mr. Haycraft, because they actually used an oil burner safety control in conjunction with
2608 their gas burner.

Q. The next company is Gold Star Oil Burner Manufacturing Company, mentioned on page 2379 of the record.

A. These people were given a Bracket 3 contract in 1940, calling for 3000 units and they actually purchased 4160. On the basis of this record we gave them a Bracket 3 contract again in 1941 calling for 3000 instruments.

Q. Gould Engineering Corporation, referred to on page 2379 of the record.

A. This company was given a Bracket 3 contract calling for 3000 units in 1940 and they purchased 4245. In view of this history we gave them a Bracket 3 contract in 1941 calling for 3000 instruments.

Q. Both these companies were on the basis of their previous years' volumes?

A. Yes.

Q. Lynn Products Company, page 2380 of the record.

A. This company was given a Bracket 3 contract in

1940 calling for 3000 instruments, and they actually bought 3318. Again, in view of their previous years' purchase record, we gave them a Bracket 3 contract in 1941 calling for 3000 instruments.

Q. Malleable Iron Fittings Company, page 2380 of the record.

A. This company was given a Bracket 3 contract 2609 in 1941, calling for 3000 instruments. The complete situation surrounding this account is already in the record and shows the controversy that occurred between Malleable Iron Fittings and Minneapolis-Honeywell.

Q. Is that Mr. Gillis?

A. Mr. Gillis. In so far as competitive prices were concerned, we knew that Mercoid was enjoying the greater portion of Malleable's business and it seemed that they would give Malleable prices at least as good as those they gave the S-K Company of Philadelphia and the Bascon Company.

As reflected in our 1940 sales reports from Mr. Dorsey of our Philadelphia office and Mr. Hoyt of our Boston office, Mercoid's prices to both S-K and Bascon were $14.20 a set. This was made up of a Thermostat, $2.70, the KMI Relay at $8.75, and a Limit Control at $2.75.

Our price to Malleable was $15.90 a set, and our reasoning dictated that Mercoid's price would be at least as low as $14.20 a set.

Q. Actually what was it, according to the record in this case, do you recall?

A. The testimony in the record showed Mercoid's price was $13.50 a set.

Q. The price at which you were competing was lower than what you had—

A. Actually anticipated.

2610 Q. Yes.

Sanmeyer Corporation mentioned on page 2380 of the record.

A. This company was given a Bracket 2 contract in 1940 calling for 1050 instruments and they purchased 2913.

In view of the fact that they only lacked 87 instruments of their contract quantity in 1940, which called for 3000 instruments, and because of the better business outlook for 1941, the beginning of the year, we again gave them a contract calling for 3000 instruments.

Trial Examiner Sheppard: In other words, he went up from 2 to 3?

The Witness: That is right.

Trial Examiner Sheppard: Under his showing?

The Witness: That is right.

Trial Examiner Sheppard: All right.

Take up the next one.

By Mr. Gilpatric:

Q. Wisconsin Oil Burner Corporation, mentioned on page 2380.

A. This company had a Bracket 2 contract in 1940, calling for 1050 instruments and their purchases combined with those of the L. J. Mueller Furnace Company to whom they were supplying burners earned Wisconsin a retroactive credit.

During 1940 we sold Wisconsin 1495 units and sold direct to Mueller Furnace Company 2187 units that 2611 were used in conjunction with burners manufactured by Wisconsin.

In 1941 we gave Wisconsin a Bracket 3 contract calling for 3000 instruments. Our direct sales to them amounted to 1376 devices and our sales from Mueller Furnace consisted of 2268 instruments that were used in conjunction with the Wisconsin Burner. This gave Wisconsin a total volume credit of 3644 units.

Q. Is that what you call a dual transaction, Mr. Lockrae?

A. Yes, sir.

Q. Sunray Burners, Inc., page 2381 of the record.

A. This account was affiliated with Kelly Oil Sales Company and we had a Bracket 3 contract calling for 3000 instruments with Kelly in 1939.

During that year they purchased 5005 instruments. In 1940 we gave Kelly another Bracket 3 contract for 3000 instruments, and they bought 2414.

In 1939 and 1940 they purchased 7419 instruments or a yearly average of 3659.

On the basis of this average volume we gave them a Bracket 3 contract in 1941 calling for 3000 instruments, but before the year was over they had quit building oil burners and were buying them from another manufacturer.

Q. Was there any competition in this account, do you recall?

A. The competitive situation was extremely keen and involved Mercoid; and from the potential volume
2612 standpoint it was quite apparent that Mercoid would give Sunray prices equal to or better than those given Bascon or S-K because Kelly Oil Sales was a much larger account than either of those two.

Mr. Haycraft: I move to strike the last statement as purely argumentative.

The Witness: It is our reason in establishing our policy basis of giving these prices, Mr. Haycraft.

Trial Examiner Sheppard: I think that is part of the competitive picture there. Whenever you do have a strenuous competitive picture I think you have a right to explain your side of it.

The Witness: Our price in 1941, incidentally, to Kelly was $15.90 a set and the price that Mercoid had given S-K and Bascon with a lower potential volume was $14.20.

By Mr. Gilpatric:

Q. Yes; and what does the record actually show Mercoid's prices to Sunray to have been in 1941?

Mr. Haycraft: I object to it as irrelevant and immaterial unless this witness knew.

Mr. Gilpatric: Well, Mr. Examiner—

Trial Examiner Sheppard: I did not get that question. Will you read it please?

(The reporter read the question as follows:

"Q. Yes; and what does the record actually show
2613 Mercoid's prices to Sunray to have been in 1941?")

Trial Examiner Sheppard: On that same transaction?

Mr. Gilpatric: I just wanted to show, Mr. Examiner, that Mr. Lockree's information at the time has been subsequently confirmed by what the facts are, to bring out the accuracy of the information under which he was testifying.

Trial Examiner Sheppard: He has already testified to Mercoid.

Mr. Gilpatric: No, Mr. Owens did. I simply wanted to refresh your recollection on this particular account because of the enormous detail in this case.

Mr. Haycraft: My point is, Mr. Examiner, that unless this witness had those figures before him at the time he made this price it is irrelevant and immaterial what it turned out they were. All this is retrospect. It has noth-

ing to do with what prompted him to make the price at the time unless he had the figures before him.

Trial Examiner Sheppard: Mr. Lockrae, if that is in connection with this picture I will let you state that.

The Witness: I only stated here, Major, that according to our best judgment Mercoid would give Kelly Oil Sales or Sunray a price at least equivalent of the prices they were giving; and we knew that they were giving to S-K and Bascon $14.20 a set.

Now, I only pointed out that we were on the con-
2614 servative side because the record actually shows they paid $13.70 a set for Mercoid's controls.

Trial Examiner Sheppard: And your prices were $15.90?

The Witness: Our price was $15.90.

By Mr. Gilpatric:

Q. The price you thought you were going to meet was $14.20?

A. Was the $14.20 price.

Mr. Haycraft: I move to strike that last question, Mr. Examiner, as not in accordance with the facts or the record and that it has no probative value. If you read the question you will find that it refers to a situation that does not exist.

Trial Examiner Sheppard: Well, the record contains both sides of that question. I will let it stand.

Mr. Haycraft: What he said, Mr. Examiner, was that that was a price that he met. He did not meet any price.

Mr. Gilpatric: No; I said, "going to meet".

Mr. Haycraft: Or, "going to meet". He did not meet it or never attempted to meet it, apparently.

Mr. Gilpatric: Under the statute you are not required to.

Trial Examiner Sheppard: All right, gentlemen, that is a matter of argument. Go ahead.

2615 By Mr. Gilpatric:

Q. Hart Oil Burner Company, page 2381 of the record.

A. This company had a Bracket 3 contract calling for 3000 instruments in 1940 and they purchased 4446. In view of this record we gave them another Bracket 3 contract in 1941 calling for 3000 instruments.

Q. The next company is York Oil Burner Company, Inc., page 2381 of the record.

A. In 1939 we sold York 4712 devices and in 1940 we sold them 2524, making a total of 7236 or a yearly average of 3618.

On the basis of this history we gave York a third bracket contract calling for 3000 instruments in 1941.

Q. Was there any competition in this account? Do you recall?

A. Perfex competition was encountered during 1940 and 1941; and we realized we were up against an appreciable price difference.

Q. What was the price difference according to your information that you had to take into account?

A. Well, we knew that Perfex were giving Reif-Roxoil an account with less potential than York, a price in the neighborhood of $14.65 and this was outlined in our Mr. Chapler's report of September 27, 1939.

Now, in addition, we knew that control prices were declining and in view of that it seems to us that our price to York in 1941 of $15.90 a set would not come any-
2616 where near meeting the prices that they were obtaining from Perfex, and again the record shows Perfex price to York in 1941 was actually $13.70 a set.

Trial Examiner Sheppard: Against $15.90 for you?

The Witness: Against our price of $15.90.

Trial Examiner Sheppard: All right. Go ahead.

By Mr. Gilpatric:

Q. The next company is the R. W. Beckett Engineering Company, page 2383 of the record.

A. I am going to ask your indulgence a little bit in going over this account because again it simplifies one of the situations that we were faced with constantly.

In 1939 we gave Beckett a Bracket 2 contract calling for 1050 units and the quantity of their purchases, combined with those of Fox Furnace Company, to whom they were supplying oil burners, warranted a retroactive credit.

Trial Examiner Sheppard: When was that?

The Witness: That was in 1939.

A. (Continuing)—and that substantiated my letter of February 9, 1942 our audit department requesting that this credit be issued.

2256 sets of oil burner controls were shipped to Fox by us in 1939, which would be the equivalent of 6768

devices and we shipped direct to Beckett 1560 in-
2617 struments, making a total of 8328 units that Beckett received credit for.

By Mr. Gilpatric:

Q. What was the situation in 1940 in that account?

A. Well, late in 1939 Beckett lost the Fox Furnace Company business and we did not think that the quantity of Beckett's purchases during 1940 would warrant a Bracket 3 contract calling for 3000 instruments. Consequently we presented, and Beckett signed, a Bracket 2 contract calling for 1050 units. This was on January 11, 1940.

Then Beckett made a deal with Olson Manufacturing Company of Elyria, who are large operators in the furnace business, to supply them with burners; and here Mercoid's competition came right into the picture.

Q. Have you any information as to that competition to this account?

A. Frank Snowberg, in his report of January 11th, at which time he presented and Beckett signed our second bracket contract, points out that Mercoid was giving Beckett prices on the JMI Pyrotherm of $8.25, and the Sensatherm at $2.50, a total of $10.75 for the two pieces of equipment.

The price we had given Beckett in our second bracket was $10.65 for the RA 117 relay and $3.75 for the Thermostat, making a total of $14.40. In other words, our price was $3.65 higher than Mercoid's.

2618 Q. Now, what did you do about that?

A. Well, that is a situation that I got into personally and on February 9, 1940 Mr. Snowberg and I called on Beckett Engineering and Mr. Beckett complained bitterly because we had raised his price over the previous years. Because he could buy Mercoid controls at approximately $4.00 a set less than MH, he said he had no recourse except to start using some of their equipment.

It was during this visit that I gave Beckett a $1.00 lower price, which was the same as our Bracket 3A. He could still buy Mercoid for approximately $3.00 less per set and as a result in 1940 Beckett only purchased 1993 instruments from us.

Q. Do you know whether Mercoid sold the balance of Beckett's requirements for that year?

A. I don't know how many controls Beckett bought

from Mercoid but I do know that on March 11th Mr. Snowberg again reported that Beckett had made a deal with Olson Manufacturing Company and it was obvious that the difference in control price was too much for Olson to overlook and Mercoid equipment was listed in their price list.

It is also significant that during 1940 Olson did not purchase a single oil burner relay from us; and from this we can only deduce that all the burners which they sold were equipped with Mercoid's controls.

2619 Q. That happened in 1941 with this account?

A. In 1941 the competitive stiuation was just about as it had been heretofore. We presented, and Beckett signed, our contract calling for 7500 units.

Trial Examiner Sheppard: That is a 3A contract?

The Witness: 3A contract.

A. (Continuing)—During that year it was again significant that Olson only purchased two oil burner relays from us.

By Mr. Gilpatric:

Q. Now, when you said, Mr. Lockrae, that you personally handled this account, you mean you personally called on the customer?

A. The situation was so acute that I thought it was necessary to make a trip to Elyria in order to find out just exactly what the setup was and what was going on.

Q. But the other account you testified to you are personally familiar with, you supervised?

A. That is right. Our price to Beckett in 1941 was $15.35 a set. And if Mercoid continued their 1940 price of $8.25 for the Pyrotherm, $2.50 for the Sensatherm, and $2.75 for a Limit Control, which we knew was the prevailing price of several manufacturers, this would make the Mercoid set $13.50 net or, in other words, our price was still $1.85 higher than Mercoid.

Q. This account then was entirely competitive;

2620 it wasn't a question of previous volume purchases justifying your 1941 contract?

A. This account illustrates what we were up against competitively and also the steps that we had to take to preserve our share of the business.

Trial Examiner Sheppard: All right. Go on to the next one.

By Mr. Gilpatric:

Q. The next account is Bethlehem Foundry & Machine Company, page 2383 of the record.

Trial Examiner Sheppard: Before you go on, what was that last account, the name of it?

The Witness: Beckett, B-e-c-k-e-t-t, Engineering Company.

Trial Examiner Sheppard: All right. Go ahead.

A. Bethlehem had a Bracket 3A contract in 1940 calling for 7500 units and they actually purchased 9,191. In view of this record we gave them another Bracket 3A contract in 1941 calling for 7500 instruments.

By Mr. Gilpatric:

Q. D'Elia Oil Burner Company, page 2383 of the record. Pardon me, that is 2384 of the record.

2621 A. The company had a Bracket 3 contract in 1939 calling for 3000 instruments and they actually purchased 6397. When they decided to enter the low price burner field in February of 1940 it seemed, from their previous years' purchase record, that they would only have to increase their volume by 20 per cent, roughly, in order to earn our Bracket 3-A contract which covered 7500 instruments.

Q. Was there any competition on this account?

A. We were faced with Mercoid competition and it was quite apparent from the facts that we had that Mercoid would give us a price at least as low as they had extended Bascom, S-K or possibly Beckett Engineering, because D'Elia offered a greater potential than these accounts.

The S-K and Bascom Mercoid price was $14.20 a set and our price to D'Elia in 1940 was $16.25 a set and the record shows that Mercoid actually sold D'Elia for $14.20 a set.

In view of this competitive situation with Mercoid in 1940, in 1941 we again gave D'Elia our Bracket 3-A price which was $15.35 a set and the record shows that Mercoid actually quoted $13.70 in 1941, whereas they quoted $14.20 the previous year.

Q. This next company is U. S. Burner Corporation, page 2384 of the record.

A. This company had a Bracket 3 contract in 1940
2622 and their purchases were sufficient to warrant a retroactive credit. This is confirmed by letter of our Mr. Swanson to our Order Department on December 27, 1940.

In view of this 1940 record we again extended the Bracket 3-A contract in 1941, calling for 7500 instruments.

Q. That brings us to Bracket 4 and upwards. Have you any general statement to make as to the distinction between the two types of accounts, that is, these Bracket Discount 3-A and Brackets 4, 4-A and 5?

A. Well, before going into a lot of detail as to the so-called off-scale accounts in Brackets 4, 4-A and 5, I should like to point out that for the year 1941 all such accounts were handled directly out of our home office, either by Mr. Pauling, who, I am sorry to state, has died since he testified in this proceeding, or by myself.

Trial Examiner Sheppard: We will take a five minute recess.

(Whereupon, a short recess was taken.)

Trial Examiner Sheppard: We will resume. Will you proceed?

By Mr. Gilpatric:

Q. Mr. Lockrae, you were talking about the brackets, 4A and 5 accounts when we recessed.

A. Well, as I explained, either Mr. Pauling or I
2623 contacted a majority of those accounts and so our files don't contain as many reports from our branch offices and salesmen relating to these larger accounts as was the case with the brackets we have already covered.

And I believe it should also be noted in contrast to the spotty competition which we encountered in selling the small and medium-sized oil burner accounts, competition for the larger accounts is constant and ever present.

Trial Examiner Sheppard: In other words, you do not have as much trouble with your big accounts as you do with the little ones?

The Witness: No, just the reverse. This is because all of our competitors go after the big volume accounts, whereas they do not have the manpower or organization to strenuously compete for the smaller ones.

By Mr. Gilpatric:

Q. Now, the first of these Bracket 4 accounts that is mentioned in the record is Ray Oil Burner Company and it is mentioned on page 2384 of the record.

A. This company was primarily an industrial burner manufacturer, but they did produce some domestic units. In 1941 they started the year with a Bracket 3A contract

calling for 7400 units; and our records show that we shipped them 19,544 instruments that year. Our order department was requested to issue a retroactive credit on December 11, 1944, giving this customer the benefit 2624 of our Bracket 4 prices.

Q. Do you encounter any competition with this account?

A. As with all accounts of that magnitude, we did encounter competition.

For example, in our Mr. Peterson's report, which was received February 5, 1940, he listed price Ray was paying Mercoid as $13.75. Our comparable equipment would have sold Ray for $15.50.

We were told that Ray used quite a few of the Mercoid controls and to our knowledge they are continuing to use them on some types of orders today.

Q. Now we will take up Century Engineering Company, mentioned on page 2385 of the record.

A. Well, Century was a highly competitive account and both Penn Switch and Mercoid had enjoyed an appreciable amount of their business for several years.

We knew that Mercoid had prices as low as $8.25 on the J. M. Constant Ignition Control, $2.50 on the Thermostat; and it was common knowledge their Limit Control was being sold as low as $2.75.

This made Mercoid's price per set $13.50 and our 1940 price to Century was $14.75.

Q. What about Penn?

A. Well, in 1941 Penn started to sell Century their No. 661 Primary Control at $6.57 each. A sales report of 2625 our Mr. Henry C. Carlson, dated July 23, 1941, substantiates this.

On the basis of this new primary control of Penn's Century was able to buy their set for $11.57 and this set included the 661 at $6.57, the Thermostat at $2.50, and a Limit Control at $2.50.

Our price to Century for the Constant Ignition set of controls was $14.05 in 1941.

It is also interesting to note that the record shows in this case that Penn Switch price to Century in 1941 was $14.40 and in 1940 was $13.50. Because of this price it is apparent that it was based on the Penn No. 670 control and not on their lower priced No. 661.

Q. What was Mercoid's price to Century in 1940?

A. Mercoid's price to Century in 1940, according to the records, is $13.50.

Q. Did you get any of Century's business?

A. We did—

Q. In the face of this competition?

A. We did get a share of Century's business, but in order to do it our prices had to be somewhat commensurate with the competitive prices we knew existed.

Q. The next company is Harvey-Whipple, page 2386 of the record.

A. In 1939 we were obtaining the majority of this
2626 company's business; but the situation surrounding the account became highly competitive in 1939, during which year Perfex obtained about one-half of the business. This was reported by our Mr. Chapler under date of February 7, 1940; and the report further points out that Perfex was hammering so hard to get more of this business that they even offered to put in a consignment stock of any size that Harvey-Whipple would want.

Perfex sold Harvey-Whipple in 1939 and it seemed that they were willing to give Harvey-Whipple, with their potential, a price that was equal or better than they had extended to Reif-RexOil, because Reif-RexOil did not have nearly the potential that Harvey-Whipple had.

This price was $14.65 per set per Perfex whereas our price to Harvey-Whipple in 1940 was $15.85 and in 1941 it was $14.90.

Q. What were Mercoid's Perfex prices in those years?

A. Well, it is interesting to find in the record that both Mercoid and Perfex priced their controls to Harvey-Whipple in 1941 at $13.70 a set and it also shows that Mercoid's price during 1940 to Harvey-Whipple was $13.50.

Q. Could you increase your prices in the face of that competition?

A. We found ourselves in no position to increase prices
2627 to Harvey-Whipple during these years, as this would often have tended to throw more of their business to competition.

Q. The next company is Norge Heating & Conditioning Division of Borg-Warner Corporation, mentioned on pages 2386 and 2387 of the record.

A. Well, again I am going to ask your indulgence, Major, because here is another case that typifies a few more of the problems that we had to encounter in conducting our business.

We started doing business with Norge on the volume basis in 1939 and during that year they purchased 15,390 instruments.

Trial Examiner Sheppard: That was in what year?

The Witness: In 1939.

Trial Examiner Sheppard: In Bracket 4?

The Witness: Well, I will have to check on that.

A Voice: That's right, Bracket 4.

Trial Examiner Sheppard: All right, go ahead.

A. (Continuing.) Then they began to gradually drop out of the heating business and, as a matter of fact, they returned a quantity of surplus instruments to us in 1939.

But during that year they were again preparing to build burners and the price of controls was a very decided factor.

As shown in our Mr. Peterson's report of February 6, 1939, Norge asked for prices on 500, 1000 and 1500
2628 sets of our controls. Prior to that time we had submitted our Bracket 3 contract calling for 3000 instruments and the price per set was $16.65.

It was not felt, in view of the large stock of controls which Norge had on hand, that they would have need for more than an additional 1000 sets.

Q. What was the competition encountered?

A. It was with both Penn and Perfex and that is borne out in Mr. Peterson's report of February 6th and that same report also points out that Perfex was about $2 under us on a set of oil burner controls and this meant that the Perfex price was in the neighborhood of $14.65 a set.

Then on March 8, 1939, our Mr. Kaiser, who had charge of our branch in Detroit, called on Norge and he was again advised that they could obtain Perfex controls for $2 less per set and that they would give Norge this low price on any order for 24 or more controls of one type at one time; whereas we were asking Norge for an order for 5,000 sets in order to get our lower price.

Q. What happened about that Perfex competition?

A. We [illegible] we didn't meet it but we did give Norge the benefit of our Fourth Bracket prices and this amounted to $15.95 [illegible] set of controls.

Q. What happened in 1940?

A. We [illegible] continued Norge in our Fourth
2629 Bracket which called for 15,000 instruments and our price that year was $15.85 a set and we continued in the same bracket in 1941 when the price became $14.90 per set. And our sales to them in 1941 amounted to 10,771 units.

Q. Did you consider increasing your price in the low-bracket as far as purchases were concerned?

Mr. Haycraft: That is objected to as irrelevant and immaterial whether he increased his price.

Trial Examiner Sheppard: Yes.

By Mr. Gilpatric:

Q. What did you do on that?

Trial Examiner Sheppard: I will let you tell me what you did about it.

A. Well, if we had been lacking in foresight during the controversy which came up in 1939 and if we hadn't dropped our prices 70 cents on a set of controls in order to at least show a willingness to come closer to competition, as sure as I am sitting here we would not have continued to enjoy any appreciable part of Norge's business.

Q. What about the Penn competition?

Mr. Haycraft: I move to strike that out as problematical and hearsay.

Trial Examiner Sheppard: Well, that should be considered in connection with that competition.

The Witness: It is a fact.

2630 Trial Examiner Sheppard: It seems to me from the figures there that that fits lower into a 3-A contract there.

The Witness: According to quantity.

Trial Examiner Sheppard: According to quantity.

The Witness: But to maintain that business, we had to give them our Bracket 4 price.

Trial Examiner Sheppard: I see. All right.

By Mr. Gilpatric:

Q. Now, what about the Penn competition?

A. Well, in addition to Perfex, we very well knew that Penn Electric Switch Company would obtain an appreciable part of the Norge Refrigeration control business.

They also built refrigerators and we also knew that if they combined, that is, if Penn Switch combined the Norge purchases of refrigeration controls with Norge heating control volume, that Penn would be in a position to quote them their low volume business on the oil burner controls and that would only be a natural thing for them to do. We would do the same thing.

But we were really up against competitive prices which

I think could be best illustrated by quotation from our Mr. Kaiser's report or letter of February 12, 1940, and I quote:

"I have been in touch with Norge in connection with
2631 getting a contract signed. I have not been able to get a session with Mr. Mueller, Chief Engineer, for the past three weeks. This morning I had a session with H. Rowley, purchasing agent. You will remember that you sent me two contracts, one based on Bracket 3 and the other on 3A. You will also remember that we have been giving them Bracket 4 prices during 1939. Accordingly, a Bracket 3 contract would be an increase of 70 cents a set and 3A would mean an increase of 30 cents per set of oil burner controls over 1939.

"Rowley hit the ceiling and said that this was the best we could do. They would have to make a change in controls. I explained to him our bracket requirements, Robinson-Patman and our regular arguments, including that fact that we played along with them during 1939, but to no avail.

"He stated that this was just about the worst time for us to try to get a price increase because the manufacturer of the furnace casting and jacket had just increased their price on that part of the unit, making it necessary for them to look for a new source of supply. They have not been able to find a new source of supply at the same price and it was accordingly their plan to continue and to absorb
the price increase themselves until such time as they
2632 could get a new source of supply at a lower price.

He said regardless of our bracket structure, they had been paying a premium for using M-H controls and could save considerable by using other controls with their own name on them, presumably Perfex."

And there is an additional quotation from Mr. Kaiser's letter of February 12, 1940, and I quote:

"I won't attempt to go into any further detail because you will appreciate that I used every argument that we have. Therefore, to sum it up, it now stands as follows, that unless we continue them on the 1939 basis they will switch to other controls."

Q. That was the Bracket 4 basis in 1939?

A. That's right.

Trial Examiner Sheppard: What was done about it?

The Witness: Well, my judgment was that if we had attempted to increase Norge price, we would have lost

this business and we therefore gave them a price of $14.90 per set in 1941, which was still higher than the price at which they obtained Perfex controls in 1939.

Trial Examiner Sheppard: That would put them in Bracket 4?

The Witness: Right; and from the competitive price stand in our potential, we felt certain that Perfex 1941 price would be considerably less than they had quoted
2633 in 1939.

Trial Examiner Sheppard: I thought that was the amount of units that he bought in 1940.

The Witness: In 1940.

Mr. Gilpatric: The record shows on page 2387 that Norge bought 10,771 units.

Trial Examiner Sheppard: Well, that figure would put him in Bracket 3A, wouldn't it?

The Witness: Yes.

Mr. Gilpatric: That's right.

The Witness: In quantity.

Mr. Haycraft: That is the 1941 figure.

The Witness: Was that 1941? Yes, that's right, that was 1941. Well, I can tell you what it was. I brought the record book along with me.

In 1940 we sold them 3325 instruments, according to our record, and you will remember that I previously stated that they were carrying inventory which they had purchased the previous year.

Trial Examiner Sheppard: All right, go ahead.

By Mr. Gilpatric:

Q. Take the account of Paragon Oil Burning Corporation mentioned on page 2387 of the record.

A. Well, in 1939 Paragon started out with a Third Bracket contract calling for 3000 units and they ac-
2634 tually purchased 10,330. They earned, and they were given, a retroactive credit.

And during 1939 they also used some Mercoid controls as evidenced by our Mr. Meder's report of September 13, 1939.

As a matter of fact, they pushed Mercoid controls wherever it was possible to do so through the builder trade and we had this competitve situation facing us in 1940.

Q. Then what bracket did you give them for the year?

A. In view of the quantity that Paragon had purchased in 1939, we gave them a Bracket 4 contract in 1940 calling for 15,000 instruments, and they actually purchased 13,700.

Q. What bracket did you give them in 1941?

A. Well, again, because of the competitive situation that existed in 1940 and the fact that their purchases amounted to 13,700 instruments, we gave them our Fourth Bracket contract in 1941 which called for 15,000 devices. They actually purchased 14,501, which was just 499 short of meeting our contract obligation.

Q. What was your information at that time on a competitive price situation?

A. Well, our price to Paragon that year was $14.90, that is, in 1941. And from the price information gathered from the field in 1941 it seemed to us that Mercoid would have quoted Paragon at least as low a price as they did
2635 Beckett Engineering Company, which, considering the limit control of $2.75, amounted to $13.50 a set.

Now, again, that seemed obvious because Paragon had a greater potential than Beckett Engineering.

Q. Can you confirm that in any way?

A. Well, I could confirm that from the purchases which Beckett made from us and also which Paragon made from us, just those figures, not including the competitive controls that they use, showed the comparison potential.

Q. What about the price?

A. Well, this set price of $13.50 was also confirmed in a letter of January 13 from our Mr. Jennings of our Boston office, showing Mercoid had quoted Weatherall Engineering, Inc., a concern of not nearly as large potential as Paragon, $13.50 a set.

Here we have a $13.50 set from Beckett Engineering Company, out in Elyria, Ohio; we have a $13.50 set price reported on Weatherall Engineers, from Providence, Rhode Island.

Trial Examiner Sheppard: That is against your price of $14.90, isn't it?

The Witness: $14.90, yes, sir.

By Mr. Gilpatric:

Q. That was the competition in that account?

A. Yes.

2636 Q. All right. Now, take this Reif—

A. I'd like to make one more remark with reference to this account, because on June 17 our Mr. Jennings reported that Korth Oil Company, also a Bracket 4 customer, had been quoted Mercoid prices of $7.50 on the J. M. Constant Ignition Control; $2.50 on the Thermostat, and $4.75 on the combination Control.

Trial Examiner Sheppard: Making the whole thing what?

The Witness: This made this whole set $12.75 and our comparable price on the same equipment figured $14.05 a set.

By M. Gilpatric:

Q. Was Korth in the same bracket as Paragon?

A. Yes, sir. Now, we will pass to Reif-Rexoil, Inc., which is mentioned on page 2387 of the record. In 1939 we have a Third Bracket contract with Reif calling for 3000 devices and they actually purchased 7157.

During that year Reif reported that they had purchased approximately 2000 sets of Perfex controls; that they cost them $2 less than our controls and that they were working out okay.

Q. That is 6000 units?

A. Yes, sir. Our price per set was $16.65 and on that basis they would have paid Perfex $14.65.

2637 The report of Mr. Chapler on December 27, 1939, contains the reference to Perfex controls just outlined. And while he was skeptical concerning the number of Perfex controls sold by Reif in 1939, yet it is interesting to note that the price information they gave us was correct.

The record shows that Perfex price to Reif during 1939 was $14.65 per set.

Trial Examiner Sheppard: Against your price of what?

The Witness: Against our price of $16.65.

By Mr. Gilpatric:

Q. What happened in 1940 with this account?

A. To maintain our position with Reif and come closer to the competitive situation that we knew existed at that time, we gave them our Fourth Bracket price of $15.85 per set and they purchased 6756 units; and again in 1941, due to the same Perfex competition, we gave Reif our Fourth Bracket price of $14.90 per set.

Q. What were Perfex prices in those years, 1940 and 1941?

A. Well, it is interesting to note from the record that Perfex 1940 price to Reif was $14.15 a set and their 1941 price was $13.70 a set.

Trial Examiner Sheppard: Against your $14.90?

The Witness: Against our price of $14.90.

Trial Examiner Sheppard: All right. Go ahead.

2638 By Mr. Gilpatric:

Q. The next account is Scott-Newcomb, mentioned on page 2387 of the record.

A. Well, Mr. Scott, who heads up this company, is one of the pioneers in the oil burner industry and we have been doing business with his company for the past ten years or more.

Trial Examiner Sheppard: Didn't he testify in this case?

The Witness: No, sir.

Trial Examiner Sheppard: I thought he did.

The Witness: You have a man from Electrol, and I was about to state here that prior to this Mr. Scott was associated with Electrol, Inc.

Trial Examiner Sheppard: I see.

A. (Continuing.) Mr. Pauling always contacted this account from the home office but I do recall his visit with Mr. Scott the fore part of 1939, at which time he was given our $15.95 per set price.

I remember distinctly a discussion that we had and Mr. Pauling's firm conviction that competition was after this account and that he had had to give this price in order to retain our share of the business.

In view of the fact that Perfex had sold concerns with similar or lower potential at $14.65 per set and Mercoid at $15.40 a set, it seemed understandable to us why
2639 we would have to radically lower our price to Scott-Newcomb if we were going to keep any of their business.

Q. Did you?

A. In 1939 we originally extended a price of $21.05 per set.

Q. What year was that?

A. 1939, and in that year Scott purchased 3262 instruments.

Q. What about 1940?

A. Well, in 1939 the record shows that Perfex' price was $15.70 a set against our price of $15.95.

In 1940, Penn Switch was $15.15 a set against our price to Scott of $15.85.

Now, during 1940, and to uphold Mr. Pauling's judgment in this case, Scott-Newcomb purchased 8034 instruments.

Q. What was your price in 1941 to Scott?

A. In 1941 our price was $14.90 a set and he purchased 9003 instruments.

Trial Examiner Sheppard: All right. Take the next one.

By Mr. Gilpatric:

Q. The next company is Silent Glow Oil Burner Corporation, mentioned on pages 2387 and 2388 of the record.

A. We enjoyed the majority of Silent Glow's business in 1938. However, Perfex' price competition came
2640 into the picture during 1938 and 1939 and it still existed in 1940.

We gave Silent Glow a price of $15.85 per set in 1940 and they purchased 9782 devices; but a substantial portion of their volume that year was supplied by Perfex. And due to Perfex competition that continued in 1941, we gave Silent Glow a price of $14.90 and they purchased 11,290 devices.

From the information in our price file we were aware, in 1939, that Perfex had quoted a company where there was less potential $14.65 per set of controls, that company being Reif-Rexoil.

And in selling Silent Glow at $15.85 per set in 1940 and $14.95 in 1941, it was felt that we had not gone as low as the Perfex price, and we also knew that Perfex prices had declined since 1939.

Q. Wayne Oil Burner Company, referred to on Page 2388 of the record.

A. This was a highly competitive account and we had to do business with them on that basis.

This case record also contains considerable testimony with reference to this company and the preponderance of their purchases during the years of 1940 and 1941 was from our competitors.

Q. That was Mercoid, wasn't it?

A. It was primarily Perfex. Had we increased
2641 prices to Wayne during these years, it is my judgment that we would have gotten even a smaller percentage of their business.

Q. The next company is Korth Oil Burner Corporation.

A. These people head a Bracket 4 contract in 1941 which called for 15,000 instruments and they actually purchased 22,739. They earned and received a retroactive credit.

There is already in the record a considerable amount of evidence as to why we had to extend prices which we did in order to obtain some of Korth's business in the face of lower competitive prices that existed.

Mercoid was our competition with this account and Korth purchased their controls from us on builders' jobs and where a competitive price difference of a few dollars meant losing or getting the business. Korth reported to us that in 1940 he purchased 2000 sets of Mercoid that were used in this manner.

Q. 6000 instruments?

A. 6000 instruments.

Q. Do you have any information on Mercoid prices to this account?

A. Well, with reference to Mercoid prices, it is interesting to note our Mr. Jensen's report of June 17, 1941.

Korth was able to buy the Mercoid Thermostat for $2.50, the J. M. Primary Control for $7.50, and the Mercoid Combination Control for $4.75.

2642 This made a total of $14.75 for the set and at that time Korth was paying us $2.95 for the Thermostat, $9.15 for the RA-116 Constant Ignition Relay and $5.25 for the Combination Control. This made a total of $17.35 a set.

In other words, Korth was in a position to use Mercoid controls on competitive jobs and save $2.60 per set.

Q. Did you know about any sales of Korth burners with Mercoid controls?

A. Well, Thatcher Furnace Company was a good customer, of course, and used their burners in the furnaces that they sold. And on May 7, 1941, our Mr. Jensen reported that Korth had sold 1300 burners to Thatcher with Mercoid controls.

Q. Now, take the company called Nu-Way Corporation, also mentioned on page 2388 of the record.

A. In 1938 we gave Nu-Way a Bracket 2 contract calling for 2250 units and a price per set of $19.35.

There was a shakeup in the Nu-Way organization and on March 29 we learned that a Charles P. Culbert had taken over a sales manager at Nu-Way. This information was contained in a report from our Mr. Cochrane and a report also pointed out that Perfex had quoted a price about $4 lower than ours.

On May 3d I received a letter from Mr. Culbert
2643 asking what prices we were going to charge the Nu-Way Corporation that year and he went on to state, and I quote:

"You understand, of course, that in order to accomplish my objectives this year I need a competitive price based

on future requirements more than present possibilities of purchase. Please write me at Rocky Island so I will have the information when I return there on May 9."

I made an appointment to see Mr. Culbert the following week and in the meantime received another letter from Mr. Cochrane dated May 7, 1938, outlining that Mr. Culbert had really turned things upside down, that the controls made by Penn would be standard at $2.50 net extra to dealers for Mercoid; and that there would be a $5 net extra charge to the dealer for Minneapolis-Honeywell controls.

I visited Mr. Culbert, as I had promised, and his whole object in this meeting was to beat down our prices. He did not accomplish his objective and although we maintained our price, yet we only sold Nu-Way 1676 instruments. We had sold them 2753 in 1937 and 4561 in 1936.

Q. What happened in 1939?

A. Well, in 1939, knowing of this competitive situation, we gave them our Bracket 3 price of $16.65 per set and we sold them that year 2106 units; and it was during 1939 that Mr. Culbert and Nu-Way parted company.

2644 Q. Did that make any difference?

A. It made a decided difference and, as pointed out in our Mr. Cochrane's report of February 22, 1940, our quotation that year was such that Nu-Way felt justified in making a $2 net extra charge to dealers and $1.50 net extra charge to distributors when M-H controls were supplied with their burners, and this represented their actual cost difference between the two controls, that is, between Penn Switch and Minneapolis-Honeywell.

Q. Did you have any information in your records at that time as to Penn Switch prices to Nu-Way?

A. Well, on the report just referred to there is a notation at the bottom which reads:

"Duplicate filed in price file. Carly."

This again substantiates the fact that we did maintain price files wherein all competitive price information was kept and this particular report, and because of my own confidence in Mr. Gipple's integrity—he is the secretary of Nu-Way Corporation—proved to me that the Penn Switch controls were bringing a price to Nu-Way of $14.75 per set.

In 1940 we lowered our price to $16.25 per set, and in that year Nu-Way purchased 3641 devices.

Q. What happened to Nu-Way's business during that year?

A. During 1940, under the guidance of Mr. Clockau and Mr. Gipple, Nu-Way's business increased remark-
2645 ably and, after learning that they were supplying several well-known furnace companies, such as Bard Manufacturing Company of Bryan, Ohio, Dewey-Sheppherd, Maywood, Illinois, Haul-Neal Furnace Company, Indianapolis, Indiana, the Majestic Company at both Huntington and Indianapolis, Indiana, Seasonaire Corporation of America, Detroit, the Train Company of La Crosse, Wisconsin, we naturally felt in view of competitive price situations and their increased volume, that we should give them our Bracket 4 prices for 1941.

The contract called for 15,000 units, the price per set was $14.90 and Nu-Way purchased 5875 instruments direct from us.

However, in addition to the instruments that we shipped direct to Nu-Way in 1941, we sold oil burner controls direct to Nu-Way manufacturing accounts for a total of 1986 sets.

Q. How many instruments?

A. Now, then, on the basis of three units per set of controls we could give Nu-Way credit for 5958 instruments which we shipped direct to their customers and this total, combined with our direct shipments to Nu-Way of 5875 devices, made a total credit for the year of 11,833 instruments.

Now, from a total of 1676 units shipped to Nu-Way in 1938, when Mr. Culbert was in charge, to a total of
2646 11,833 instruments in 1941, is a record in which we take justifiable pride, particularly when this was accomplished in the face of keen competition and without extending prices that were lower than our competitor.

But if we had not lowered our prices to Nu-Way as we did, we would not have gotten that volume of business.

Q. Anchor Post Fence Company.

Trial Examiner Sheppard: Your lowered price in that instance was still higher than the competitive price?

The Witness: Yes, sir.

Trial Examiner Sheppard: By how much? Can you tell me the actual figure on that?

The Witness: Well, as I pointed out here, Major, in 1940 they were purchasing from Penn Switch at $14.75 and our price that year was $16.25. That is $1.50 difference per set.

By Mr. Gilpatric:

Q. What was their price in 1941?

Trial Examiner Sheppard: Was that the 1940 price you just gave me?

The Witness: That was the 1940 price.

Trial Examiner Sheppard: See if you can give me the 1941 price.

The Witness: That was $14.90 a set. I do not have their record, but remember their previous year's price
2647 of Penn was $14.75. Our 1941 price was still higher than theirs. It was $14.90.

Trial Examiner Sheppard: It was pretty close together, though, wasn't it?

The Witness: That is right.

Trial Examiner Sheppard: All right. Go ahead.

A. Anchor Post Fence was given a price of $19.85 on a set of controls and a contract for 7500 units. In 1937 we sold them 7660 instruments.

I am going back quite a ways here in order to develop this story.

In 1938 Perfex nad Mercoid competition appeared and a report of our Mr. Dorsey pointed out that Anchor had received prices anywhere from $12 to $19 a set and that Mercoid had quoted $13.50 per set.

This was $6.35 less than our 1937 price and it was very apparent that we were going to have to lower our price structure if we were to continue to enjoy Anchor's business.

So we extended a price of $17.25 to Anchor in 1938, but this price was so unattractive that they standardized on Perfex controls and we sold them only 1941 instruments.

Trial Examiner Sheppard: Your price was not low enough to suit them?

2648 The Witness: That was exactly the case and our volume dropped between 1937 and 1938 a total of 6239 instruments.

This keen competition continued in 1939 and we lowered our price to $16.65 per set and that year sold Anchor 4056 instruments as against 1421 the previous year.

Perfex was again standard equipment during that year and Anchor charged the dealer $3 extra when a burner was supplied with our controls. Our files show that we would have to meet a price of around $13.85 but we did not see fit to do it.

Trial Examiner Sheppard: What is the lowest price there that you quoted on that?

The Witness: Up until 1939 it was $16.65.

Trial Examiner Sheppard: Go ahead.

Q. All right.

A. (Continuing.) Then in 1940 we still faced the Perfex competition and we knew that we were up against a Perfex price of $13.85 for we had indications that their prices were dropping.

We gave Anchor a price of $15.15 per set and they purchased 4327 instruments. In other words, we just about held our own for the previous year when they bought 4056.

2649 In 1941, with a repetition of the competitive situation we had faced the previous year, we ended up by giving Anchor a price of $14.25 a set and they purchased only 3359 instruments even with our lower price. Their quantity fell off from the previous year's purchases. We were confident that Perfex had again lowered their price to Anchor in 1941 and I so informed our Mr. Chapler in my letter of March 7th of that year, pointing out that as near as I could figure from the information that we had accumulated from the field, that Perfex was quoting Anchor $13.20 for a set of Intermittent Ignition Controls and $12.70 on the Constant Ignition. We did not lower our price of $14.35 a set even though we were confident Perfex was away underselling us, and as a result it is estimated that we got only about 15 per cent of Anchor's business in that year.

By Mr. Gilpatric:

Q. Even though they had your Bracket 4A prices?

A. That is right.

Trial Examiner Sheppard: We will take a brief recess.

(A short recess was taken.)

Trial Examiner Sheppard: Let us proceed.

By Mr. Gilpatric:

Q. The next company is Automatic Burner Corporation, which is mentioned in the record at Page 2389.

2650 A. Automatic Burner was given a Bracket 4A contract in 1940 and their purchases that year amounted to 15,739 instruments. In addition, we sold Holland Furnace Company 15,129 units for use with ABC

Burner, which made a grand total of 30,868 devices credited to Automatic Burner Corporation.

This earned them a retroactive credit and it was given to them as shown in our Mr. Swanson's memo to our Order Department on December 10, 1940. We gave Automatic Burner a Bracket 5 contract in 1941 calling for 30,000 instruments, and their direct purchases amounted to 19,851 instruments.

Holland Furnace purchased 21,315 units that year, making a grand total of 41,166 instruments to ABC's credit.

Q. Was that a dual transaction?

A. That was a dual transaction, yes, sir.

Q. What about competition in this account?

A. We were confronted with competitive situations at Automatic Burner year after year.

As a matter of fact, in 1940 and 1941, they started to use Perfex controls and we knew it. Because of Automatic Burner's potential, we likewise knew that Perfex could give them their very best price, which was lower than the prices we extended. The record shows the competitive situation we [illegible]ed and also that our prices 2651 were higher than competition.

Q. This was a case that Mr. Hirsh testified about?

A. Yes, sir.

Q. He was the president of this company?

A. He was the president, but he is since deceased.

Q. The next company is Cleveland Steel Products Corporation, referred to on page 2390 of the record.

A. This account has always been extremely competitive and the record shows our basis of doing business with them. Our prices were always higher than our competitors' prices.

Q. Who was the witness there?

A. O'Brien, Mr. J. L. O'Brien.

Trial Examiner Sheppard: I remember he testified in this case.

Mr. Gilpatric: In Cleveland.

By Mr. Gilpatric:

Q. All right. That is already covered, then, in your testimony.

Trial Examiner Sheppard: I remember his testimony very well.

Mr. Gilpatric: We won't go into that one further then.

By Mr. Gilpatric:

Q. Delco Appliance Division of General Motors Corporation, mentioned in the record of this case on page 2390.

2652 A. As I testified previously, this company made its own thermostats and primary controls. So our sales to them in 1941 consisted of primarily limit controls. We sold them 23,524 limit controls and gave them our low price.

You will remember that customers obtained our lowest price on limit controls in our Bracket 4A, which calls for 22,500 instruments.

Q. You mean in Bracket 5 there is no lower price on limits?

A. Yes, sir, and on that basis Delco's purchases on limit controls actually exceeded the Bracket 4A quantity.

But further testimony that I have already given points out that limit controls were shelf items, that one manufacturer's make was on a par with their competitors' and I know that Delco could have purchased their limit controls from our competitors at the same price as we extended them.

Q. What about competitive prices on limit controls taken as a unit?

A. Our prices on limit controls have followed competition's prices, and we have never been able to obtain a price premium on limit controls.

Q. Did Delco use any other devices than limit controls?

A. Yes. They used some miscellaneous devices in 1941, to the best of my knowledge. The oil burner
2653 controls that they bought were used for replacement purposes, and they were also building gas furnaces and purchased some of our gas burner controls, such as gas valves, pilots, thermostats, to use therewith.

Q. That competition there was limited entirely to limit controls?

A. Virtually to limit controls. Delco also manufactured a stoker in 1941 and they used Perfex controls exclusively with that stoker.

Q. The next company is Gilbert & Barker Manufacturing Company, mentioned on page 2391 of the record in the previous hearing in this case.

A. This concern has been one of our major accounts for a great many years and were extended our lowest prices.

In 1939 they began to develop and sell low priced burners and selected Penn Switch controls as standard therewith.

As reported by our Mr. Chapler on October 2, 1939, Gilbert & Barker had sold about 3000 of the Penn-equipped burners. In our Mr. Chapler's report of December 4, 1939, he says, and I quote:

"Mr. Elliott said they had tried out the new low-priced Penn switch stack control and that it seemed to function okay. He is putting one of these jobs in his home for observation and test."

2654 In 1940 we quoted our RA-116 Constant Ignition Protector Relay at $7.80 to Gilbert & Barker. And again, from Mr. Chapler's report of June 27, 1940, we learned that the price of the new Penn Switch Relay was $7.30.

It should be remembered that Gilbert & Barker were buying our RA-116 Protector Relay at that time for $8.45 but they had been advised that we expected to have our new RA-116 Relay available a few months hence and that it would be priced at $7.80.

Q. As against the Penn Switch Relay of $7.30?

A. Of $7.30. Gilbert & Barker reported to have sold about 3000 Penn-controlled equipped burners in 1939 and they continued to merchandise them during 1940.

Q. What happened in 1941?

A. We maintained our price of $7.80 on the RA-116 Relay and Gilbert & Barker standardized on the Penn control for their burner.

It was reported they purchased between 8,500 and 12,500 sets of controls from Penn and the saving of approximately 50 cents per set, in my opinion, was the determining factor in our losing this volume of business.

Q. Who got the preponderance of Gilbert & Barker's business from you?

A. It is my understanding, during that year, that Gilbert & Barker gave Penn Electric Switch Company
2655 the preponderance of their business.

Q. Did you ever quote a price as low as Penn Electric Switch's price?

A. To my knowledge, we never quoted a price to Gilbert & Barker or to anyone else as low as Penn Electric Switch.

I would like to point out that they were given our lowest prices and yet these prices were not low enough for us to get the preponderance of their business.

Q. That is a big account, isn't it?

A. A big account.

Trial Examiner Sheppard: Can you give me, without any trouble, the difference between your lowest price that you gave them and the price that got the business?

The Witness: Well, the principal factor there, Major, was on the primary control and then Penn Primary Control was priced to them, according to our Mr. Chapler's report, at $7.30 and our control at $7.80. So there was a 50-cent price premium being paid us for our control.

By Mr. Gilpatric:

Q. That was after you had lowered your price?

A. That was after we had lowered our price.

Trial Examiner Sheppard: All right. Take up the next one.

By Mr. Gilpatric:

Q. The next one is May Oil Burner Corporation, 2656 mentioned on page 2391 of the record.

A. This account has been a consistent user of M-H controls but Perfex began to knock at their door in 1938 and our files show that May installed 25 sets of their controls for test that year.

Also later in 1938 our files show that Perfex had presented their new high-voltage constant ignition control to May and that they advised it was to be priced between $6 and $7.

Q. Was there any other competition for this account?

A. We knew that Penn Electric Switch Company was active in this account in 1938 and with our accumulated competitive price data we were certain that our competitors quoted May prices that were lower than ours.

We felt it was necessary to give them our best prices in order to hold this business and we knew that our low price was higher than our competitors' low prices.

Q. The next company is Micro-Wesco, Inc., also mentioned on page 2391 of the record in this case.

A. In 1939 a competitive situation arose with Penn and Micro was given our Third Bracket contract calling for 3000 units. They actually purchased 3,089.

As shown in our Mr. Cochrane's report of February 1, 1939, Micro standardized on Penn controls and charged a price difference when M-H controls were supplied.

2657 Q. There was an extra charge on M-H controls?

A. To their dealers when they were supplied. As

borne out in our Mr. Reichow's report of April 17, 1939, Micro packed either a Penn or an M-H primary control with each burner and when M-H was sold it was priced at $1.50 over Penn.

Q. What happened in 1940?

A. Well, the competitive situation became even more acute in 1940 and I called on Micro, in company with our Mr. Cochrane, on January 3.

Micro had started to build up their volume through sales to furnace and boiler manufacturers and we gave them our Bracket 4 price of $15.85.

Inasmuch as I had been led to believe that the $1.50 price difference which Micro had charged in 1939 represented the difference in price between our controls and Penn Switch, it seemed to me that our price reduction of 80 cents would still make our prices higher than Penn.

We sold Micro 6526 instruments direct in 1940 and in addition supplied several thousand instruments to the furnace and boiler manufacturers to whom they were selling burners.

With sales to Lenox and their other manufacturing customers, plus our direct sales to Micro, their overall volume exceeded 30,000 instruments.

2658 Now, obviously, this volume of business would be sufficient for any of our competitors to quote Micro their very lowest prices and again we knew that our competitors were soliciting this business.

Our prices were higher than competition. Micro was entitled to our lowest prices on a volume basis and I am convinced if we had quoted any higher prices that competitive controls would have received plenty of consideration, as they did back in 1939 when the price difference was $1.50.

Q. The next company is Timken Silent Automatic Division of the Timken-Detroit Axle Company.

A. The record already contains several phases of the testimony with reference to our business dealings with this company in 1941. The keenest of competition existed. Our competitors' prices were less than ours and they got the larger share of Timken's business.

Q. Even though Timken got your best prices?

A. Yes.

Trial Examiner Sheppard: I remember that, gentlemen.

Mr. Gilpatric: Rockwell & Crawford.

Trial Examiner Sheppard: There were several of them.
Mr. Gilpatric: Yes.

2659 By Mr. Gilpatric:

Q. The next company is Williams-O-Matic Heating Corporation, referred to on page 2391 of the record.

A. The record already discloses the competitive situation existing with this account and it has existed every year that we have been doing business with Williams. Our prices were always higher than competition. As a matter of fact, Williams charged more for their burners equipped with our controls until 1939.

Trial Examiner Sheppard: Is this Williams-O-Matic?
The Witness: Yes, sir.
Mr. Gilpatric: We have a lot of testimony on that, too.
Trial Examiner Sheppard: Yes. I remember.
Mr. Gilpatric: That was the case where Penn—
The Witness: Both Penn and Mercoid were involved in that competition.

By Mr. Gilpatric:

Q. Well, now, there is one other account that is mentioned on page 2481 of the record and that is Ace Engineering Company, a Bracket 1 account. It is out of order but it will go in later in the record. Can you explain about that?

A. Ace Engineering Company had a Bracket 1 2660 contract in 1941 calling for 150 or more instruments and our audited records show that they purchased 1,072 devices. In checking I find a retroactive credit memorandum was issued them in the amount of $251.50, equalizing the cost of their controls to our Bracket 2 status.

Q. Now, Mr. Lockrae, can you very briefly just sum up this testimony you have given so that we have in one place a brief statement on it?

Mr. Haycraft: I object to that, Mr. Examiner He made a statement in the beginning, an introductory statement.

Trial Examiner Sheppard: Well, it may be helpful to all of you. It may be helpful to me. We will let him do that.

A. This detailed explanation of each of the off-scale accounts has taken so long that it might be helpful for me to sum it up in a few words.

Of the 77 accounts characterized by Mr. Warmack as being "off-scale", one, namely Gasconaire, was not an oil burner manufacturer at all and was erroneously included by Ernst & Ernst in their original cost study.

Of the 76 remaining accounts, 6 were instances of retroactive credits where the customer was, by the end of the year, given the benefit of the control prices to which the quantity of his purchases entitled him. That leaves
2661 70, of which 40 fall into the category where, on the basis of the facts known to us at the time the contracts were issued, we were justified in extending prices we did. That justification usually took the form of the customer's past performance, that is, where either his purchases during 1940, or the average of his purchases for the years 1939 and 1940 equalled or exceeded the contract quantity on which his 1941 prices were based.

In a few of the forty instances we didn't rely entirely on past performance, but were influenced by the customer's prospects for future business. By that I mean not merely what business he thought he would do but actual orders of which we ourselves knew or other factors that we could check independently.

Then there were 8 accounts where the facts called for a different explanation. Four of those were examples of what have been referred to as "dual transactions", that is, where to arrive at the true volume of the oil burner manufacturer we had to take into account not only our direct control sales to him but also our sales of controls to furnace manufacturers who bought their burner units from him.

Then there were two instances where we were dealing with new customers and had no past performances to guide us in determining contract quantity and in two
2662 other instances the account either went out of business during 1941 or converted to war work.

This leaves only 22 out of the 77 cases referred to by Mr. Warmack as to which the principal consideration affecting our determination of the price bracket to be extended to the customer was the competitive situation. In each of those cases I have given you the information as to competitive conditions which we knew we had to meet and which influenced our decision as to which bracket the customer should be put.

These 22 accounts represent only a small part of our contract customers so that percentagewise the number of instances where we in effect departed from our bracket structure to meet competition was relatively small and nothing like the percentage that might have been inferred from Mr. Warmack's original list of 77.

Mr. Gilpatric: That is all.

Mr. Haycraft: Mr. Examiner, I should like to have the notes that the witness used in this direct examination so that I can go over them, and also I would like to defer cross-examination until tomorrow so that I could have a copy of the record that is made.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: We shall reconvene in
2663 this room at 10 o'clock on Wednesday, October 3, 1945.

We now stand adjourned.

(Whereupon, at 12:15 p. m., September 19, 1945, the hearing in the above-entitled matter was adjourned.)

2664

Room 1121, New P. O. Building,
Chicago, Illinois,
Wednesday, October 3, 1945.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Attorney for the Federal Trade Commission.

Cravath, Swain & Moore, by R. L. Gilpatric, 15 Broad Street, New York, N. Y., and

Bair & Freeman, by Will Freeman, 135 South La Salle Street, Chicago, Illinois, appearing for Respondent.

2665

Proceedings.

Trial Examiner Sheppard: All right, gentlemen, we will come to order.

Miss Reporter, you will convene the hearing in the matter of Minneapolis-Honeywell Regulator Company, Docket No. 4920, ordered by the Examiner to be reconvened in Chicago, October 3, 1945, at 10:00 o'clock in the morning of said date.

Show Mr. Everett F. Haycraft appearing for the Commission, Mr. Will Freeman and Mr. Gilpatric appearing for the respondent.

Show Mr. Arthur F. Lockrae having been previously sworn on the stand for cross-examination by the Commission.

ARTHUR F. LOCKRAE was thereupon called as a witness by the respondent and, having been previously duly sworn, testified further as follows:

Cross-Examination by Mr. Haycraft.

Q. Do you have a list of the twenty-two accounts that you testified were accounts that were sold on the competitive basis, that is to say, the differences in price were based on competition?

A. I haven't a list of those.

Q. You said there were 22?

2666 A. Yes, that can be easily compiled.

Q. How long will it take you to get that?

Mr. Gilpatrick: We have got it here, I think.

Mr. Freeman: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: I think it would be a good idea to list those in the record.

A. B. & W. Oil Burner Service Co. Do you want the record read?

By Mr. Haycraft:

Q. Yes.

A. 2366-7.

Mr. Gilpatric: That is the original record reference, you know.

A. (Continuing.) Campbell Machine Company, 2375, Electrol, Inc., 2378, Malleable Iron Fittings Company, 2380; R. W. Beckett Engineering Company, 2383, D'Elia Oil Burner Co., 2383, Century Engineering Co., 2385, Harvey-Whipple, Inc., 2386, Norge Heating & Conditioning Division, Borg-Warner Corporation, 2386, Paragon Oil Burner Corporation, 2386, Reif-Rexoil, Inc., 2387, Scott-Newcomb, Inc., 2387, Silent Glow Oil Burner Corporation, 2387, Wayne Oil Burner Company, 2388, Anchor Post Fence Company, 2389, Cleveland Steel Products Corporation, 2390, Delco Appliance Division, General Motors Corporation, 2390, Gilbert & Barker Manufacturing

2667 Company, 2390, May Oil Burner Corporation, 2391, Micro-Westco, 2391, Timken Silent Automatic Division, Timken-Detroit Axle Company, 2991, Williams Oil-O-Matic Heating Corporation, 2391.

Trial Examiner Sheppard: Those are the 22?

Mr. Gilpatric: Yes.

Mr. Haycraft: I only get 20 on that.

Mr. Gilpatric: 22.

Mr. Haycraft: Yes, that is right.

By Mr. Haycraft:

Q. Have you made any computation or calculation of the quantity of sets or units both, in those 22 accounts during the year 1941?

A. We have those records and I think they are already in the record.

Q. You haven't any tabulation of that?

A. I wouldn't make any tabulation on that.

Q. First with respect to the B. & W. account, that is located in Chicago, Illinois?

A. Yes, sir.

Q. I believe you stated that the Berryman Oil Burner Company was a predecessor?

A. That is right.

Q. Now, in your testimony you stated that you gave them a Bracket 1 contract in 1941 because Mercoid
2668 Corporation was still your competition as they had been at the Berryman Oil Burner Company?

A. Yes, sir.

Q. And you also stated that the highest manufacturer's price given by Mercoid in 1940 that you knew of was to the Fairfield Oil Heating Company. Where was that located?

A. Let me think. It is down in Connecticut. I just don't recall offhand the city, where they are located.

Q. Well, did you have any information as to the price at which Mercoid was selling to the B. & W. or Berryman?

A. We had no specific information that I know of as to what the exact Mercoid price was to either Berryman or B. & W.

Q. Ordinarily what would you say was the differential in price between the Mercoid set and your set as was generally understood or observed in the trade?

A. Well, that would all depend on the quantities that you are thinking about.

Q. Let us say equal quantities.

A. Well, here is a typical case before us of this B. & W., and, as I stated here, the highest price that we knew of that Mercoid was quoting was $18.10 a set. Now, our comparable price, as I recall, on our first bracket was $20.25. There is $2.15 difference between those two prices.

Q. And did you enjoy any business with the Berry-
2669 man Company at that differential?

A. I have to check our records on that. I believe we did sell them some controls but in what quantity I would have to go back to the records.

Q. That was back in 1939?

A. Back in 1940 and 1939. They were in business several years prior to 1940, 1941.

Trial Examiner Sheppard: 1939 or 1940?

The Witness: They were a small account here in Chicago and I do know we sold them some controls prior to 1941.

By Mr. Haycraft:

Q. Now, I notice your testimony you often referred to your bracket prices in previous years. Now, can you tell us what changes were made? You mentioned the years 1938, 1939 and 1940 before 1941. Could you give us the bracket changes, the changes in bracket prices for those years so that we have a comparison?

A. Again, if I am not mistaken, you already have that.

Trial Examiner Sheppard: I was going to say I thought that was in the record already.

Mr. Gilpatric: It is in the stipulation, Exhibit 1.

Mr. Haycraft: Do you have all those figures there?

Mr. Gilpatric: Yes.

Trial Examiner Sheppard: Yes, that is all in that 2670 Exhibit 1.

(Document handed to Mr. Haycraft.)

The Witness: Off the record?

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Mr. Haycraft: In other words, your price was $18.10?

The Witness: Yes, not $20.25 and the lowest price of Mercoid was $15.25 in 1940. So the difference there was $2.85 on the set of controls.

Mr. Freeman: That is, your price was higher throughout?

The Witness: Higher by $2.85.

By Mr. Haycraft:

Q. Now, in 1941, your top bracket price was $17.35?

A. That is right.

Q. That is Bracket No. 1?

A. Yes, sir.

Q. So that brought you somewhat closer to the Mercoid price?

A. Providing the Mercoid price didn't also drop in 1941.

Q. Well, did you have any information as to whether it did or did not drop, I mean, as of that time?

A. I can't say that we had comparable information on the Mercoid high price in 1941.

Q. Now, I notice that in your bracket prices your 2671 1941 prices were less than your 1940 prices on all brackets. Can you tell us the reason for that reduction in bracket prices?

A. As I have testified before, those bracket prices were

set according to the information that we had that would enable us to maintain our business in the face of competition. It is pretty well indicated right here with this price of Mercoid of $15.25 a set in 1940, the high price that we had the record of, versus a price that we had of $18.10 and we felt it advisable to lower our price to come closer to that competition.

Q. In other words, your $17.35 was $2.10 more than that $15.25?

A. Yes, sir, if they didn't lower their price again in 1941.

Q. Did you further lower your bracket prices in 1942?

A. Those prices have remained stable ever since. If you will recall, I believe the testimony shows that we put through a 10 per cent increase in November of 1940, but reverted to the old price at the request of OPA in February, I believe it was, of 1941. So there were only those slack months there. Let's see, that would be three months that those prices were in effect.

Q. Those were the 1940 prices?

A. Those were the 1941 prices.

Q. I mean, 1941 prices?

2672 A. That is right. In 1942 we reverted to the previous 1941 prices.

Q. There was no time, then, after December, 1941, that you observed any other bracket prices other than those indicated on this form?

A. Yes. There were three months until February of 1942. I believe I misstated that at first. I was thinking that price change occurred in November of 1940, but it was November of 1941 and we reverted back to these prices.

Trial Examiner Sheppard: 1941?

The Witness: 1941.

By Mr. Haycraft:

Q. To the 1941 prices?

A. Yes.

Q. What was it in that three months' period?

A. Well, I can't give you the exact figures, but it was roughly 10 per cent increase for those three months.

Mr. Gilpatric: Over your 1941 price?

The Witness: Over the 1941 price.

By Mr. Haycraft:

Q. Well, was that increase made because of the let-up in competition?

A. That increase was—
Q. The lack of competition?
A. Increased costs.
Q. Did you then disregard the competition that
2673 you had in making those higher prices?
A. We felt that our increased costs justified an increase in our prices of 10 per cent. We had had no increase basically in prices since 1937 and we decided to increase our prices approximately 10 per cent and that is what was done, regardless of what the competitive situation was.
Trial Examiner Sheppard: That showed up on all the brackets?
The Witness: All the brackets.

By Mr. Haycraft:
Q. Now, in Chicago at the time that you were selling to the B. & W., at the Bracket 1 prices, you had other customers that were being sold at higher bracket prices?
A. Again I would have to check, Mr. Haycraft, because if we did it would be a discount manufacturer. There might have been some in Chicago.
Q. Well, I have in mind the Automatic.
A. Well, you said at higher prices.
Q. Higher brackets.
A. Oh, you mean lower prices?
Q. Yes.
A. Yes, we did sell other manufacturers at lower prices than we sold B. & W. in Chicago.
Q. And the Automatic, A. B. C., was one of them?
A. That was one of them.
2674 Q. And can you recall any other accounts in Chicago at that time, offhand? How about Sanmeyer?
A. Yes, that is one.
Q. And are you sufficiently familiar with the business of those concerns to know whether or not they sold their burners equipped wtih Minneapolis-Honeywell devices, controls in and around Chicago? In other words, were they competitive?
Mr. Freeman: Are you talking about retail price, wholesale price, jobbers' price, or are you talking about comparable equipment or whether or not the burners were installed? What are you talking about?
Mr. Haycraft: I am talking about the sale of a burner containing the controls, equipped with controls.

Trial Examiner Sheppard: Did you get the question, Mr. Lockrae?

The Witness: If I understand your question correctly, Mr. Haycraft, you are asking me if I knew that Automatic Burner Corporation, B. & W., and Sanmeyer sold burners in Chicago in 1941 equipped with our controls?

By Mr. Haycraft:

Q. That is right.

A. That is a question I could not answer definitely, because Sanmeyer, A. B. C., and B. & W. were also using competitive controls. Now, what type control they put
2675 on their burners when they sold them in Chicago, I could not say.

Q. Well, you sold the controls for use in the burner?

A. Wherever they might sell them.

Q. Now, take the account of Chalmers Oil Burner Company in Minneapolis, Minnesota. Now, that account you said you were selling at Bracket 1 prices, which calls for 150 minimum because you knew that Chalmers were purchasing burners equipped with your controls in the Aldrich Company in sufficient volume to make their combined usage of your controls in excess of 150 instruments per year. You sold controls to the Aldrich Company?

A. Yes, sir.

Q. Did you give them a volume discount?

A. Yes, sir.

Q. What bracket did you sell them?

A. They bought at our lowest price, Bracket 5.

Q. You refer to that sort of a transaction as a dual transaction?

A. Yes, sir.

Q. That is, within this case, though, you gave one customer Bracket 1 prices and another customer Bracket 5 prices; is that right?

A. That is right, in view of the different quantities involved in their purchases.

Q. Why didn't you give the Chalmers the same
2676 bracket price you did the Aldrich?

A. Well, that seems to be perfectly obvious. Aldrich was buying in excess of 30,000 instruments a year from us. Chalmers is a small manufacturer. His quantity, when he was building all of his own oil burners, wouldn't have warranted better than a Bracket 1 price.

Q. In fact, wouldn't have warranted a Bracket 1 price?

A. In previous years it would warrant a Bracket 1 price, possibly a Bracket 2.

Q. You stated here that Chalmers bought in sufficient volume to warrant a combined usage of controls in excess of 150 instruments. How many did they buy from you?

A. I can't tell you exactly how many they bought, Mr. Haycraft. I do know, and I am pretty sure, that the oil permits in the City of Minneapolis and St. Paul, while I haven't looked them up, I would be willing to gamble that they showed Chalmers installed in the Twin Cities far more burners than the requirements to make 150 units that is involved.

Q. Now, I take it that you, as a matter of more or less gambling or estimating as to what Chalmers might or might not do, that was the basis for your determination of what bracket you put them in, is that right?

A. No, sir, that is not right. To me there was no gamble involved at all. Here is Chalmers that had been in
2677 business in Minneapolis, to my knowledge, since 1927 and their business consisted of the sale of oil burners and Mr. Chalmers, Mr. Rosche, his engineer, and his office help lived all those years and apparently comfortably on the profits they made in the sale of oil burners and they certainly couldn't do that if their sales were confined to anywhere near 50 oil burners a year, and, incidentally, their credit was very good.

Q. Well, the direct purchases in 1940 were 36.

A. That is right.

Q. And you had no figures to note how many more they bought?

A. I had no figures, concrete, at that time, but it was the safest assumption in the world; so far as I was concerned that they bought in excess of 50 burners from the Aldrich Company.

As a matter of fact, Mr. Haycraft, just to confirm that, I chatted with Mr. Chalmers over the phone when this question came up and he told me at that time that he had bought far in excess of the 50 that were required to make this 150 unit purchase from Aldrich.

Q. But you did not get that information before you made the price?

A. No, it was not necessary. It was so perfectly obvious that I wouldn't have wasted five minutes to
2678 settle that question in my own mind.

Q. Did you contact Chalmers direct before that

contract was signed, yourself? Did you make any calls on them?

A. Oh, I have made calls on Mr. Chalmers at times, but never any number a year or anything of that sort. Our local Minneapolis man handled that account like he handled the others in Minneapolis.

I had met Mr. Chalmers. In this event or another he would come up to the office to see us occasionally. I would drop in to see him occasionally, but just when I couldn't tell you.

Q. Now, did you call B. & W.?

A. No.

Q. Now, are there any other accounts in Minneapolis that you were selling at different bracket prices in 1941?

A. Yes.

Q. What other accounts were they?

A. Well, just from memory, without referring to the record, Mr. Haycraft, we were selling Chalmers in Bracket 1, we were selling Campbell Machine Company in Bracket 2, and we were selling the Hubbard Company in Bracket 2. I can recall those from memory.

Q. On that Campbell Machine account, while we are up there in Minneapolis, we might as well take that up.

What information did you have with respect to that 2679 concern's requirements before you made the contract?

A. We were quite familiar with the operation of the Campbell Machine Company. Again they were an old-established concern in Minneapolis.

Q. Well, what factor did you take into consideration before you determined to put that in a Bracket 2 contract?

A. Just as I previously testified, Mr. Haycraft.

Q. Well, it is rather general, your testimony. I am trying to get more specific testimony.

A. We knew the condition of the oil-burning industry in Minneapolis. We know that our competition was active in Minneapolis. As a matter of fact, before Mr. Chalmers started to sell the Aldrich burner, he was buying a preponderance of his controls from Perfex. That same situation faced us with these other accounts in Minneapolis. We had competition at Hubbard Oil Burner Company from Perfex and we just knew that if we increased either Hubbard's price or Campbell Machine Company's price that we were faced with a loss of that business and we continued them in Bracket 2.

Trial Examiner Sheppard: What year was that?

The Witness: 1941.

Trial Examiner Sheppard: And the previous year the same price?

The Witness: The same price.

By Mr. Haycraft:

2680 Q. Then you did not take into account in making that bracket price to them any quantity that they might have bought or might buy in the future?

A. As I have just testified, Mr. Haycraft, we went into that situation with our eyes open. We knew the competitive situation existed and we maintained that at the previous year's price with the full knowledge that we would lose that business or a goodly portion of it if we attempted to increase our price in the face of an already lower competitive price. It was perfectly obvious that Perfex—

Q. What were the competitive prices there? You did not tell us that.

A. We are right back again to our knowledge of Mercoid's price with Fairfield Oil Heating of $18.10. We knew that they would be tickled to death to quote that account $18.10 or probably a better price in order to get that business. That was the competitive price that we had in mind.

Q. Well, I am trying to find out whether or not you had any information from the officials of Campbell Machine Company as to the price they were being sold by either Perfex or Mercoid or that were being offered by Perfex or Mercoid.

Mr. Freeman: You mean the specific price or lower price?

Mr. Haycraft: A specific price.

The Witness: I couldn't say that we had that
2681 specific price information as regards Campbell Machine Company.

Q. Well, you gave them a better price than you did Chandler. Why was that? Are they in the same competition as Chandler that you had there?

A. Campbell's purchases were greater than Chandler's. They were a bigger operator. They always had been a bigger operator.

Q. What do you mean? Had their purchases from you been more?

A. Their overall purchases or their purchases from us had been more.

Q. What were their purchases in 1940?

A. I would have to refer to the record on that.
Q. And how many did they purchase in 1941?
A. I do not have my book.
Mr. Gilpatric: That is not in the record.
The Witness: I am sorry that I do not have that with me. I do not have that information for you.
Mr. Haycraft: Off the record?
Trial Examiner Sheppard: Off the record.
(Discussion off the record.)
Trial Examiner Sheppard: On the record.
The Witness: Here it is, 505 instruments.

By Mr. Haycraft:

Q. In 1941?
2682 A. In 1941.
Q. Do you know how much Chalmers bought in 1941?
A. The record shows they bought direct from us 36, and just how many they bought from Aldrich with their burners, I don't have specific knowledge.
Q. Now we turn to—first, before we have that, were there any other accounts in Minneapolis that you sold in 1941?
A. Well, the one that I just mentioned, the Hubbard Oil Burner Company and their name hasn't been mentioned, to my knowledge, heretofore.
Q. Do you know what bracket they were sold in?
A. They were sold in Bracket 2.
Q. And what were their purchases?
A. I am sorry. According to this record, Mr. Haycraft, Hubbard was in Bracket 1. They bought 274 instruments.
Q. That is where they are entitled to be?
A. That is where they are entitled to be.
Mr. Freeman: Let the record show that the document just referred to by the witness Lockrae was certain papers made by the Federal Trade Commission.

By Mr. Haycraft:

Q. The next account I want to direct your attention to is the Goodrich Oil Burner Company of New Haven, Connecticut, page 2575. Is this one of your 22 accounts?
Mr. Gilpatric: No, it is not.
2683 The Witness: No.

By Mr. Haycraft:

Q. Well, I understand from your testimony here that they had standardized on Mercoid controls?

A. Yes, sir.

Q. And used yours as optional equipment?

A. That is right.

Q. And sold their burners when equipped with your controls at a premium price?

A. Yes, sir.

Q. In 1940 you stated you lowered your prices, so you might come closer to Mercoid's prices. You make a comparison there of $17.25. That was the price that you offered them—you offered to Goodrich in 1940.

Now, let's see what bracket that would be in. $17.25 was your Bracket 2 in 1940, was it not?

A. Yes, sir.

Q. And do you know whether you got any business from them at that price or not? 343 controls; is that right?

A. That is right; 343 instruments.

Q. Now, do you know what price they were paying Mercoid at the time that you were able to sell them 343 instruments?

A. I don't know specifically the price that they were paying Mercoid. We did know, however, that Mercoid were selling accounts that we would call comparable at a

2684 price that was less than ours.

Q. You mean comparable in quantity?

A. Quantity.

Q. Number of burners put out?

A. Number of burners put out.

Q. How did you have those facts? How did you know how many oil burners this concern put out?

A. Well, after you have been in this business for several years, Mr. Haycraft, and you get reports from salesmen, one of the things that you are naturally curious about—the salesmen is—is how their customers are progressing, how many burners they are building and that is a common question to ask a customer, "How many burners did you turn out in 1940 or 1941?"

Q. Well, this Goodrich account was comparable with what other account that you knew when you were informed were buying controls from Mercoid?

A. Well, Goodrich, in my opinion, would be comparable to the Bascom Company in Boston. We knew Mercoid was selling Bascom in 1940 for $14.20 a set of controls.

Q. How did you know that?
A. From our sales reports.
Q. That is, your salesmen reported that?
A. Our salesmen reported that.
Q. How did he know?
2685 A. In discussion with the customer.
Q. So there was a difference then of $3, almost, or $3.05?
A. On that basis.
Q. And, in other words, you were able to sell 343 instruments to Goodrich in 1940 at a premium of $3.05?
A. That is right.
Mr. Gilpatric: The record already shows a $5 differential on controls for Goodrich. When Johannsen testified in Philadelphia he told us about that.

By Mr. Haycraft:

Q. Now, when you put them in Bracket 1 in 1941, you were charging 10 cents more in 1941 than you did in 1940; is that correct?
A. Yes, sir, that is correct.
Q. So that your Bracket 1 price in 1941 was almost the same as your Bracket 2 price in 1940?
A. That is right.
Trial Examiner Sheppard: Mr. Lockrae, did your competitors raise prices at the same time?
The Witness: To my knowledge—
Mr. Freeman: This was not a raised price.
The Witness: This was not a raise in price.
Mr. Freeman: This was not a raise in price that Mr. Haycraft just referred to because he is referring to a discount bracket and Bracket 1.
2686 Trial Examiner Sheppard: I understand, but I want to go back. You said in 1941 you did raise your general prices in all brackets 10 per cent?
The Witness: That was in the fall of 1941.
Trial Examiner Sheppard: That is right.
The Witness: And that applied to our 1942 business, for three months only.
Trial Examiner Sheppard: For three months only?
The Witness: That is right.
Trial Examiner Sheppard: Oh, I see.
The Witness: That was put back on the old basis at the request of the OPA.
Trial Examiner Sheppard: I see.

By Mr. Haycraft:

Q. To your knowledge, did your competitors increase their prices at about the same time?

A. I am not positive that all of them did that, Mr. Haycraft, I know that one company, one competitor did. I am not sure as to the others.

Trial Examiner Sheppard: And the same amount, 10 per cent?

The Witness: I don't know that, Major. I don't know what that price was.

Trial Examiner Sheppard: All right, go ahead.

By Mr. Haycraft:

2687 Q. Can you tell me how many controls the Goodrich bought from your firm in 1941?

A. 66 instruments.

Q. And still you did not know what they were paying Mercoid at the time?

A. I did not know specifically what they were paying Mercoid.

Q. Why is it you did not list this account as one of the competitive accounts?

A. They were justified by their previous year's purchases. They bought 343 units in 1940. Logically it would only be safe to assume that they could buy at least 150 in 1941.

Q. Well, now, as I understand it, the 22 accounts are not the only accounts where you had competition with Mercoid and Perfex?

A. Certainly not. We had competition with every account.

Q. But they are the only accounts where you say to us now that the off-scale prices were made to meet competition?

A. Of course they were.

Q. As a matter of fact, you had this competition with Mercoid and Perfex in all your accounts?

A. Practically all of them.

Mr. Freeman: We will concede that.

By Mr. Haycraft:

Q. In some places you cut your price by off-scale
2688 selling in order to come near their price; in other places you didn't; is that right?

A. That is right.

Q. In other words, there was not any uniformity in your practice at all?

A. Oh, yes, there was uniformity. When you take the number of accounts we have—and we are talking about a few here that were off-scale—I think that there was comparable uniformity in our method of doing business.

Q. All right. We will take the next one now of Quiet Heet Oil Burner Company of Brooklyn, on page 2577. I don't want to confuse that with Quiet Heet over in Newark.

A. That makes quite a difference.

Q. I think you testified there that you placed them in Bracket No. 1 because they bought 679 instruments in 1940, is that right?

A. Yes, sir.

Q. What other accounts were you selling in Brooklyn at the time, do you recall?

A. No, I don't, Mr. Haycraft. I would have to go to the record to find that out.

Q. Well, there is the Seal-O-Strain Corporation on page 2592 of the record. Now, there you placed them in the same bracket although they purchased only 187 instruments?

A. Well, that is right. They had made their 2689 bracket for quantity the previous year, which called for 150. Likewise, Quiet Heet made their bracket, which called for 150.

Q. And yet the Quiet Heet in the previous year had bought three or four times as many as the Seal-O-Strain bought?

A. Our requirement with each account was exactly the same. They signed the same contract, calling for 150 instruments. They both got the same price.

Q. But one customer bought very substantially more than the other, didn't they?

A. Yes.

Q. At the same price?

A. That is right, because our bracket was from 150 to 1050 instruments and they both were in that qualification.

Q. How did you take in that bracket price running from 150 to 1050? What brackets did you take into consideration that anybody coming in that bracket was entitled to the same price?

A. That 1050 bracket is a carry-over from a great many years and I think I previously testified, Mr. Haycraft, that in setting up those brackets in prices as well as the quan-

tities, that we classified these customers where we thought they logically belonged on a quantity basis; and again competition entered into it just as much as with any other group of accounts.

We shifted our bracket quantities around to meet
2690. competition. We had to, the same as we shifted our prices around to meet competition.

Q. Well, here is another account that you had in Brooklyn at that time, which was the Atlas Manufacturing Company, wasn't it?

A. That's right.

Q. Page 2601. Now, in that case they had been in Bracket 2 in 1940 and had purchased 1258 units, but you gave them a Bracket 3, put them in Bracket 3 and gave them a Bracket 3 contract in 1941, base on representations made to you that they were hopeful of getting some increased business?

A. That's right.

Q. Which they did not get. Now, what were their total purchases in 1941?

A. 819 instruments.

Q. So they really belong in Bracket 1?

A. Yes, sir, according to the quantity that they bought.

Q. In your opinion, do they have a competitive advantage over those other two located in Brooklyn who were in Bracket No. 1?

A. Whether or not they were selling burners in Brooklyn, whether the others were selling in Brooklyn, I haven't any idea, Mr. Haycraft. The figures of the testimony certainly clearly point out that our Bracket 1 prices were higher than our Bracket 2.

2691 Q. I call your attention to the account of Weiskittel.

A. What page?

Mr. Gilpatric: Do you have a page number on that?

Mr. Haycraft: 2581.

By Mr. Haycraft:

Q. (Continuing.) I take it that that account was placed in Bracket 1 based on their 1940 purchases?

A. Yes, sir. They earned a retroactive credit in 1940, giving them Bracket 1 prices, and their quantity in that year warranted another Bracket 1 contract in 1941.

Q. What were their 1940 purchases?

A. I am afraid I would have to go to the record for that,

Mr. Haycraft. I don't have that information here, what they bought in 1940. I do know it was more than the 150 units required to get the Bracket 1 price.

Q. What did they buy in 1941?

A. In 1941 they bought 51 instruments.

Q. Were you selling any other account?

A. Yes, we were selling May Oil Burner Corporation. We were selling Anchor Post Fence Company.

Q. And were you giving them an extreme discount?

A. We were giving an extreme price to May Oil Burner Corporation, but we did not give the extreme price to Anchor Post Fence Company.

Mr. Gilpatric: When you say "extreme" you mean
2692 your low price?

The Witness: Low price.

By Mr. Haycraft:

Q. Well, why did you make the distinction between May and Anchor?

A. Well, again it was the quantity of the purchases that legislated the bracket price we had to give them and the competition we had to meet in both of those accounts.

Q. The same competition?

A. We had the same competition with both of those accounts.

Q. That is, in both accounts you had competition of Perfex?

A. Perfex, and we also had Mercoid competition at Anchor Post in years previous to 1941. We might have had it again in 1941.

Q. But you put May in Bracket 5, and what bracket did you put Anchor Post in?

A. Anchor Post? 4-A.

Q. Now, in the case of Anchor Post you were unable to get a large proportion of their business that you were in May?

A. No, sir.

Q. Did you call on those accounts, yourself?

A. I have called on them spasmodically for a great many years.

Q. We will take Anchor Post. Did you call on them at the same time?

2693 A. Yes. When I would go to Baltimore I would call on both of them almost invariably.

Q. And did you call on the Electrol account?

A. I can only recall having visited their place of business once.

Q. Did you call on the Malleable Iron Fittings Company?

A. Not regularly. I have been at their factory.

Q. The R. W. Beckett Engineering?

A. Yes, I called on them. I see them usually, oh, once or twice a year, sometimes more frequently than that.

Q. How often did you see the two accounts in Baltimore here?

A. Oh, it would average once a year. I don't believe it would be any more than that.

Q. The D'Elia Oil Burner Company? Did you call on that company?

A. I have called on them, but again not regularly.

Q. Did you call on the Century Engineering?

A. Yes, I used to see Century usually two or three times a year.

Q. Harvey Whipple?

A. I would call on Harvey Whipple when I happened to be east, which would be once or twice a year.

Q. Norge?

A. Yes, I have called on Norge, but again not regularly. If I happened to be in Detroit, I would usually see the 2694 major accounts there.

Q. Paragon Oil Burner Company?

A. Yes, I called on Paragon, but again not regularly.

Q. Reif-Rexoil, Inc.?

A. Same with Reif.

Q. Scott-Newcomb?

A. I never called on Scott-Newcomb.

Mr. Gilpatric: That was one Mr. Pawling called on.

The Witness: Mr. Pawling always made that contact.

By Mr. Haycraft:

Q. Silent Glow?

A. Yes, I called on Silent Glow several times.

Q. Wayne Oil Burner?

A. The same with Wayne, I used to see them quite frequently.

Q. Cleveland Products you made a number of calls?

A. Yes, a number of calls there.

Q. Delco Appliance?

A. I would see them occasionally, but again not regularly.

Q. Gilbert & Barker?

A. Like Silent Glow, Harvey-Whipple and Gilbert & Barker, while I was in that neighborhood I would call on all of them.

Q. Micro-Westco?

A. Yes, I called on them, rather often.

Q. Timken?

2695 A. Again there I would see Timken each time I was in Detroit. It was likely to vary, sometimes three or four times a year; other times maybe a couple of times a year.

Q. Williams Oil-O-Matic?

A. I called on them quite frequently.

Q. Were there some accounts that you called on more frequently than others where there was a more competitive situation? Was that a factor that required your presence?

A. It could very well require my presence. If there was a situation like that existed, naturally I would be interested.

Trial Examiner Sheppard: Your visits are goodwill visits, are they?

The Witness: Yes, Major, almost entirely. I would take a swing around perhaps the Mid-west two or three times a year, perhaps down East one or twice a year, even perhaps out to the West Coast once a year or every two years and then when I made those trips, why, I of course called on every account that time would permit. That is why I was there.

By Mr. Haycraft:

Q. Did you call on the larger accounts usually?

A. Usually.

Q. Well, weren't there instances when you were sent for?

A. Yes.

2696 Q. Where the salesman figured he was not equal to the situation?

A. Yes, indeed, those things happened several times in my recollection.

Q. Can you recall some of the instances?

A. Well, as I testified the Beckett case was one. Another was with Nu-Way Corporation. Those are typical examples of that sort of thing.

Q. Now, in the making up of Respondent's Exhibit 186, what information did you furnish the accountant with re-

spect to your calls and the time that you expended on these various accounts in determining the allocation of your expenses?

A. Mr. Haycraft, practically all of my time was spent in handling of our oil burner business, manufacturers' business. Whether I was on the road or whether I was in the office, that was my primary responsibility.

We had Mr. Lyford look after our gas accounts the same way. I paid little or no attention to those accounts. I seldom, if ever, called on a gas account.

The same applied to Mr. Scoggin, who is primarily interested in our stoker accounts and I paid very little attention to that branch of the business except in an advisory capacity. I might call on a stoker account occasionally or an oil burner account occasionally or meet the boys at conventions, but that was practically the exception.

2697 Q. You mean the gas?

A. I mean the gas, but that was practically the extent of it. There was—I did not attend any conventions for either the stokers or gas in 1941.

Q. Was any record kept or did you furnish to the account of the records any time you expended on these various accounts?

A. No; it was physically impossible. It would be ridiculous to try even to keep a record. It wouldn't have been worth the time involved to keep it. It is impossible for a man in business to keep time cards. We even go down in that respect to our employees that have any responsibility at all—we don't require them to keep time records. They are not time clerks and we are not clock watchers and we don't operate our business in that manner.

Q. Well, how was the expense involved in your activities allocated, then?

A. Well, it was allocated 100 per cent to the oil burner division, which was rightfully so.

Q. And it was spread over all accounts equally?

A. Oh, I don't know how they spread that, Mr. Haycraft.

Q. As I understand from your previous testimony there was no time record kept?

A. There was no time record.

Q. So there could be no allocation of your ex-

2698 penses to any particular account?

A. I don't know how my time was allocated to those various accounts.

Q. Take the account of Kienzle & Merrick, Minneapolis.

Mr. Gilpatric: What page is that, Mr. Haycraft?

Mr. Haycraft: 2585.

By Mr. Haycraft:

Q. Now, you say here that you started to do business with this company on May 20, 1940, on a Bracket 1 contract. Would that be during that calendar year or until the next contract was signed?

A. Well, all of our contracts expire on December 31; so they bought 124 instruments from May 20, 1940 to December 31, 1940.

Q. When was their contract for 1941 negotiated and signed?

A. I couldn't say to that without again looking up the contract, but it was probably either in December of 1940 or in January of 1941. That would be my guess on it, Mr. Haycraft, because they were right there in Minneapolis.

Q. The reason I ask this: I think it is a typographical error on page 2587 on the 6th line down. Mr. Freeman was questioning. You say you started in May, 1941.

Mr. Gilpatric: That should be 1940.

The Witness: 1940, that is right.

Q. And both those years should be 1940; is that 2699 right?

A. That is right.

Mr. Gilpatric: Yes.

By Mr. Haycraft:

Q. So that it is your custom where a contract is entered into during the calendar year, you have that contract expire in December and then you begin a new contract at the beginning of the following year?

A. That is right.

Q. So far as you know, that custom was followed in this instance?

A. I am almost positive it was, Mr. Haycraft. I am quite sure the record would verify that.

Q. Now, in this account of Mechanical Products Company, Seattle, Washington—

Mr. Gilpatric: What record number?

Mr. Haycraft: It starts at the bottom of page 2587.

Q. (Continuing)—you say that this company was devoting 75 per cent of its efforts to the manufacturing of

aeroplane parts for the war effort. When were they doing that? Not in 1941, were they?

A. That information was given us in a report by our Mr. Farnes on September 27, 1941. Now, just when they started their war work, I can't tell you, but they were devoting 75 per cent of their effort in September, surely, if they were tooled up and prepared to turn out that many parts they would have had to start their operations several months prior to September.

2700

By Mr. Haycraft:

Q. Did Mr. Farnes state what he based his report on?

A. No. He called on Mr. Shinman, who is the owner of that business, on September 27 and then reported that 75 per cent of his effort was being devoted to the manufacture of aeroplane parts.

Q. That was his estimate or Mr. Shinman's estimate?

A. Well, apparently—I can't say for sure—but apparently that is the information that Mr. Shinman gave him.

Q. Now, in connection with your Scholz & Stalder account, Chicago, page 2588 in the record, there you don't base your 1941 contract on the 1940 business but you combined the two years and then made an average?

A. Yes, sir.

Q. When did you do that? Just now when you were testifying or did you do that before, before you made your contract?

A. You never know how much inventory a concern has at the beginning of a year and it is only fair to a customer to give him the benefit of the doubt. Now, here is a concern that in one year bought 179 and the next year they bought 139. Now, it isn't beyond reason at all to expect that on January 1 of 1941 that those people had 11 of our instruments in stock, that they actually used 150 of our instruments.

2701 Q. Well, that may be. I am not asking for the argument on that. What I am trying to find out is whether you actually made that calculation that you are now talking about at the time that you signed up the 1941 contract or whether that is now an afterthought to justify the placing of that in that bracket.

A. That is a common occurrence, Mr. Haycraft. If you were calling on these accounts—

Q. I want an answer to my question.
Mr. Freeman: He is giving you an answer.
A. I am giving you an answer.

By Mr. Haycraft:

Q. Let's not go around the barn on that.
Were these factors in your present recollection the factors that you took into consideration at the time you made the contract or are they now your afterthought as to why you did it?

A. Those same policies go back in our method of analyzing an account year after year. It is nothing new.

Q. What is your present recollection of what you did at the time that you granted that discount?

A. I can only tell you it was common practice for us to consider the purchases of a company two years in succession in order to give us a fair average of their yearly purchases from us, just as was outlined here in the
2702 case of Scholz & Stalder.

Q. Did you do that in all instances?

A. In all instances where there was any doubt. That would be only the logical thing to do. We keep records year after year of these accounts. We know this inventory situation exists. It always exists. They might have overbought some in one year, a little bit in one year. They might have had a bigger inventory in one year than another.

Q. As a matter of fact, did you take into account more than two years?

A. Not that I recall, Mr. Haycraft. Two years was the fair average, to my way of thinking.

Q. It is your testimony now that at the time of this account coming up for your determination, you recall that you did take into account that there was a two-year average which would entitle them to be put in Bracket 1?

A. As I testified, Mr. Haycraft, there has been a common practice for us to consider the purchase of an account two years in a row if their previous year's purchase didn't warrant the same quantity price the preceding year and the Scholz & Stalder—I can't say that I previously remember the Scholz & Stalder—but I took those two years into consideration. But it was common practice with us. Undoubtedly we did it with Scholz & Stalder, but I can't swear here today, specifically, that we did that back in

1941; but that was our common practice and un-
2703 doubtedly we did it with Scholz & Stalder.

Q. Wasn't it your policy, if it was anywhere near the 150, to do the same thing?

A. In some cases we did, yes.

A man missed his bracket by a few instruments, it was only logical to give him the benefit of the doubt and it was necessary to do that if we wanted to continue to get his business. We have got a competitive situation in every one of these accounts, as well as the quantity.

Q. In this Koalamatic Combustion Company, page 2588, how many did they buy in 1941?

A. I would have to check that.

Q. Can you get that?

A. 78 instruments.

Q. The Pacific Automatic Heating Company in Seattle, page 2589. Now, I take it from your testimony there that you did not have any record of sales to that company before 1941?

A. Not to my knowledge.

Q. And the way in which you determined what bracket you were going to place them in was to see how many burners they had installed in the previous year?

A. Installed in the city limits of Seattle.

Q. Did you know who was selling them their controls in 1940?

2704 A. Yes, Mercoid was selling them in 1940.

Q. And you expected to get all the business in order to give them Bracket 1?

A. I couldn't say that—answer that. It would be expected to get all of their business, Mr. Haycraft. I know that we presented to them, and they were willing to sign a contract that they would buy 150 instruments from us in 1941 and we took the precaution of further checking to see if they had potential enough to do that. We more than satisfied ourselves of the potential on the basis of the installation records right there in the city of Seattle.

Q. Do you know what they were paying Mercoid then?

A. I do not.

Q. You don't know how much of a premium they were paying?

A. I do not.

Mr. Freeman: You do concede, Mr. Haycraft, that there was a premium?

Mr. Haycraft: I don't concede anything. Off the record.

(Discussion off the record.)

By Mr. Haycraft:

Q. Take the case of Chandler Company, Cedar Rapids, Iowa, page 2593. You say the first contract with that company was executed on May 3, 1940. Now, what factor did you take into consideration to put them into Bracket 2?

2705 A. That is very easily explained, Mr. Haycraft. Chandler took over another company, oil burner manufacturer, in Cedar Rapids at that time.

Q. What was the name of the other company?

A. I am trying to think. It doesn't come to me at the moment. I can get you that name. We knew the volume of business this other company was giving us and when Chandler, who was a much larger concern—and they were, incidentally, in the wholesale business and very well regarded and had a high reputation—we felt they would surely do as well as their predecessors in the oil burner business and we gave them a Bracket 2 contract and I think the facts justified that our judgment was sound in that case.

Q. How many did they buy?

A. Well, in eight months in 1940 they bought 876 instruments.

Q. How many did they buy in 1941?

A. In 1941—I will have to check that—they bought 802 instruments, and again Penn Electric Switch Company was our competition in that account.

Q. You did not list that account as one of your accounts, meeting the competitive price?

A. No, but I do recall right now that Penn Switch was competing with us on that account.

Q. The next account is the Fairfield Oil Heating

2706 Company of Connecticut. That is at page 2594 of the record.

Mr. Freeman: Which account is that?

The Witness: Fairfield.

By Mr. Haycraft:

Q. Now, in that case you put them in Bracket 2 in 1939 and 1940. That was $17.25 in both years, wasn't it, and

then in 1941 you placed them in Bracket 2 which made it $16.45; is that right?

A. That is right.

Q. So that your Bracket 2 in 1941 was really a price reduction from 1940?

A. That is right.

Q. About 80 cents?

A. That is right.

Q. Now, you said you had Mercoid competition there?

A. Yes, sir.

Q. Do you have the report of Mr. Patrick of June 6, 1940, referred to?

A. Yes.

Q. What did they say with respect to Mercoid competition?

A. He specifically states there that although Mercoid stands him about $2 per set less than M-H he would rather standardize on one make but does get calls for Mercoid, mostly distant territory—mentioned Pennsylvania as outstanding Mercoid users. That ends the sentence.

2707 Q. What else?

A. At present has an account there that expects to use about 500 or more burners per year and they insist on Mercoid.

Q. Now, in that situation you sold them in 1940, 937 sets or units. Then you reduced your price 80 cents in 1941, but kept them in the same bracket as to quantity, that is, calling for 150 units. How many units did they buy in 1941?

A. They bought 858.

Q. Units?

A. Units.

Q. Now, you did not list this firm in one instance where you did not list your low price to meet the competitive price but listed this as an account where you gave them—where you kept them in Bracket 2 because of what they had bought in the two previous years?

A. That is right. That could have logically been listed either way. We did definitely have Mercoid competition and their average the two previous years did warrant our giving them the quantity bracket.

Q. Now, that $2 differential that Mr. Patrick reported would put the Mercoid price in 1940 about $15.25, wouldn't it?

A. In 1940?

2708 Q. You were selling at $17.25?

A. Yes. It would be about $15.25, yes.

Q. So that when you sold them at $16.45 in 1941, they were 80 cents nearer their 1940 price?

A. Yes.

Q. Do you know what they did in 1941?

A. If they again didn't drop their price in 1941. Well, the way we would have reasoned a thing like that, Mr. Haycraft, we dropped everyone's price in Bracket 2 that year, not just Fairfield. We dropped everyone that was buying in that Bracket 2 and it did bring our price closer to the previous year's Mercoid price by 80 cents, but we still were higher, considerably, than Mercoid.

Q. Do you know whether you were still $2 higher or just $1.20 higher or did you have any information at that time as to whether Mercoid followed that price reduction?

A. We knew that Mercoid prices dropped in 1941.

Q. But you don't know how much?

A. I don't know how much in that particular case.

Q. Well, did you find out how much they actually dropped that year in accounts of this size?

Trial Examiner Sheppard: You mean later on?

Mr. Haycraft: During the year 1941.

A. I don't know specifically what the difference was in that class of accounts.

2709 By Mr. Haycraft:

Q. Well, you do know this, do you not, that in 1940, according to your reports, you were $2 higher than Mercoid and you sold them 937 units?

A. Yes, sir.

Q. Do you know what proportion that was of their requirements?

A. I wouldn't care to estimate. This one report that I read here, Mr. Patrick's, said they had one customer who was taking 500 burners equipped with Mercoid. There alone would be instruments considerably more than we sold them all year.

Q. But you don't know whether they had any other Mercoid accounts?

A. I don't.

Q. In other words, in this case it was a case of where the oil burner manufacturer was selling on account, that

is, a furnace account, I assume, and equipping that entire account with Mercoid controls?

A. It could have been a builder, a furnace manufacturer, but you will recall that his report stated that the Mercoid was sold mostly in distant territory and he mentioned Pennsylvania as outstanding. Mercoid users—plural—not just one. There may have been more there for all I know.

Q. Do you know whether or not he required a
2710 premium as to this particular customer when the burner was equipped with Minneapolis-Honeywell controls?

A. Offhand I can't answer that.

Q. The next account is Todd Combustion Equipment Company, page 2597. In that account you corrected some previous testimony as to the quantity.

A. Quantity sold, yes.

Q. So that, according to your testimony now, they came within the 1050 bracket?

A. Yes, sir, both years, 1940 and 1941.

Q. The next account is one that you have already discussed somewhat before, the Atlas Manufacturing Company in Brooklyn, page 2601. When was that contract signed? Was that in March, 1941?

A. Off the record.

(Discussion off the record.)

A. The Atlas contract was signed March 3, 1941.

Q. Now, had they taken any devices between January and March, 1941, before they signed the contract?

A. I would have to check that.

Q. Any deliveries made?

A. I would have to check that. I don't know offhand.

Q. Now, when it was first suggested to you that the Bracket 3 contract be entered into with this customer, what was the first thing you did? I suggest you look
2711 at your letter of February 11, 1941, addressed to Mr. Brown.

A. Well, when I received Mr. Brown's report of February 5, I wrote him on February 11 asking him that he give us some more information regarding the story back of this move that Atlas wanted us to make.

Q. Well, my question was: What was the first thing you did? Would you say the first thing you did was to check the 1940 purchases of this customer?

A. I would say from this letter that that's what I did, because I cited in the letter that they bought 234 sets,—

Q. They would place them—

A. —or 1258 units in 1940.

Q. That would place them in Bracket 1, wouldn't it?

A. No, sir, that would place them in Bracket 2.

Q. Bracket 2, I should say. Then you also stated that unless they had been using a competitive control of greater volume than you were aware of—

A. I could see no justification for a 1000-set contract or a contract for 3000 units based on the previous year's purchases. I also told him that I felt there was something back of this, that it had gotten by us.

Q. What did you mean by that?

A. Well, I thought that there was some more information in the background that he hadn't given me regarding this particular transaction.

2712 Q. What was the competitive control that you had in mind there?

A. Mercoid.

Q. And what was the quantity that you understood in volume? What information did you have as to the volume?

A. I can't tell you that on this date—I can't tell you about something that transpired back in 1941.

Q. You don't have any reports?

A. I don't have anything here that indicates anything about that.

Q. Now, when was it that you found out that they fell down on their building development bids or failed to get the business?

A. Well, I can't answer that either, because an account like this, ordinarily we would pick up—if they had a Bracket 3 contract and they had only purchased 25 sets, it should have come to light pretty quickly. Apparently it didn't. Why, I can't answer; but I only know at the end of the year they had only bought 819 units.

Q. The next one is the Diesel Oil Burner Corporation in Jamaica, Long Island.

A. What page is that?

Q. 2606. How many did they purchase in 1941?

A. 1916 instruments.

Q. So on that quantity they should have been in Bracket 2?

2713 A. For 1941.

Q. And Atlas would have been put in Bracket 1 from the quantity they purchased?

A. Tat is right.

Q. And they were given Bracket No. 3 prices?

A. That is right, but, of course, Diesel earned their bracket in 1940.

Q. And Atlas didn't?

A. Atlas did not. That is, Atlas did not earn a No. 3 contract in 1940.

Q. The next one is Electrol. Now, then, in 1940 they purchased a total of 2504, which would put them in Bracket 2; is that right?

A. That is right.

Q. I notice in this case that you suggested to Electrol—yes, I guess it was you—

A. Not I, Mr. Brown.

Q. —or Mr. Brown suggested—was he authorized to make a suggestion?

A. Well, that is only a natural suggestion to make, for any of our salesmen to make.

Q. That is, he suggested that they cut their $4 extra price on M-H equipment, on Electrol burners with M-H equipment?

A. That is right.

Q. 50 per cent?

2714 A. That is right.

Q. So there would be only $2 difference?

A. Then he would be more closely in line with his competitive manufacturers and the prices extra they were charging to their dealers. That was only a logical thing to try to do. I hope he succeeded.

Q. Do you know whether he did or not?

A. I can't say at the moment.

Q. Do you know what the price was of the other—in other words, how much of a premium they were paying M-H for a set of controls as compared with Perfex on these burners? I notice you say your price is $15.90 a set in 1941.

A. That is right.

Q. Do you know what Perfex's price was?

A. We knew that Perfex and Electrol had some kind of a patent tie-up, and I haven't any documentary evidence to substantiate this at all; but it was my impression right

along that Electrol was getting the Perfex bottom price on their control equipment.

Q. Well, let's see if I have got this straight now. You sold them 2504 units in 1940?

A. 1940.

Q. On a Bracket 3 price, which was $16.65 a set?

A. That is right.

Q. Then, in 1941 you say you sold them $15.90, 2715 so they were still in Bracket 3?

A. At a lower price.

Q. Now, that reduction was about 70 cents?

A. That is right.

Q. A set?

A. Yes, and that same reduction was enjoyed by all manufacturers buying Bracket 3 in 1941.

Mr. Gilpatric: A general reduction, wasn't it?

The Witness: General reduction.

By Mr. Haycraft:

Q. Now, do you know how many you sold them in 1941?

A. 1118 instruments.

Q. And you sold them 1118 instruments at $15.90 a set and Electrol, in turn, charged the public $4 extra for oil burners carrying your equipment?

A. That was in 1939 that they charged $4 extra. What they charged extra in 1941, I don't know.

Q. Or in 1940?

A. Or in 1940.

Q. Well, do you know whether they charged any extra in 1940?

A. I don't know.

Q. Well, why did you bring it to our attention, this letter of 1939?

A. I thought this letter would be of interest to
2716 you in knowing that Electrol was charging dealers extra for Minneapolis-Honeywell controls over Perfex, which certainly indicated that they were paying less money for Perfex than they were paying for Minneapolis-Honeywell.

Q. That would be in 1939; but what about those two years? Was it your idea to give us the impression they were doing the same thing in 1940 and 1941?

A. I think you will find that the same procedure was followed in 1940 and 1941, but what the difference in price was in those years, I don't know.

Q. Well, that is what I would like to find out. I had the impression from your testimony that this was a premium paid during those two years.

A. No, because it is right in the testimony, if you will note there, an excerpt from our Mr. W. J. Brown's report of June 13, 1939, and I quoted.

Q. Yes, but you don't say—you don't know what happened in 1940 and 1941?

A. That is right.

Q. So I had the impression, and anyone reading the text would have the impression, that that would apply to the succeeding years.

A. I don't know.

Q. You don't know?

A. If you would like that information, I will get it
2717 for you. Electrol's records are available now. We can get it.

Mr. Gilpatric: It has all been testified to. They were charged a premium all the way through. We had a witness on the stand here from Electrol, Mr. Bendix.

Trial Examiner Sheppard: I don't know why you need to check. The man who represented Electrol so testified. That is the best evidence.

Mr. Haycraft: If that is in the record, all right.

Mr. Freeman: It is in the record. Mr. Bendix so testified.

By Mr. Haycraft:

Q. Then if that is true, in spite of the fact that the public was required to pay $4 extra on Electrol burners equipped with M-H controls, you sold them 1100 and some odd units in 1941?

A. That is correct, except you say the public, and it was the dealer.

Q. The dealer?

A. The dealer.

Q. You don't know what the public paid?

A. I don't know.

Trial Examiner Sheppard: I think I will excuse you now until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 p. m., this day.)

2718 Afternoon Session:

2:00 p. m.

Trial Examiner Sheppard: All right. We will go ahead when you are ready, Mr. Haycraft.

ARTHUR F. LOCKRAE resumed the stand and testified further as follows:

Cross-Examination by Mr. Haycraft (Continued):

Q. The next question is Malleable Iron Fittings Company, page 2608. You stated here that you knew that Mercoid was doing a greater portion of Malleable's business. How did you know that?

A. It is already in the record, Mr. Haycraft, that Malleable Iron Fittings and Minneapolis-Honeywell had some differences of opinion, and we practically lost out on Malleable Iron Fittings' business that year, and from then on Mercoid continued to be their standard control and enjoyed the major portion of their business.

Q. Did you have anything to do in the negotiations of that contract?

A. Nothing in the way of personal contact with the account.

Q. You did not contact Mr. Gillis?

A. I did not contact Mr. Gillis after that occurrence.

2719 Q. Do you know what price they actually were paying at that time, paying Mercoid? I notice you testified with respect to what other customers were paying, but do you know what—

A. I did not know at that time specifically what Malleable was paying for Mercoid.

Q. Now, you had them in Group 2, $15.90 a set?

A. That is right, and we later dropped them to 3, if I recall correctly.

Q. $15.90 in 1941?

A. That, I think, is the Bracket 3 price, because it was in 1941. As I remember, we gave them Bracket 3.

Q. And that was not based on anything that they bought in 1940?

A. No, sir.

Q. Do you know what the sales were to them in 1940?

A. We sold them 1923 instruments.
Q. In 1940 or 1941?
A. 1941.
Q. You don't know what you sold them in 1940?
A. I don't have that record with me.
Q. Well, was that 1923 instruments sold before or after the misunderstanding you had with them?
A. That was afterward. The misunderstanding—I may be a little bit hazy on this, but that was back, I think, in 1939.
2720 Q. So that you did continue selling them in spite of that?
A. We certainly did.
Q. And in 1941 you sold them 1923 instruments?
A. That is right.
Q. At $15.90 a set?
A. Yes, sir.
Q. And I think you testified here yesterday—I mean in your last time on the stand—that you learned later that Mercoid was paying $13.50 a set.
Mr. Freeman: Selling.

By Mr. Haycraft:

Q. Or Mercoid was selling at $13.50 a set to the Malleable Iron Fittings Company, which was $2.40 less than you were charging?
A. Yes, sir.
Q. Now, the Sanmeyer Corporation of Chicago, page 2610, you gave them in 1941 a 3,000 instrument contract, Bracket 3, based on their 1940 purchases of 2913, is that right?
A. Yes, sir.
Q. What did they buy in 1941?
A. 2402 instruments, and I can add right there that they were buying Mercoid also in 1941 in what I think was representative quantities.
Q. Do you know what price they were paying?
A. I do not know what price they were paying Mercoid.
2721 Q. Do you know what quantities they were buying?
A. I do not know what quantities they were buying, but I do know they were using a substantial quantity of Mercoid controls.

Q. Do you know whether they were buying more from Mercoid than they were from you?

A. I couldn't say that.

Q. Were they making a burner, the Sanmeyer Corporation?

A. Yes, sir.

Q. And were they selling in competition with the Automatic Burner Corporation?

A. It is my belief, Mr. Haycraft, that they were not competing with Automatic Burner Corporation because the Sanmeyer burner was a modulating or low-high fire burner more commonly used in industrial or semi-industrial applications, and Automatic Burner Corporation was making purely a domestic type of burner.

Q. Did the Sanmeyer make any domestic at all?

A. They could use this burner for domestic, but it was not commonly used that way because it was much more expensive than the ordinary domestic gun type burner.

Q. Now, the next account is the Wisconsin Oil Burner Corporation. You stated you had that on Bracket 2 in 1940 and you sold them 1945 units that year. Now, you say you sold direct to the Mueller Furnace Company,
2722 2187 units that were used in conjunction with burners manufactured by Wisconsin. Well, now, who visited the account of the Mueller Company?

A. Mueller is located in Milwaukee, and our direct contact with them is through our Mr. Harold Pride, who has charge of our Milwaukee office.

Q. Did he make separate calls on Mueller Furnace Company?

A. Well, Mueller we have sold a great many years, not only oil burner controls, but gas controls and furnace and boiler controls, and then they took on this Wisconsin Oil Burner to augment their line, and it was just one of those things that happens constantly. Here was a furnace manufacturer broadening his field. He was going from gas to oil, took on the Wisconsin burner. Our Mr. Pride, of course, knew it, and it was another one of those dual transactions.

Q. Now, did you give Mueller the same price that you gave Wisconsin?

A. No, sir. Mueller's purchases from us were far greater than Wisconsin.

Trial Examiner Sheppard: They were in different brackets, weren't they?

The Witness: Yes, sir.

By Mr. Haycraft:

Q. Well, let me see if I understand it correctly. They bought 2,187 units in 1940. In 1941 they bought 2,268 units.

2723 A. That is Mueller.

Q. Mueller. Now, what bracket were they in?

A. I would have to check my record, because we classify them as a furnace and boiler manufacturer, but if my memory serves me correctly, they are buying on our bracket for Wisconsin 15,000 instruments.

Mr. Gilpatric: Each sale is shown here only for use in conjunction with Wisconsin burners?

The Witness: That is right, but there are other purchases for gas, and furnace and oil burner controls would exceed that quantity.

By Mr. Haycraft:

Q. Would you pool all those various controls?

A. Oh, yes. Any manufacturer that bought from us, we didn't care. We still don't, whether they are buying refrigeration controls, whether they are building stokers or gas burners or what not, as long as they are using our instrument, a unit is still a unit.

Q. Then you allowed the Wisconsin Oil Burner to add the Mueller instruments, that is, that were bought direct, were not bought through Wisconsin, so they could get a higher bracket or a lower price?

A. That is right.

Q. Did the Wisconsin Oil Burner do anything to your knowledge to cause the Mueller Company to use the M. H. devices?

2724 A. No.

Q. That was your own direct contact did that?

A. That is right. Mueller was buying their controls direct from us, and there was no use of their buying the burner and the controls from Wisconsin. They simply bought the burners and bought the controls from us. That is often common practice with furnace manufacturers of that size.

Q. But so far as the Wisconsin Oil Burner Corporation is concerned, they signed a contract, Bracket 2 contract?

A. For 1050 instruments.

Q. In 1940. Then, in 1941 they signed a Bracket 3 contract calling for 3,000 instruments?

A. That is right.

Q. And they actually placed orders for 1,376 devices?

A. They actually purchased those direct from us.

Q. Now, the Sunray Burners, Inc. How are they affiliated with Kelly Oil Sales Company?

A. Well, as I understand the picture, they were totally owned or partially owned by the Kelly Oil Sales Company. Kelly Oil Sales manufactured their own burner for years, and then they set up this Sunray account to actually manufacture those burners, and they took their entire output.

Q. Well, in your dealings with Sunray or with Kelly—

A. Our dealings with Kelly were actually building the burners, direct with Kelly, and then with Sunray, too,
2725 over the manufacture of those burners, our dealings were with Sunray.

Q. I notice you don't list this with one of your competitive accounts, although you do say here that competition was extremely keen.

A. That is right. That is another account that we could have listed either way or both ways.

Q. Well, now, when you made that Sunray contract, just which one of those factors did you take into consideration, the competitive situation, the volume of business they did in the preceding year, or the dual account that they might have with Kelly Oil?

A. That was not a dual account as we term dual account, Mr. Haycraft.

Q. Well, did you give them credit for what the Kelly Oil sales—

A. Yes, as I recall, we had a contract back in 1939 with Kelly. That was a Bracket 3 contract, and in that year they bought 5,005 instruments. Now, I say here we gave Kelly another Bracket 3 contract. We may have done that although the controls were delivered to their subsidiary, the Sunray. I would like to check my records on that before I will say positively. My first impression was that when Sunray started in business, we did business with Sunray and no longer had a contract with Kelly, but I am not sure of that.

Q. This, according to your testimony, said you
2726 gave them a contract.

A. It says we gave Kelly another Bracket 3 contract in 1941.

Q. And they bought 2,414 instruments?

A. That is right, and then it says—to continue—if you will note, Mr. Haycraft, before 1941 was over they quit building oil burners and were buying from another manufacturer.

Q. Well, just what, then, did you take into account to put Sunray in Bracket 3? It isn't clear to me.

A. Well, let me reiterate it. I think it is clear right here in this prior testimony. In 1939 our dealings were with Kelly, and they had a Bracket 3 contract calling for 3,000 instruments, and they actually bought 5,005, and then in 1941 they had another Bracket 3 contract for 3,000.

Mr. Freeman: It should be 1940.

The Witness: Pardon me. Wait a minute. No, during the year of 1941 we gave Kelly another Bracket 3 contract for 3,000, and they bought 2414. Now, that was based on the fact that in 1939 and 1940 they purchased 7319 instruments for those two years, which would give them a yearly average of 3659, and—

Mr. Haycraft: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

2727 The Witness: During that year they purchased 5,005 instruments. That is 1939, right?

Mr. Gilpatric: Yes, it is.

The Witness: And then in 1940—it is printed here 1941. It should be 1940, is that right?

Mr. Gilpatric: Yes.

The Witness: This should be 1940, Mr. Haycraft, and this should be 2314.

By Mr. Haycraft:

Q. That is in line 16, you can change 2314, and line 15, 1941 should be changed to 1940?

A. That is right, so in 1939 and 1940 they purchased a total of 7319 instruments or a yearly average of 3659, so in 1941 we gave them another Bracket 3 contract.

Q. And what did they buy?

A. They bought 1,077 instruments that year before they went out of business of manufacturing oil burners and buying from somebody else.

Q. Do you know when that was?

A. I don't recall, and the record wasn't clear on it.

Q. Now, your price to Sunray was $15.90 a set?

A. $15.90 per set.

Q. And you say here at page 2612 that was your price at Kelly Oil sales. Do you mean by that to Sunray?

A. Well, you could look upon those two accounts as being one and the same, Mr. Haycraft, if that will clear your thinking. Now, we have it listed on this contract as Sunray. I think our contract was with Sunray, but I am not sure about that.

Q. All right, then, the price that you understood Sunray was paying Mercoid was $14.20, is that right?

A. The price of $14.20 we knew had been extended by Mercoid to the S. K. Oil Burner Company and the Bascom Company, and neither of those two concerns had the potential of Sunray, so we felt that Mercoid's price to Sunray would be $14.20 or less.

Q. Well, in determining that, though, you didn't take into consideration anything that was sold you by Sunray or Kelly?

A. No.

Q. Did you ever find out what they actually paid?

A. I believe that Mr. Owens testified that he took an order from Sunray for a thousand burners and he gave the price, but I don't remember.

Q. It is the top of page 2614. Let's see if that is right. According to your notes, $13.70.

A. That would be the figure, $13.70.

Q. So that the actual price of $13.70 as compared to your $15.90 was $2.20 difference?

A. Yes, sir.

Q. Now, do you know what time that $13.70 price was made?

2729 A. I wouldn't know unless the record shows the date of that order, and it seems to me that the date was in the record.

Mr. Freeman: You mean Mercoid's date?

The Witness: Mercoid's date.

Mr. Freeman: Mercoid were giving you 1941 prices when Owens testified.

Mr. Haycraft: Was it 1941 or 1940?

Mr. Freeman: 1941.

By Mr. Haycraft:

Q. So that if the $13.70 price, if that is the correct figure that Sunray was paying Mercoid in 1941, they bought 1,077 units from you at $2.20 more?

A. Premium per set.
Q. More per set?
A. Per set.
Q. Now, take up the York Oil Burner, York, Pennsylvania.
A. What page was that?
Q. It is right on the next page.
A. Oh, yes, 2615.
Q. There again, did you have any information from York Oil Burner as to the price they were paying Perfex?
A. According to my recollection. I am not sure about that.
Q. As I understood your testimony, you compared the price that you thought—
2730 A. That is right. We compared that to Perfex Oil. We didn't have any definite recorded information from York.
Q. But you were selling York at $15.90?
A. We were selling York at $15.90 in 1941.
Q. And you determined later that they were paying Perfex $13.70?
A. Yes, sir.
Q. In 1941?
A. Yes, sir.
Q. So there again, there was a difference of $2.20?
A. Yes, sir.
Q. And how many units did you sell York in 1941?
A. 1641.
Trial Examiner Sheppard: Units?
The Witness: Units.

By Mr. Haycraft:

Q. In other words, they bought 1641 units and paid a premium of $2.20 per set?
A. Yes, sir.
Q. Higher than they paid Perfex?
A. Higher than they paid Perfex.
Q. Do you know which control was standard in York that year?
A. Perfex was standard.
Q. Do you know which was standard in Sunray?
2731 A. Minneapolis Honeywell was standard, so far as I know.
Q. Malleable Iron Fittings, Mercoid was standard, wasn't it?

A. Yes, sir.

Q. What about Electrol, did they have their own device?

A. No, Electrol, part of their device they manufactured themselves, but the other part they bought from Perfex and Perfex was standard.

Q. While we are on that, see if I can get some of these others. R. W. Beckett Engineering. That is the next one coming. Which device was standard on that in 1941?

A. Our controls were standard on the Beckett, although it catalogued both types.

Q. And by standard, if we get our definitions uniform on that, by that you mean that they would be—that the burner would be equipped with that if the customer did not request any other make of device?

A. I think that is absolutely true in the case of Beckett. I think they furnished Mercoid controls to certain dealers who wanted to save some money on an oil burner, but if a dealer wrote in an order for a burner and didn't specify the control, I am pretty sure Beckett would have shipped our control.

Q. All right. Now, what is the situation with respect to D'Elia Oil Burner Company?

2732 A. The same situation would apply there.

Q. Century Engineering?

A. No, Century Engineering used both our controls and Penn Switch controls, and as I believe I testified before, Penn Switch got the preponderance of the business of that account. Now, again they allowed their dealers to buy a burner and specify either control, either M. H. or Penn.

Q. And they catalogued both of them?

A. Yes.

Q. Was there any difference in price?

A. Yes, there was a difference in price. There was a difference in the price of the controls to start with.

Q. I mean to the dealer.

A. And Century never gave away anything that I know of.

Q. In other words, they charged the dealer the difference in price?

A. I am quite sure that they did.

Q. How about Harvey-Whipple?

A. Harvey-Whipple, there was another case where M. H.

and Perfex were standard and they gave the dealer the option when it came to the choice of control.

Q. Norge Heating?

A. Our controls were standard with Norge Heating.

Q. Paragon?

A. Our controls were standard with Paragon.

2733 Q. Reif-Rexoil?

A. There they used both M. H. and Perfex, and the same situation would apply; if the dealer wanted H. M. he got it, and if he wanted Perfex, he got it. And again, while I don't have anything in the record, Reif is similar to Century. I never knew them to give away anything, and it would be my judgment that if they bought Perfex controls, they would get them at a lesser price than they would get M. H.

Q. Scott-Newcomb?

A. Scott-Newcomb, M. H. were standard.

Q. Silent Glow?

A. Silent Glow was in exactly the same situation as Harvey-Whipple. They used both Perfex and M. H., and gave their dealers the option.

Q. Wayne Oil?

A. Wayne Oil, Perfex was standard. If the dealer wanted M. H., they got it. If they sent in an order for a burner without specifying, they would get Perfex.

Q. Do you know whether they charged their customers extra for M. H. equipment?

A. We were told, Mr. Haycraft, that Wayne made no difference in price in 1941 to the dealer. They could have M. H. or Perfex.

Q. Anchor Post Fence?

2734 A. Perfex was standard equipment and Anchor did price a charge difference.

Mr. Gilpatric: For M. H.?

The Witness: For M. H.

By Mr. Haycraft:

Q. Cleveland Steel?

A. M. H. was standard.

Q. Delco Appliance, General Motors?

A. Well, as you recall, Delco built their own controls. We only supplied the limit control.

Q. Gilbert & Barker?

A. With Gilbert & Barker, Penn Switch was standard, and they got the preponderance of the business.

Q. Did they charge more for—

A. I can't say as to that, Mr. Haycraft. My memory says that the Penn control was standard on their price burner and our control was standard on their deluxe burner.

Trial Examiner Sheppard: I don't remember anything in the record about any premiums except on yours.

The Witness: As far as we know, Major, no manufacturer ever charged a premium to get one of our competitor's controls. If a premium was charged, it was always when M. H. controls were used.

By Mr. Haycraft:

Q. On this Gilbert & Barker Manufacturing Com-
2735 pany, as I understand your testimony, it is that on their cheap line Penn Switch is standard, and on their expensive, M. H.?

A. Yes.

Q. When you said Penn Switch got the preponderance of business, do you mean the preponderance of the entire business?

A. That is right.

Q. By that you mean there were more cheap burners sold than more expensive?

A. Yes, sir.

Q. You had a substantial sale of that?

A. That is right.

Mr. Freeman: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

The Witness: But nevertheless, their controls were standard and they bought more controls from Penn than they did from us?

By Mr. Haycraft:

Q. What is the situation in the May Oil Burner?

A. M. H. controls were standard.

Q. Micro-Wesco?

A. M. H. controls.

Q. Timken?

2736 A. Perfex controls were standard.

Q. Well, now, was that on all burners?

A. On all burners.

Q. How do you account for the sale of 11,000 units, then?

A. Dealer demand. They wanted our controls.

Q. Did they pay a premium for them?

A. I am not sure whether they did or not.

Q. Williams Oil-O-Matic?

A. Williams Oil-O-Matic give the dealers the choice of Perfex, Mercoid or—I beg your pardon. They give them the choice of Penn, Mercoid or M. H.

Q. And what did they charge extra for M. H.?

A. At the beginning of 1941 they had an extra charge when M. H. were supplied. Late in the year, in August, I believe, of that year, just as the peak selling season was coming along, as a sales incentive they offered M. H. as optional at no additional price.

Q. B and W?

A. Frankly, I don't know the situation surrounding that account, whether Mercoid was standard or whether our controls were standard.

Q. Campbell?

A. M. H. controls were standard.

Q. Now, I will ask you whether or not as a business proposition the fact that a control is standard equip-
2737 ment on a burner is an advantage to the manufacturer of the control that is standard.

A. Well, it all depends on how you look at it, Mr. Haycraft. A manufacturer like May Oil Burner, for example, they build just one type of burner. It is a quality burner. They buy the best motors and pumps and transformers and controls that they can buy, and M. H. was standard on that burner and has been for a great many years. They have tried out other controls, but they have always standardized on M. H. Now, just a few miles away in the same city is Anchor Post Fence, and their policy is diametrically different. Now, they have a gun type burner that competes with May, and they are out to get business at a price. Perfex controls cost them less money. They therefore can price their burner less with Perfex controls, and it is their standard, although the dealer can have M. H. controls if they want to pay the difference in price. Now, right along that line, Anchor Post built a rotary burner and M. H. controls are standard on that higher quality rotary burner, but the sales are in the minority.

Q. Most of the sales, then, that you made to Anchor Post, was for their oil burner?

A. It would be for both, and I think it was for both, because the rotary burner part of their business was not

a big part; it was small in comparison to the num-
2738 ber of gun type burners that they built.

Q. Well, in your judgment, did you sell more or less controls where M. H. was standard than you did to accounts where Mercoid or Penn Switch were standard?

A. Well, it would all depend on the account and the attitude of that account. Now, with Gilbert & Barker we were standard on their deluxe burner, and they didn't sell nearly as many of those burners as they did their lower price burner that was equipped with Penn Switch controls.

Q. But did you get a larger proportion of the sales of controls that went on the deluxe burner?

A. Well, we got, as far as we know, all of the sales that went on the deluxe burner.

Q. What I am trying to get at is whether of not the fact that a device or heat control is standard on the burner gives the manufacturer of that control an advantage over competitors that are not standard on that.

A. Mr. Haycraft, the dealer, in this day and age, usually gets what he wants, and I don't care whether it is Anchor-Post Fence or whether it is Century Engineering or any accounts you may name, business is done along the lines of less resistance, and a manufacturer is not going out and argue with a dealer to try to get him to take a different control than he wants to buy with his burner. Now, any
dealer can get what he wants from any manufacturer,
2739 as far as I know. They may try to sell him their standard control, but if he insists that he wants a specific control, he gets it.

Q. Well, as a matter of policy, hasn't it been your policy to try to get your customers, the burner manufacturers, to make your device standard?

A. We try to get every dollar's worth of business we can get from every account.

Q. Does that mean that you do?

A. We get every dollar's worth of business we possibly can get from every account.

Q. Answer my question. Do you try to get your customers to make your device standard?

A. Listen, if we can get an account to buy our controls and they don't buy anything else, we are very, very happy indeed, and they then become standard equipment on that manufacturer's burner.

Q. Well, isn't that your policy, to try to get them to standardize on your device?

A. If we can get them to catalogue our controls and not catalogue any other, if that were possible we would be very, very happy indeed.

Q. Isn't that your proposition to the Cleveland Steel Products?

A. Yes, I think it was our proposition to Cleveland
2740 Steel Products because in the year previous they had been standardized on Mercoid, and if they offered our controls as standard, the dealer was not going to demand Mercoid in the vast majority of cases because they would rather have M. H. than they would Mercoid any time, or Penn or Perfex, because they knew they were getting a higher quality control, one that they could go out and sell to the home owner without having to do two selling jobs, first on the burner and then on the control, therefore, all those advantages to the dealer in using M. H. controls. There are very few dealers that ever came to my attention that got their back up because the manufacturer was selling them M. H. controls.

Q. Even though they had to pay as high as $4.00 a set extra?

A. No, I said that they never got their back up if the manufacturer supplied them. I didn't say at what price burners.

Q. It wouldn't make a difference?

A. It would make a difference to anyone, of course.

Q. By your testimony you mean if he had paid the same price for both controls they would prefer M. H.?

A. Absolutely, every time, and you will find—

Q. Even if he required them to pay a premium?

A. Even if he was required to pay a premium. The average dealer would rather do it, thank God, than to buy a competitor's control at a lesser price.

2741 Q. And yet, as I understand your testimony, in 22 accounts you broke over and made off-scale prices to get your share of the business.

A. Yes, sir.

Mr. Freeman: What do you mean by your share?

Mr. Haycraft: That is what I would like to know.

By Mr. Haycraft:

Q. What do you mean by your share? You used that term a good many times in your direct testimony, and I would like to get a definition of it.

A. All right. Of course, having charge of sales, I could

selfishly say that a hundred per cent of the business would be our proper and legitimate share, but we know that there is a tremendous amount of the oil burner business done with a price burner, and the manufacturer is always tempted to put the lower price controls on his burner. Now, if we can get them to use our controls at a price premium, even though they go out and add and make a difference in the price of a burner equipped with our controls to the dealer, we know that we are going to get our share of that business. I couldn't say what our share was in any particular account. You could look at the overall picture. It is in the testimony that we got around 60 per cent of the oil burner business. Well, if we ever get less than 60 per cent, I will say from here on in we
2742 are not getting our share of the business.

Q. Let's turn to the Beckett account.

A. On 2616 it starts.

Q. What was your share of the business at R. W. Beckett, Inc., Engineering?

A. Well, that depends on the year that you want to talk about.

Q. Well, we will start in 1939.

A. Well, in 1939 I would say that our share of the business that year was pretty close to a hundred per cent, because to my knowledge they weren't using any competitive controls that year.

Q. And was that another dual account?

A. Yes, it was a dual account at first with the Fox Furnace Company. That was in 1939, and then later it became a dual account with Olsen Manufacturing, but as it turned out, Olsen didn't buy any controls from us. We thought it was a dual proposition when they went in with us.

Q. But you gave them a Bracket 3 contract, didn't you?

A. We gave them in 1939, yes. In 1940, after we knew they had lost the Fox Furnace business, even though they had purchased a combined 8328 units the previous year, we put them back on a Bracket 2 basis at the start of 1940.

Q. Now, then, where did you find out what price they were paying Mercoid for their sets of controls?

2743 A. Well, that information first came in a report from our Mr. Snowberg, who had called on Beckett. Later it was confirmed to me in person when he called on Beckett.

Q. And Beckett told you?

A. That is right.

Q. And he told you your price was almost $4.00 more than Mercoid's?

A. Perhaps he didn't say it in just those words, but he gave us the price that he was paying for the relay at that time, and it was easy enough to adduce the rest, because we knew what Mercoid's limit control was priced at.

Q. In 1940 what was your share of the business?

A. I couldn't say as to that, Mr. Haycraft. I don't know how many sets Olson used of Mercoid. I don't know how many sets Beckett used of Mercoid.

Q. Now, then, that was in 1940. Did they start buying Mercoid then?

A. Yes, in 1940.

Q. Then what would you say your share of the business in 1941 was?

A. Well, again the same situation existed. They were still selling Olson. Olson, to our knowledge, were buying Mercoid controls, and I couldn't say how many Olson bought or how many Beckett actually bought that year.

I do know they catalogued Mercoid controls, and I do
2744 know Beckett catalogued both M. H. and Mercoid in 1941.

Q. Well, was your instrument standard in 1939 on Beckett?

A. Yes, in 1939 they were.

Q. 1940?

A. Well, then they catalogued both types.

Q. And did the customer ever have a choice at the same price, or did the customer have to pay more?

A. I couldn't answer that. I would say that the customer would have had to have paid more if he bought M. H. controls.

Q. Now, then, do you know what your sales were in 1940?

A. I don't have that here. I am sorry. I forgot that.

Q. In your 1941 sales, though, Beckett Engineering was a little over 2,000 units, was it not?

A. What year was that?

Q. 1941.

A. 2,031 instruments.

Q. And you don't know whether that was your share of the business or not?

A. I couldn't answer that.
Mr. Gilpatric: That is what he actually got?
The Witness: That is what we got.

By Mr. Haycraft:

Q. And you got that at a price which was nearly $4.00 more than Mercoid, is that right?

A. I couldn't say that again, because we lowered 2745 our price $1.00.

Q. Oh, I see.

A. And that would make $3.00.

Q. Here it is, $1.65 higher than Mercoid.

A. That is right.

Q. That is your estimate, isn't it, page 2619, is that correct?

A. No, sir. You are down on another—wait a minute. That is right. In 1941, according to these figures, our price would have been $1.85 higher than Mercoid.

Q. And you got a total of 2,000 units on that basis?

A. Yes, sir.

Trial Examiner Sheppard: I thought you said four.

The Witness: Pardon?

Mr. Haycraft: Well, 2,000 units were sold. At the beginning of the period it was $4.00 difference, but they reduced their price and they came down to $1.85.

Trial Examiner Sheppard: I see.

By Mr. Haycraft:

Q. You reduced that price by giving them a higher bracket?

A. That is right. We gave them our Bracket 3 prices.

Q. You didn't have any idea they would buy that many?

A. My thinking at the beginning of 1941 would have been that in their normal business they couldn't have bought enough controls to justify the 3-A bracket 2746 quantity of 7500 units.

Q. See if I can get it correct. Your price at that time, 1941, was $15.35 a set with a 3-A price, wasn't it?

A. $15.35.

Q. Now, the D'Elia Oil Burner Company, Bridgeport, Connecticut.

A. Page 2620.

Q. At that time, in 1939, you gave them a Bracket 3 contract. In 1940, was that the year the Mercoid competition developed, or was that prior to that time?

A. It developed in 1940. In 1939 they bought 6397 instruments.

Q. Their standard equipment?

A. And they were standard equipment, but they decided in 1940 to enter the low price burner field. That was in February of that year, and that is when the competitive situation showed up, and we gave them our Bracket 3 contract which called for 7500 instruments.

Q. And they had bought 6300 the year before?

A. Yes, sir. They had only lacked 1103 instruments of earning the 7500 quantity the year before, and obviously if they were going into the low price burner business, it seemed as though they could easily make a 7500 commitment for 1940.

Q. Well, do they still keep your control standard?

2747 A. To my knowledge they do.

Q. The low price burner?

A. To my knowledge they did.

Q. And you sold them over 5,459 units in 1941. Now, how much of a premium did they have to pay you for those controls over Mercoid?

A. Well, the record shows that Mercoid quoted $13.70 in 1941, and we were selling D'Elia at $15.35, so that would be $1.85 per set of controls.

Q. Provided Mercoid offered D'Elia the same price?

A. I beg your pardon. The Mercoid price is in the record that they either quoted or sold D'Elia, 1941, at $13.70.

Q. You learned that afterwards?

A. That is right. We thought that they were getting a price from Mercoid of about $14.20.

Q. So it was your impression when you made that $15.35 price that you were coming within—

A. $1.15 within their price.

Trial Examiner Sheppard: I think that is the closest one I have noticed, I mean in the competitive price between them.

Mr. Freeman: That is what they thought, but in fact it was the $1.85.

Trial Examiner Sheppard: It was?

Mr. Freeman: Yes, in fact.

2748 By Mr. Haycraft:

Q. So that you sold to D'Elia Oil Burner Company 5,459 units at a premium of $1.85 a set over Mercoid, is that right?

A. That figure, where did you get that, Mr. Haycraft?

Mr. Freeman: It is in the record.

Mr. Gilpatric: It is in the record.

Mr. Freeman: It is in the record. It is all right.

By Mr. Haycraft:

Q. The next account is the Ray Oil Burner Company.

A. On page 2623.

Q. Well, that is one of your Bracket 4 accounts, isn't it?

A. Yes, sir.

Q. Now, this report that you had on Ray, and the Mercoid price, is a difference of $1.85 again, isn't it?

A. $1.75.

Q. $1.75?

A. Yes.

Q. Did you get that from Ray himself or was that—

A. That came direct from Ray through our Mr. Peterson, who calls on Ray. Mr. Peterson is the manager of our San Francisco branch.

Q. Well, was that price made to meet that competition or was it justified by your previous dealings with that firm?

A. Well, Ray were given our Bracket 4 prices, and 2749 they earned them as far as their purchases were concerned. They purchased in excess.

Q. How many did they buy in 1941? Is 19,544 correct?

Mr. Freeman: If that is not in the record, it ought to be.

The Witness: The figure they have here for 1941 is 18,056 instruments that we sold them in 1941.

By Mr. Haycraft:

Q. That would be Bracket 4, wouldn't it?

A. Yes, sir.

Q. Now, as I understand your testimony in the record, you sold the Ray Oil Burner Company 18,000 units, or 19,000, whichever figure is correct, at a premium of $1.75 per set over your competition?

A. No, in this case that would not be true, Mr. Haycraft, because this price that I have mentioned in here, Mercoid's and ours, was not on the conventional or stack control, limit control and thermostat used with the domestic burner. If you will recall, the predominant part of Ray's business was the industrial oil burner. Now, what Mercoid's price might have been to Ray on their standard domestic controls, I don't know.

Q. That is what this price was that you mentioned in your testimony, $26.24 being Mercoid, $13.75?

A. That is right, and our comparable equipment 2750 sold Ray for $15.50.

Q. But you don't know how much of this 18,000 was on domestic, is that what you mean?

A. That is the point.

Q. Do you have any way of determining that?

A. No, I wouldn't know.

Q. Now, take Century Engineering. Did you get the price of your Mercoid and other controls from the Century at that time?

A. We had a direct price comparison from Century in 1941 covering Penn controls. To my knowledge we didn't have any information from them concerning the Mercoid price.

Q. Except from other dealers?

A. Except comparing with other concerns of similar size and potential.

Q. Well, now, what was the comparison of Penn Switch?

A. Well, do you want the figures that we got from Century or the figures that appear in the record?

A. What you got from Century?

A. All right. Now, let's see.

Q. $11.57, isn't that right?

A. That $11.57 price is correct for the set controls, including Penn's new lower priced constant ignition control No. 661. Now, I know that Century used some of those controls, and I also know that they used some of the 2751 Penn better quality constant ignition controls.

Q. Well, if they used the constant ignition, $11.57 was the price, and your price was $14.05?

A. Yes, sir.

Q. They used the other one, and their price was $13.50, is that right?

A. That is how I deduce that, because I think that $13.50 covers the number 670 control.

Q. Why do you think that?

A. Because of the previous price we got from Century of $11.57 where the 661, the cheaper control, was involved, and I will say that there was $1.50 difference between the two primary controls, their deluxe job and their price job.

Q. Well, if it was based on your $14.05 compared to $11.57, that would be about $2.50 there, wouldn't it?

A. Approximately $2.50.

Q. Based on the other. What was your comparable figure, $14.40 to $13.50?

A. Our price to Century was $14.05 on the constant ignition set, and on the Penn deluxe, according to the record, that is $13.50, so there would be 55 cents difference there.

Q. What is this $14.40 figure that you sold—oh, I see, your price.

A. I think there is an error right there in this testimony, Mr. Haycraft. On line 11, it is interesting to
2752 note the record shows in this case that Penn Switch's price to Century in 1941 was $14.40, and in 1941 was $13.50. I think that is in 1940 instead of 1941.

Trial Examiner Sheppard: That may be changed right there and the record will show that it should be changed in other copies.

The Witness: That is right.

By Mr. Haycraft:

Q. What is your price to Century in 1940?

A. I am sorry, but I will have to look that up, Mr. Haycraft, because this record doesn't show the constant ignition.

Q. Now, then, line 16 on the same page, you say Mercoid's price in 1940 was $13.58. Isn't that $13.50?

A. Yes, it is $13.50.

Q. Now, what was their price in 1941, or is that the 1941 price?

A. No, Mercoid's price to Century in 1940 was $13.50 a set.

Q. And what was the price in 1941, do you know?

A. I don't know Mercoid's price in 1941.

Q. You don't know what your price was and you can't make that comparison at this time, can you?

A. Yes, we know our price in 1941 was $13.50. No—beg your pardon. That is off the record. That was wrong. That was Penn Switch.

2753 Q. Your price in 1941 is $14.05?

A. Right.

Q. On the constant ignition?

A. That is right, and that is all they use.

Q. That would be 55 cents more than Mercoid's if they had the same price in 1941 as they had in 1940?

A. Yes, sir.

Q. How many did you sell them in 1941?

A. We sold them 8398 instruments.

Q. Do you know whether that was your share of the business?

A. According to my way of interpreting, it was not, because Penn Switch got the most of the business with Century Engineering Company.

Q. That is your understanding, but did you see any figures on that?

A. No, but the conclusions are very, very obvious, and evident, Mr. Haycraft, because the biggest account that Century had was Crane Company, and Penn controls were standard on all the Crane burners.

Q. I see on page 2624 you say that your price to Century is $14.75. Is that constant ignition or the other?

A. Now, off the record, I would say that was right, Mr. Haycraft, because that allows $1.10 difference for the intermittent over the constant.

Q. What was the intermittent?

2754 A. $15.85.

Q. So that your $14.75, then, in 1946, is compared with Mercoid's $13.50?

A. Yes, sir.

Q. And on page 2625, line 20, you say, "We did get a share of Century's business, but in order to do it, our price had to be somewhat commensurate."

A. Yes, sir.

Q. Is that the word?

A. Yes, sir.

Q. "With the competitive prices we knew existed"?

A. Yes, sir.

Q. Are you referring, then, to 1940 or 1941 there in that statement?

A. From the continuity of the testimony here, I think you have been referring to 1940, although the same statement could be made for 1941.

Q. In 1941 you got 8,398 units. You don't know whether that is more or less than your 1940 sales?

A. I don't. I would have to look that up for you.

Q. You don't know how many burners they put out?

A. No, I don't.

Q. The next one is Harvey-Whipple, Springfield, Massachusetts.

A. Page 2625, at the bottom.

2755 Q. Did they tell you, did Harvey-Whipple tell you what the Penn Switch and Mercoid prices were, or did you learn that from other sources?

A. Harvey-Whipple did not tell us what price they were paying for Perfex. The nearest account for whom we had received the Perfex price was Reif-Rexoil.

Q. In 1940 they were buying your M. H. equipment for $15.85 as against $13.50.

A. In 1940 our price to Harvey-Whipple was $15.85.

Q. And the Mercoid's price was $13.50?

A. That is correct.

Q. And Perfex, $13.70?

A. That is right.

Q. And you don't know how much business you did with them that year?

A. Now, wait a minute. I think we are a little confused there, Mr. Haycraft. In 1940 our price to Harvey-Whipple was $15.85, and Mercoid's price in 1940 to Harvey-Whipple was $13.50. Now, in 1941 our price to Harvey-Whipple was $14.90, and the Perfex price to Harvey-Whipple was $13.70.

Q. I see. And what was the Mercoid price?

A. I don't believe that is shown in the record.

Q. What did you finally sell them that year?

A. 8632 instruments.

Q. So that in 1941 you sold 8,632 units to Harvey-
2756 Whipple, and at that time, that was at a premium of at least $1.40 per set over your competitors, is that right, $1.20, at least $1.20?

A. $1.20 between our 1941 price and the Perfex 1941 price.

Q. $1.40 probably was Mercoid.

A. It probably was Mercoid, at least that.

Q. Now, the next account is Norge Heating & Conditioning Division of Borg-Warner Corporation. You started business with that firm in 1939, and they bought 15,000 instruments, which would put them in what bracket?

A. Bracket 4.

Q. And then in 1940 you put them in the same bracket? In 1939 you started doing business with them and they were in Bracket 4?

A. And we sold them 15,390 instruments that year.

Q. That year you were $2.00 above your competitors in price, your set?

A. That is what Norge reported to us on two separate occasions, that they could buy Perfex controls for about $2.00 less than ours.

Q. But they didn't—

A. They bought that many.

Q. In 1940 did they continue to buy from you and pay that premium?

A. We sold Norge in our Bracket 4 in 1940, and
2757 they paid us $15.85 a set.

Q. You don't know how many you sold that year?

A. I do not have that record.

Q. In 1941?

A. In 1941.

Q. You reduced the price?

A. We kept them in the same bracket, and they bought 10,771 instruments.

Q. And what was the difference in price during that time?

A. You mean between our price and our competitors'?

Q. Yes.

A. I don't know what it was that year. I only know that the year previous it was $2.00.

Q. Well, if your price is $14.90 and they obtained the $13.50 price from Mercoid, it would be $1.40, wouldn't it?

A. Yes, sir.

Q. But you don't know whether that was right?

A. I don't know whether that was right or not.

Q. They didn't give you any information in 1940 and 1941 as to what they were paying their competitors?

A. Not to my knowledge, but our price in 1941 would still be higher than the Perfex reported price in 1939.

Q. Now, in the Paragon Oil case, you started off with a third bracket in 1939. Were they featuring your device as standard?

A. As far as I know, they were.

2758 Q. They did handle some Mercoid controls that year?

A. Yes, they did.

Q. Then you put them in Bracket 4, in view of the quantity they purchased in 1939, which was what—10,330, and in 1940 they purchased 13,700 units.

A. Yes, sir.

Q. And do you know what premium they were paying for your controls?

A. Except by comparison with the prices that we knew Mercoid had quoted concerns that had a smaller potential than Paragon, such as Weatherall Engineering.

Q. The second line on page 2635, I ask again whether that shouldn't be $13.50 a set instead of $13.57?

A. I think $13.50 is correct there.

Q. Well, if your assumption is correct, then you were charging this account $14.90, or $1.40 more than Mercoid?

A. Yes, sir.

Q. And you sold them 14,501 units in 1941, is that right?

A. Yes, sir.

Q. Reif-Rexoil. Now, were they at one time standardized on your controls?

A. They standardized on our controls at one time.

Q. Well, in 1939 they were standardized?

A. That is right, in 1939.

Q. They were in third bracket, and bought 7,157 units?

2759 A. That is right, and they were using Perfex.

Q. At $2.00 less?

A. At $2.00 less per set that year.

Q. In 1940 you reduced, put them in fourth bracket price, $15.85, and they bought 6,756 sets. Now, how much was that if the Perfex price that year was $14.15—is that right—as compared to $15.85?

A. Perfex' 1940 price was $14.15 a set, and their 1941 price was $13.70 a set.

Q. Well, you have got your price—you cut your price, too, from $15.85 to $14.90?

A. So that year we were $1.20 higher. That is, in 1941 we were $1.20 higher than Perfex.

Q. In 1940 you were $1.70 higher?

A. In 1940 we were $1.70 higher.

Q. All right. Now, then, in 1940 when you were $1.70 higher, you sold them 6,756 units?

A. Yes, sir.

Q. In 1941 you sold them 4,940 units?

A. Yes, sir.

Q. Although you were 50 cents closer in price?

A. Closer in price.

Trial Examiner Sheppard: Say that again, Mr. Haycraft.

Mr. Haycraft: I say in 1940 they sold them 6,756 2760 units and their price, that is, M. H. price, was $1.70 higher than Perfex. In 1941 they sold them 4,940

units, and their price was $1.20 more, or 50 cents closer to the Perfex price than in 1940.

Trial Examiner Sheppard: All right.

Let's take a five minute recess.

(A short recess was taken.)

Trial Examiner Sheppard: All right. On the record.

Mr. Haycraft: The next is Scott-Newcomb.

Mr. Gilpatric: Page 2638.

By Mr. Haycraft:

Q. Is this correct? Page 2639, line 10, from 1939 the record shows that Perfex' price was $15.70 a set against your price of $15.95?

A. Let me check that.

Q. What bracket was that?

A. Let me check that. Well, according to my notes, that is correct, Mr. Haycraft.

Q. Let's see, now. That would mean 1939; at the top of page 2639 you say, "We extended a price of $21.05 a set," is that right? 1938, that must be.

A. Yes, that is 1938.

Q. Do you want to correct that?

A. Yes, sir.

Trial Examiner Sheppard: Let the record be cor-
2761 rected. The reporter will make the correction on the permanent record and we will change them all.

By Mr. Haycraft:

Q. In 1939 you put them in Bracket No. 4 and gave them a price of $15.95?

A. Yes, sir.

Q. Per set?

A. Yes, sir.

Q. And during that year they bought 3,262 instruments?

A. That is right.

Q. Well, what bracket would that ordinarily put them in if you follow the brackets?

A. Bracket 3.

Q. And in that year is it your testimony that the Perfex price was $15.70 per set?

A. Yes, sir.

Q. In 1940 the Penn Switch price was $15.15 a set against your price of $15.85?

A. Yes, sir.

Q. And they bought 8,034 instruments in 1940 as compared with 3,000 in 1939, is that correct?

A. That is right.

Q. Now, is it correct, then, that the difference in price in 1939 was 20 cents a set as between M. H. price and the Perfex price?

2762 A. Yes, sir.

Q. And the difference in 1940 was 70 cents per set?

A. Between Penn Switch and M. H.

Q. In other words, when you increased your differential, the difference between your price and Penn Switch, you sold more instruments?

A. That is the way the case turned out to be.

Trial Examiner Sheppard: You mean when he went from 4 to 3?

Mr. Haycraft: No, he is still in 4.

Trial Examiner Sheppard: I thought he was in 3.

Mr. Haycraft: He kept them in the same bracket.

Trial Examiner Sheppard: I thought he dropped to 3 there.

Mr. Gilpatric: His quantities put him in 3, but he was kept for price purposes.

Mr. Haycraft: In 1940 the $15.85 was the Bracket 4 price. It is ten cents less than the 1939 prices.

Trial Examiner Sheppard: I get it, competition.

Mr. Haycraft: But the Penn Switch price was dropped to $15.15. In other words, they dropped 55 cents.

By Mr. Haycraft:

Q. You are talking about two different companies?

A. No, in 1939 it was the Perfex price.

Q. Well, wasn't Perfex there in 1940?

2763 A. Yes, but I don't know what their price was in 1940.

Q. The Penn Switch price was lower?

A. That is right.

Q. You don't know whether the Perfex price was lower or not?

A. I don't know.

Q. In 1941, line 16, that isn't a correct quotation of that question, I don't think. What was your price in 1941 to Scott? Do you mean Scott-Newcomb?

A. Scott-Newcomb.

Q. In 1941 your price was $14.90. That was the regular Bracket 4 price?

A. That is right.

Q. And you sold 9,003 units. Now, what was the price of Penn Switch and Perfex during those years, do you know, during 1941?

A. I don't have any direct price information from Scott-Newcomb, but there is plenty of other information with respect to accounts comparable in quantity to Scott-Newcomb, if you want it.

Q. Well, what were those other prices?

A. $14.20 and $13.70.

Q. $13.70, and the Reif-Rexoil, wasn't it? That was the Perfex price?

A. That is right.

2764 Q. That would be $1.20 less than your price, is that right?

A. That is right.

Q. Your device was standard on Scott-Newcomb?

A. Yes, sir.

Q. Do you know whether or not you got your share of the business that year?

A. I was quite content to say that we got our share of the business that year.

Trial Examiner Sheppard: Say that again.

The Witness: I say I am quite content to say we got our share of the business that year.

By Mr. Haycraft:

Q. The price you gave them, though, would require them to give you about 15,000 units, wouldn't it?

A. That is right.

Q. It was based on that?

A. On quantity.

Mr. Freeman: You say if based on quantity?

The Witness: If based on quantity.

By Mr. Haycraft:

Q. Now, the next is Silent Glow Oil Burner. There again, you had Perfex competition, didn't you?

A. Yes, sir.

Q. You had them in Bracket 4 also, didn't you?

2765 A. Yes, sir.

Q. Did their purchases in 1940 entitle them to that bracket?

A. No, sir. They did not meet that quantity in 1940. It was the competitive situation that legislated that price in 1941.

Q. Your $14.90 price in 1941, do you know what the Perfex price that year was?

A. As I recall, in similar companies, it was $14.20 and $13.70.

Q. In those two years. That would be $1.20 difference, then, wouldn't it?

A. In the one case it would be $1.20 difference. In the other it would be 70 cents difference. But in 1941 it would be $1.20.

Q. And your sales to that account increased in 1941 over 1940 and 1939, did they not?

A. Yes. In 1940 they had 9782 instruments, and in 1941 they purchased 11,290 instruments.

Trial Examiner Sheppard: Mr. Lockrae, what other consideration outside of competition made you get away from the regular bracket prices?

The Witness: Well, to my knowledge, Major, there is nothing else.

Trial Examiner Sheppard: Just a mere matter of 2766 competition?

The Witness: It is a matter of competition.

Trial Examiner Sheppard: All right.

The Witness: Because we never gave lower prices unless we had to.

Trial Examiner Sheppard: In other words, you never broke away from the bracket prices?

The Witness: Unless we were forced to.

Mr. Haycraft: Well, you have 55 instances here aside from price, 22 that you gave us that were off-scale prices in your brackets.

The Witness: That is true, Mr. Haycraft, but based on the previous year's history or other extenuating circumstances, we felt and we still feel that those accounts were given the right bracket price.

By Mr. Haycraft:

Q. Well, isn't that your answer, then, that where there were other circumstances, such as an average of previous years—

A. Yes, you can say where there was an average of previous years or of the two previous years, or where the account made their quantity the previous year, we had

nothing else to do but to give them the same price bracket the succeeding year.

Mr. Gilpatric: But the point is, Major, the time he did that he didn't know they weren't going to make
2767 the bracket. We are talking about hindsight one moment and foresight the next.

Trial Examiner Sheppard: My question went more to policy.

Mr. Gilpatric: Well, policy was never to go off bracket except in competition.

Trial Examiner Sheppard: I am cognizant of the matters that Mr. Haycraft has brought out here in reference to combining two years.

Mr. Gilpatric: Yes.

Trial Examiner Sheppard: I think I get a pretty good picture of this.

By Mr. Haycraft:

Q. Now, the Korth Oil Burner Corporation. Was your device standard on Korth burners?

A. It was standard on Korth burners except where they were selling to speculative builders or to furnace manufacturers who were buying strictly on price. Then Mercoid was standard.

Q. Well, the difference between the price of your controls and Mercoid's in 1941 was $2.60 per set, is that right?

A. That is right, when you take into consideration the constant ignition relay, the thermostat and the combination control.

Q. Now, do you know how many of the sales that you made to Korth during that year consisted of that particular set?

2768 A. I couldn't say, Mr. Haycraft. I don't know how many combination controls we sold them that year. We could figure it out from our records, but I don't recall. If you want to know the difference on standard sets of controls, the price difference would be pretty easy to work this backwards, if you would like to have that.

Q. If you can give it to us.

A. Just off the record, then.

Q. Then I will ask you the question on the record. What was the difference between the Mercoid price per set and the M. H. price per set on ordinary controls?

A. It would be approximately $1.85 a set.

Q. So that your sale of 22,739 instruments to Korth in 1941 would be on a premium of at least $1.85 per set?

A. It would be approximately $1.85 a set.

Q. And that portion of the combination control would be $2.60 a set?

A. $2.60 a set.

Q. Now, the Nu-Way Corporation, the difference there was about $2.00 per set, was it not?

A. In 1941?

Q. Yes, or was that earlier?

A. Well, in 1940 we had information that led us to believe that the price difference was $1.50 a set. That was the price that Nu-Way charged extra when our con-
2769 trols were furnished to their distributors.

Q. What year was that?

A. That was in 1940.

Q. What about this top of page 2644 where it says—

A. That is just what I was referring to.

Q. —$2.00 net extra charge.

A. To the dealer, and that is another correction right there. That $1.50 should be $1.50 to the distributor.

Q. You didn't know anything further than that?

A. Yes.

Q. Well, how about in 1940, you lowered your price to $16.25 per set, and Nu-Way bought 3,641 devices. Was that more or less than they bought the previous year?

A. My recollection is that it is more than they bought the previous year.

Q. Then in 1941, what bracket did you put them in that year?

A. In Bracket 4. The price was $14.90 a set.

Q. That was not based on any of their purchases?

A. That was based on competition situation which we knew existed.

Q. And is that what you just referred to, the $1.50 difference?

A. Yes, the $1.50 difference the previous year.

Q. Now, then, you made a price of $14.90 in 1941, which was a reduction of $1.35 from your 1940 price, wasn't it?

2770 A. Yes, sir.

Q. And you sold 5,875 units that year, is that right?

A. That is right.

Q. Now, do you know what the price was of the Perfex for the competitive unit?

A. Not specifically as pertains to Nu-Way. Concerns of the same class, yes, $13.70 and $14.20 a set.

Q. Assuming it was $13.70, it would be a difference there of—

A. $1.20.

Q. $1.20 per set?

A. Per set.

Q. Now, the Anchor Post Fence account.

A. Page 2647.

Q. M. H. was standard equipment on this account?

A. No, sir.

Q. At any time?

A. That goes back to 1937 when M. H. was standard equipment on that account and the subsequent years Perfex was standard equipment.

Q. In 1940 and 1939 you still continued to sell this account about 4,000 units, is that right?

A. Yes, sir, that is right.

Q. What was the difference in price during those two years? Do you know?

2771 Mr. Freeman: You mean different as against competitors?

Mr. Haycraft: Yes, M. H. price and Perfex.

The Witness: Well, in 1940 we had information that led us to believe the Perfex price was $13.85, and our price to Anchor was $15.15, or a difference of $1.30 a set. In 1941 we gave Anchor a price of $14.25 a set, and from the information we accumulated from the field, it seemed to us that Perfex was quoting Anchor $13.20, or $1.05 difference.

By Mr. Haycraft:

Q. This $14.25 price that you give, though, was your 4-A price?

A. 4-A bracket price.

Q. And it was next to your lowest price. You did have a price to large consumers of $13.75, didn't you?

A. That is right.

Q. Your sales in 1941 were a little over 3,000 units, that is right, isn't it, 3,339 units?

A. Yes, sir.

Q. And a difference of about $1.20 per set?

A. $1.05 a set.

Q. Now, in the Automatic Burner account your device was always standard, was it not?

A. Our controls have been standard with Automatic Burner Corporation for quite a few years.

2772 Q. When was it they began to use some Mercoid and Perfex controls?

A. Well, I think Mr. Hirsch testified that they had always purchased some competitive equipment which included Perfex and Mercoid.

Q. Now, I notice you did not list this Automatic Burner account as one where you made a price on account of competition, is that right?

A. Automatic Burner justified the price we gave them based on the volume of their purchases and our sales to Holland Furnace Company of our controls that were used with Automatic Burner Corporation's burners.

Q. It took the two accounts together, though, to make it?

A. Yes, it was another dual transaction.

Q. Did you give Holland the same price you did Automatic Burner Corporation?

A. Yes, in that case they both got the benefit of our old price.

Q. Do you know anything about the prices that were being quoted the Automatic Burner Corporation by Perfex and Mercoid?

A. I could only say this, Mr. Hayeraft, that I will gamble the last dollar I possess that either one of those competitors would give Automatic Burner Corporation their lowest price.

Q. And the lowest price that you knew of in 1941

2773 was what, $13.50 and $13.70 per set?

A. $13.20 we had a record of to Anchor Post Fence on Perfex.

Q. And $13.50 on Mercoid?

A. And we had a record in 1941 of $13.50 on Mercoid.

Q. And your price, did you give them a 4-A?

A. Five.

Q. $13.75?

A. $13.75.

Q. So you would say that you got your share of the business in that instance?

A. Yes, we did.

Q. In fact, you got the bulk of it?

A. Yes, sir.

Q. That added a premium of 25 cents so far as the Mercoid is concerned, and 55 cents so far as Perfex is concerned, based on quotations that you knew about?

A. That we knew about, based on the actual prices that they probably quoted A. B. C. The difference would be greater than that, because I think the record would show here other concerns—

Q. That is all you knew about?

A. At that time. As was subsequently proved, they were buying $13.00 a set; at least they were selling other concerns at that price.

2774 Trial Examiner Sheppard: Did that price go on to the bracket price?

Mr. Freeman: No.

Mr. Haycraft: That was the bracket price if you combine it as a dual account.

By Mr. Haycraft:

Q. The Automatic Burner Corporation sales were 19,838 units for the Holland Furnace?

A. Holland Furnace purchased 21,315.

Q. So that put them up into the 30,000 bracket. If you counted the Automatic Burner Corporation alone, they would be in Bracket 4, would they not?

A. Well, you better say 4-A, Mr. Haycraft, because you see, there is only 149 units out of Bracket 4-A, 19,851, as against 22,500. It would be right in between our Bracket 4 and 4-A.

Q. It would be in the 4 bracket?

A. That is right, in the 4 bracket.

Q. Cleveland Steel Products Corporation. What is your lowest price to Cleveland Steel Products in 1941?

A. $13.75 on the intermittent ignition set of controls.

Q. And in that instance would you say that you got your share of the business?

A. Yes, sir.

Q. Now, there again, how many did they buy that 2775 year? 19,445 units, is that right?

A. If you have that on the record, that is their pur[illegible]. I don't have the record here.

Q. Now, that would place them, if they were on the bracket, that would place them in Bracket No. 4?

A. Bracket No. 4.

Mr. Freeman: That is one he listed as a competitive account.

The Witness: That is right.

By Mr. Haycraft:

Q. Was there any more competition between Cleveland Steel Products than there was with Automatic Burner Corporation?

A. In 1941?

Q. Yes.

A. Well, as I have said many times, Mr. Haycraft, our competitors were campaigning on the doorstep of all of these larger accounts. There was never a minute when we weren't facing competition from both of those accounts.

Q. Well, the only difference is that in the case of the Automatic Burner Corporation you didn't list them as an account where you went off scale to meet competition, because by combining their purchases with the Holland Furnace you put them into that Bracket 5?

A. That is right.

Q. Whereas the Cleveland Steel Products, they
2776 just had the one account. In other words, you just—

A. We handled them purely on a competitive basis.

Q. So as far as competition was concerned, the competition was probably about the same in both accounts?

A. I would say it was probably equivalent, because they were after the business of all of those bigger accounts.

Q. Now, in the Delco account, was that off-bracket price there made to meet competition?

A. I don't consider it an off-bracket price, Mr. Haycraft, because the price that we gave Delco on limit controls is the same in our Bracket 4-A as it is in 5, and Delco purchased 23,524 limit controls, and our Bracket 4-A quantity is 22,500 instruments.

Q. Couldn't you put them in Bracket 5?

A. It wouldn't make any difference, because the price on the limit controls was the same.

Q. I see. Gilbert & Barker, did you sell them?

A. 2653 is the page.

Q. Off-scale prices to meet competition there?

A. We had to handle Gilbert & Barker purely on a competitive basis. For many years they made the 30,000 instruments required to get our low price, but when Penn Switch broke in with that account and they divided their business, they made their Bracket 5 quantity each year,
but we had to give them our low price in order to
2777 get any of their business. As it was, we lost over half of it to Penn Switch.

Q. What makes you think you lost over half of it?

A. Based on reports which we had in from our salesmen. I am speaking now of 1941.

Q. Well, how much business did they do in 1941?

A. Well as our Mr. Chapler reported, it was reported they purchased between 8500 and 12,500 sets of controls from Penn, and their purchases from us during 1941 were—

Q. 25,000 units?

A. 25,000 units. So if they bought 12,000 sets from Penn, they would have bought more from Penn than they did from us.

Q. Well, if they bought 8,500, it would be about the same.

A. It would be about the same, yes, sir.

Q. So you don't think you got your share of the business?

A. No, sir, I don't think we got our share of the business there.

Q. That Micro-Westco, is that another one of your dual accounts?

A. Yes, sir. Micro-Westco sold their burners to quite a number of furnace manufacturers like the Lenox Furnace Company who, incidentally, bought them out in 1942, and they sold to a number of other furnace manufacturers.

Q. They didn't standardize on your instruments?

A. Yes, they did. The burners that Micro-Westco sold to their dealer trade were standard with our con-
2778 trols and Lenox Furnace Company purchased our controls for us with the Micro-Westco burners, as did others like the Dowagiac Steel, and several other furnace manufacturers.

Q. Well, you have listed this account also to meet competition. Now, which factor was it that was instrumental in getting you to give them the Bracket 5 when they were buying some devices themselves?

A. Well, actually, Mr. Haycraft, we were justified in giving them our low price on both bases, because with our dual transactions they never exceeded our Bracket 5 quantity, and then again, we had the competitive situation to face at Micro.

Q. What was the difference between the M. H. price per set and Penn Switch price per set to the May Oil Burner Corporation?

A. What page was that, Mr. Haycraft?

Q. The bottom of page 2655 and the top of 2656.

A. Well, again we knew that any of our competition, considering the May volume, would give them their lowest prices.

Q. You had them in what, Bracket 5?

A. We had them in Bracket 5 in 1941.

Q. Giving them $13.75?

A. That is right.

Q. But they bought 14,000 units which would put them in 3-A?

A. That is right.

2779 Q. Now, what was the Penn Electric Switch? Do you know what price it was that they were quoting?

A. Well, the Penn—

Q. The May Oil Burner Corporation, 1941?

A. I know that they would quote them their low price.

Q. $13.20 is the lowest price.

A. And that is the price that I am confident that Penn would have been glad to have given May if they had gotten their business.

Q. Well, did you manage to obtain your share of that business?

A. Yes, sir, we did.

Q. How about Timken Silent Automatic? Did you manage to retain your share of that business?

A. No, sir, I don't think we did. Perfex was standard equipment with them, and they got the preponderance of the business.

Trial Examiner Sheppard: Who did that?

The Witness: Perfex.

By Mr. Haycraft:

Q. Was the difference in price the same?

A. We gave Timken our Bracket 5 price, and Timken obtained Perfex' low price.

Q. But you don't know exactly what it was?

A. I do not know what it was. We do know that

2780 they quoted around $13.00 to other accounts.

Q. But in spite of that you did sell them a thousand units?

A. Yes, sir.

Q. But you don't know what percentage that was?

A. I don't know what percentage that was of their business.

Q. Are they putting out a cheap burner and expensive burner?

A. Yes, they had two burners, a rotary burner and gun type.

Q. And the rotary burner was yours?

A. No, sir, Perfex was standard on both burners.

Q. Now, the Williams Oil-O-Matic Heating Corporation. Is the situation the same there as with Timken?

A. No, sir. It was not exactly the same, because Williams Oil-O-Matic purchased from Mercoid and from Penn and from Minneapolis-Honeywell.

Q. They also required their dealers to pay a premium for part of that year, didn't they?

A. They did, part of 1941 for M. H. controls.

Q. I don't know whether I brought this out or not, Mr. Lockrae, but in the Anchor Post Fence Company account your controls were standard equipment, but dealers were required to pay $3.00 extra for them, were they not?

A. In what year?

Q. 1939.

A. In our Mr. Dorsey's report of April 14, he stated that M. H. controls remain as standard equipment
2781 on their present model gun burner, and also on the rotary burner. However, they did advise their dealers that their new pressed steel burner—and that, incidentally, Mr. Haycraft, was a gun burner—their price burner, was to have a standard equipment fluid heat controls manufactured for them by Perfex. He further stated that they would not attempt to force the dealers to take Perfex if they showed a desire for M. H. and paid the $3.00 difference. Then, on June 6th, about two months later, Mr. Dorsey again wrote us and said, as outlined in his previous report, "The private brand Perfex controls are only being offered as standard on their new pressed steel burner," which was their price burner. Our controls were still standard on their present line of gun burners. That would be their high priced gun burner, and also their rotary burner. So we were still standard on their deluxe burners, but on the price burner where they got their volume, Perfex was then standard.

Q. Well, do you know how long they continued to have that $3.00 difference in dealer price?

A. I know it continued through 1939.

Q. Which burner was that?

A. That was on the pressed steel low priced burner.

Q. Well, now, going into 1940, to refresh your recollection from this report, tell us what changes, if any, took place with respect to the Anchor Post account, from
2782 your standpoint. (Handing document to witness.)

A. What year was involved there?

Q. 1940. Beginning of the year 1940.

A. Well, in the report which we received, or which was written on December 28, 1939, by our Mr. Dorsey, he said they had not decided on their 1940 policy, but the way things looked they would probably go along the same as they did in 1939 unless we had prices, and by that he meant lower prices that would make it worthwhile for them to change. He said that Perfex was somewhat under $2.00 less in 1940 than they were in 1939.

In 1940 we gave Anchor a price of $15.15 per set, and it was indicated that Perfex' price to Anchor that year was $13.85 a set, but subsequent to that the record showed they actually purchased Perfex controls for $13.20 per set that year.

Q. Now, the $13.75 price in Bracket 5 in 1941, that was on intermittent ignition?

A. Yes, sir.

Q. What was your price on constant ignition set of controls in that same bracket in 1941?

Mr. Gilpatric: Off the record.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record.

2783 The Witness: $13.00 was our price on the constant ignition set in our fifth bracket.

By Mr. Haycraft:

Q. In 1941 the Perfex price was what on constant ignition, according to your report?

A. According to the report we got from the field, Perfex' price to Anchor in 1941 on the constant ignition set of controls was $12.70.

Q. What was it on their intermittent?

A. And on the intermittent ignition it was indicated that Perfex was quoting $13.20 per set.

Q. Now, was that constant ignition used on any particular type of burner?

A. Constant ignition and intermittent ignition burners are pretty generally interchangeable. In other words,

it is simply a function of whether they want the ignition to stay on all the time or whether they want it off once the fire is ignited, and most manufacturers, or I will say a goodly number of them, they buy a transformer that will stand up under constant duty. So if a dealer prefers to use a constant ignition control, why, he can put it on and then the spark is on all the time the burner is running. Lots of dealers think that it is a safer method of operating the oil burner than having the spark off as soon as the fire ignites and then let the flame support itself.

2784 But Anchor Post, their standard on their price burner was constant ignition. That is the control they furnished as standard equipment.

Q. What is the difference in manufacture, or why is a constant ignition control cheaper?

A. The constant ignition control only contains one relay unit and the intermittent ignition control contains two relays. That is the basic difference in the cost and price. The thermostats and the limit controls are identical.

Q. Seventy-five cents' difference, then, represents the difference in relay?

A. Difference in the relay.

Q. Does Anchor Post use this constant ignition on all their burners, or just on one burner?

A. I understand they use it only on their new cheap burner. They use intermittent ignition on the rotary burner. I know that for sure.

Q. Now, in this Williams Oil-O-Matic account, didn't Williams make the M. H. equipment optional on all their burners except the high pressure burner, which was two and a half more than the Penn?

A. In 1940, Mr. Haycrafft, they made our controls or Penn or Mercoid optional.

Q. I mean without further expense.

A. Oh, no. They did in two or three months, I believe. There was an interlude in there in 1940. They made

2785 our controls optional on all of their burners, and with the exception of their high pressure price job, the price on burners equipped with our controls and competitors was the same, but on their price job they charged $2.50 more when M. H. controls were furnished.

Q. You mean their cheap job?

A. Their cheap job.

Q. And that lasted until along in 1941 when it was taken off, is that right?

A. I will have to check the record on that, Mr. Haycraft, to answer you explicitly. I know that that continued on, to my recollection, until August of 1941, and at that time they were putting on a sales campaign and they offered our controls at no extra cost as a sales incentive, and it remained that way, and they are that way today, as far as I know.

Q. Was the price of $13.75 on intermittent controls the lowest price that you ever sold the sets in 1941?

A. Well, to my recollection that is the lowest price that that control was ever sold an oil burner manufacturer, $13.75. Constant was $13.00.

Q. And that was for 30,000 units and up?

A. That is right.

Q. And you had one customer that bought approximately 90,000 units that year, didn't you?

A. Yes. I think you are referring to Quiet Heat.

2786 They paid the same price. Yes, it was the same price.

Q. Isn't it a fact that the Quiet Heat and the Petroleum Heat and Power Company were the only two accounts in Bracket 5 that actually were considered, according to the purchases, belonging in that bracket?

A. Again I would have to check before I could answer that, Mr. Haycraft.

Q. In other words, you had dual accounts which, by combining the purchases of the burner manufacturer with the furnace manufacturer, you sold—

A. That isn't quite correct, Mr. Haycraft, because Aldrich Company bought more than 30,000 instruments; according to this record they bought 31,731 instruments that year.

Q. Then there were three, Aldrich, Quiet Heat and Petroleum.

A. It would be those three accounts, then, that were classified as oil burner manufacturers that earned the Bracket 5 price on the basis of quantity without considering dual transactions in 1941, and the rest of them were sold in that bracket on the basis of competition.

Mr. Haycraft: I think that is all, Mr. Examiner.

Trial Examiner Sheppard: All right. Any questions?

Mr. Gilpatric: No, I think Mr. Haycraft's examination has considerably clarified the record for us.

Trial Examiner Sheppard: All right, then, Mr. Lockrae, I will excuse you, sir. Mr. Haycraft, have you got

2787 any of these gentlemen you want to put on?

Mr. Haycraft: I will have a witness tomorrow morning.

Trial Examiner Sheppard: We will adjourn until 10:30 tomorrow morning.

(Whereupon at 4:50 p.m., October 3, 1945, the hearing was adjourned to 10:30 a.m., October 4, 1945.)

2788 Room 1121, New Post Office Building,
Chicago, Illinois,
Thursday, October 4, 1945.

Met, pursuant to adjournment, at 10:30 a. m.

Before:

W. W. Sheppard, Trial Examiner.

Appearances:

Everett F. Haycraft, Attorney for the Federal Trade Commission.

Cravath, Swaine & Moore, by R. L. Gilpatric, 15 Broad Street, New York, New York; and

Bair & Freeman, by Will Freeman, 135 South La Salle Street, Chicago, Illinois, appearing for respondent.

2789 Proceedings.

Trial Examiner Sheppard: Miss Reporter, you can convene the hearing pursuant to our adjournment taken yesterday. Show the usual appearances for these gentlemen and show Mr. William J. Warmack on the stand, having been previously sworn in this case, and he appears now called on behalf of the Commission.

Mr. Haycraft: I suppose I should, Mr. Examiner, before calling Mr. Warmack, ask whether or not counsel for the respondent have concluded their rebuttal or surrebuttal.

Mr. Gilpatric: That is correct, we have.

Trial Examiner Sheppard: All right.

Mr. Haycraft: I suppose, then, in calling Mr. Warmack, we might be put in a position of calling a witness in sur-sur-rebuttal.

Trial Examiner Sheppard: That is right.

WILLIAM J. WARMACK was thereupon called as a witness by the Commission, and, having been previously duly sworn, testified further as follows:

Direct Examination by Mr. Haycraft.

Q. Mr. Warmack, you are the same Mr. Warmack that testified in this proceeding on January 10, 1945?

A. Yes, sir.

2790 Q. Have you examined Respondent's Exhibit 186?

A. Yes, I have.

Q. And have you compared that with Respondent's Exhibit 170?

A. Yes, sir.

Q. What else have you done with respect to the statements contained in Respondent's Exhibit 186, just in a brief way?

A. We have made a field study, or at least a review of the offices of Ernst & Ernst, certified public accountants in Minneapolis, who prepared this document. In that connection we examined the underlying data that was compiled in connection with the preparation of this document that is Respondent's Exhibit 186.

Q. Will you refer to these two exhibits, 170 and 186, and testify as to your interpretation of the changes that took place or the differences between the two exhibits with respect to any justification of differences in prices to different customers under the various brackets indicated in the exhibits?

A. Yes, sir.

Respondent's Exhibit 170, that information is shown on page 6. That page is marked Exhibit A of Respondent's Exhibit 170. The page number is not shown in Respondent's Exhibit 186, but the page is likewise marked Exhibit A.

I refer particularly to column 8 on each of those pages.

On column 8 in Respondent's Exhibit 170, there is

2791 shown an excess of cost differential over price differential of $1.38 and the comparison of the $20.25 price per set of oil burners as compared with the $17.35 per set price. That figure in Respondent's Exhibit 186 is $4.20.

Still in column 8, a comparison between the $20.25 price

per set and the $16.45 per set is $3.56 in Respondent's Exhibit 170 as compared with $5.62 in Respondent's Exhibit 186.

A comparison between the $20.25 and the $15.90 price is the excess of cost differential over price differential or $3.90 in Respondent's Exhibit 170 and $5.96 in Respondent's Exhibit 186.

The comparison between the $20.25 price and the $15.35 price per set of oil burners shown is $4.04 in Respondent's Exhibit 170 and $5.94 in Respondent's Exhibit No. 186.

In column 9 there is a comparison of all lower prices with the $17.35 price bracket. The comparison there between that price and the $16.45 price per set, that is, the excess of cost differential over price differential is $2.18 in Respondent's Exhibit 170 as compared with $1.42 in Respondent's Exhibit 186.

A comparison of the $17.35 price per set with the $15.90 price per set shows an excess of cost differential over price differential of $2.52 per set in Respondent's Ex-
2792 hibit 170 as compared with $1.76 per set in Respondent's Exhibit 186.

A comparison of the $17.35 price with the $15.35 price shows an excess of cost differential over price differential in Respondent's Exhibit 170 of $2.66 as compared with $1.74 in Respondent's Exhibit 186.

Going over to column 10, there is a comparison with the $16.45 price per set with the lower prices, that is, prices per set; and the comparison of the $16.45 price with the $15.90 price, there is an excess cost differential over price differential of 34 cents per set in Respondent's Exhibit 170 as compared with 34 cents, the same figure, of course, or same amount, in Respondent's Exhibit 186.

The comparison between the $16.45 price and the $15.35 price shows an excess of cost differential over price differential of 48 cents per set in Respondent's Exhibit 170 as compared with 32 cents per set in Respondent's Exhibit No. 186.

Now, we will move over to column 11 and we have a comparison of the $15.90 with the $15.35 price per set and there is shown an excess of cost differential over price differential of 14 cents per set in Respondent's Exhibit No. 170 as compared with an excess of price differential over cost differential of 2 cents per set in Respondent's Exhibit 186.

2793 Q. Now, have you made any check of this Exhibit 186 so that you can testify as to the reason for the changes of the differences that appear in the new exhibit as compared to the old?

A. Yes.

The reason for those changes, are, in fact, the results of a recasting of the original report, that is, Respondent's Exhibit 170, whereby customers were classified according to the quantity price brackets in which their quantity purchases fell in the year 1940.

Mr. Gilpatric: 1941.

The Witness: 1941.

By Mr. Haycraft:

Q. Was that recasting done along the line you said was necessary in your testimony at the time you testified before?

A. Yes, sir; in my opinion it was.

Q. And have you checked to see—have you made any check or study of the work sheets used by the accountants in making the recasting?

A. Yes, sir. We made a field check of that data, as just previously stated, at the offices of Ernst & Ernst in Minneapolis. It was that firm of accountants which prepared this document, Respondent's Exhibit 186.

Q. Now, then, I will ask you whether or not, as a result of that check, you are satisfied that the recasting

2794 has been properly done?

A. In my opinion it has, yes, sir.

Q. From an accounting standpoint?

A. Yes, sir.

Q. Now, from the standpoint of excess of cost over price—in other words, which would be the justification? Can you calculate from this Exhibit 170 the percentage of the total sales of Minneapolis-Honeywell to fall within the brackets or the price ranges which are not justified, in other words, where the price exceeds the cost distribution?

A. I can give you the manufacturing cost of those controls which fall in the group where there is indicated excess cost differential over price differential and the manufacturing cost where the result was just the other way.

Q. All right. Will you do that at this time?

A. There is shown on the page marked Exhibit B in Respondent's Exhibit 186, a total of $1,266,947.49 repre-

senting manufacturing costs applicable to products sold to oil burner manufacturers.

Trial Examiner Sheppard: This is in 1941 also?

The Witness: Yes, sir, all this is for 1941, your Honor.

A. (Continuing.) It is shown in the upper right hand part of that page, a figure of $677,545.10 representing the cost of those controls sold to customers whose quan-
2795 tity purchases would fall within the 4, 4-A and 5 brackets, the brackets of the respondent.

Now, we have there the relationship of $677,545.10 to $1,266,937.49, or approximately 50 per cent or a little over. Now, if we add to the $677,545.10 the production cost of the instruments sold to customers falling within the 3-A quantity bracket, that is, quantities of 7500 units to 1499 units, and the figure there is $236,476.68, you will have a total of approximately $914,000.

When we relate this total to the total cost of all the instruments sold to the oil burner manufacturers of $1,266,947.49, we will have a percentage of around 75 per cent.

The reason that I brought in that manufacturing cost figure for 3-A was because there was a slight extent of price differential over cost differential of 2 cents per set as shown on Exhibit A of Respondent's Exhibit 186.

By Mr. Haycraft:

Q. Is that cost figure that you give there a fair measuring stick of the value of the products that fall into those various classifications for the purpose of making comparison?

A. Which cost figure do you mean?

Q. Cost figures that you used, $1,266,000 and something.

A. Well, that was the cost figure—that is the manufacturing cost of all of the oil burners sold and that
2796 was used—that is, that total figure is separated by the quantity price brackets. That is the annual volume of quantity price brackets.

Q. You said oil burners. Do you mean burners or controls?

A. Controls, I mean. It was related to the distribution cost figures arrived at by respondent's accountants to determine percentage, that is, the relationship, the distribution cost to the manufacturing cost in arriving at percentages in comparison of this and that appears to be satisfactory.

Q. So that roughly speaking, then, the 75 per cent, or at least between 70 and 75 per cent of the business done in controls cannot be justified from the standpoint of cost distribution?

A. Yes. That would be indicated by this Exhibit 186. Of course, bearing in mind that in the 3-A there is a 2 cents failure between the $15.90 price and the $15.35 price. Of course, respondent doesn't claim cost justification for the 4, 4-A and 5 brackets, that is, the prices applicable to those brackets.

Trial Examiner Sheppard: Let me see if I understand you there. Do you mean that in respondent's high brackets, say, 4, 4-A and 5, the differential between the bracket is not justified on account of it being too high; is that what I understand you to say?

The Witness: Yes, your Honor, and that state-
2797 ment is made by the respondent that in Respond-
ent's Exhibit 170 it didn't justify by differences in cost the prices given in those three brackets.

Mr. Haycraft: This Exhibit 186, then, according to the testimony of the witness, Mr. Johannsen, has a 3-A in that group.

Trial Examiner Sheppard: I was going to ask him about that. Then you deduct from the last report and that same statement applies to the 3-A bracket?

The Witness: To the extent of 2 cents per set, yes, sir.

Mr. Gilpatric: Which is one-seventh of one per cent of the cost.

Trial Examiner Sheppard: I see. That is true of the lower brackets. I take it, conversely, that the spread between the brackets would be justified by showing that?

The Witness: Yes, sir. In each of those instances there is an excess of the cost differential over the price differential.

Trial Examiner Sheppard: Do you know or do the figures indicate, Mr. Warmack, what percentage of respondent's business falls within those lower brackets?

The Witness: Yes, sir. As I have just testified, approximately 75 per cent of the company's business falls in the 3, 3-A, 4, 4-A and 5 price brackets.

2798 By Mr. Haycraft:

Q. Just a minute. Did you include Bracket 3?

A. Yes.

Q. As well as 3-A?

A. As well as 3-A. That represents approximately 75 per cent of the company's business and, of course, there would remain 25 per cent which would fall in the brackets, discount Bracket 1, and Bracket 2 and Brackets—1, 2 and 3.

In my statement awhile ago I didn't intend to include Bracket 3. I intended to include Brackets 3-A, 4, 4-A and 5.

Trial Examiner Sheppard: That represents the 75 per cent?

The Witness: Yes, sir.

A. (Continuing.) Now, bear in mind, of course, in that connection that there is included in that figure 3-A manufacturing costs of $236,476.68, which would be something like 20 per cent of the total business.

Now, if we take that away from the 75 per cent we would have around 55 per cent not justified and about 45 per cent justified; and in that Bracket 3-A, the comparison of the cost between the 3 bracket and the 3-A bracket shows an excess of price differential over cost differential of 2 cents per set and that is shown on page marked Exhibit A of Respondent's Exhibit 186.

2799 Trial Examiner Sheppard: That would be negligible, wouldn't it? That 2 cent differential?

Mr. Freeman: That is 1/7th of 1 per cent and I don't think the Commission is going to complain much on that for accuracy.

The Witness: Well, of course, that is for the Commission to decide.

Mr. Gilpatric: We take the position that is substantial justification. When we get that close we are practically home.

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. Now, Mr. Warmack, the last time you were on the witness stand you expressed in the record a further objection to Exhibit 170 than the wrong assignment of the various items in the respective bracket columns, which, according to your testimony today, has been cured by the recasting of that exhibit.

Have you changed your opinion or do you still hold the same opinion with respect to your other objection that you have to your exhibit?

Mr. Freeman: I suggest you read from the record as to what his other objection was.

Mr. Haycraft: If the witness does not have a recollection of what it was, I will be glad to.

2800 Trial Examiner Sheppard: I don't remember it, myself. Tell us what the other objection was, Mr. Warmack.

Mr. Freeman: Well, I suggest we read from the record.

Trial Examiner Sheppard: Well, it is right before you there.

By Mr. Haycraft:

Q. Well, I will read, starting from the top of page 2468:

"I understand that respondent is not manufacturing and i not merchandising its regular line of products at the present time as it would under normal peace-time conditions. This means that the respondent's accountants could not inaugurate a study when they started this thing of the time and effort expended by individuals engaged in the normal selling activities in order to develop the most accurate measuring factors for the separation of these distribution costs, which were used in the company's cost report. Therefore, they had to develop measuring factors as stated above.

. . . . . .

Respondent, as I understand it, had never made time studies during prior years when they were operating normally to develop what I would consider to be the most accurate measuring factors which could be used in the separation of distribution costs. That is, based, as

2801 far as it could be based, on effort expended. I feel that respondent's accountants made an honest and diligent effort to analyze their distribution costs and I think that they probably established the best measuring factors possible for use in the separation of costs under the existing circumstances. That is, they had a job here that they had to do in retrospect. I have always contended in previous cases before the Commission that nothing short of time studies of selling activities and related activities should be considered as proper support for measuring factors to be used in separating those costs which are closely related to effort expended by the separate employees. Now, as I stated, my principal objec-

tion is the classifying of the costs according to the prices in view of the fact that there was extensive off-scale selling.

"The next thing that is questionable, of course, is the measuring factors, or at least some of the measuring factors used for the separation of the costs by respondent's accountants. The correctness of some of the measuring factors is questionable and this is in view of the fact that the company did not avail itself of past opportunities, as I just stated, during years of normal operations to develop the most accurate measuring factors pos-
2802 sible. I feel, however, from a review of the studies and efforts made by respondent's accountants in their attempt to separate the costs that they probably did the best job that they could. I rather think that the procedure followed was probably he best that could be followed under existing war-time conditions, except for the fact that I certainly do not subscribe to the separation of costs to the quantity brackets on the basis of prices paid, in view of the off-scale selling."

Trial Examiner Sheppard: All right.

By Mr. Haycraft:

Q. How, he follows on to give examples of that following that opinion and now I am asking whether or not the new exhibit, 170,—whether or not Exhibit 170 with the new Exhibit 186 you wish to change your opinion that you gave in that respect with respect to 170?

Trial Examiner Sheppard: Have you got anything to add to that?

The Witness: I have this, your Honor:

A. Respondent's Exhibit 186 represents a complete recasting of the data set forth in Respondent's Exhibit 170 and gives effect to the placing in the proper quantity price brackets all of the customers that were sold at what we called—when we were talking about in that testimony just read—off-scale selling.

2803 In my opinion that has been corrected in Respondent's Exhibit 186 and although there might be some little point that might be questionable, I think it would be quite trivial and we don't make a point out of it or an issue out of it and I think Respondent's Exhibit 186 is the best job or represents the best job that the respondent's accountants, Ernst & Ernst, could do under existing war-time circumstances.

My testimony with respect to all of the other points is given. I believe that was on January 10, 1945, in Minneapolis. My testimony on all other points given remains the same.

Trial Examiner Sheppard: All right.

Mr. Haycraft: I think that is all, Mr. Examiner.

Trial Examiner Sheppard: Any cross?

Cross-Examination by Mr. Freeman.

Q. Mr. Warmack, then are we to understand that your criticism as of today with respect to Respondent's Exhibits 170 and 186 is that it was made in retrospect?

A. Well, the only criticism that I have runs to that point, and it is necessarily so, the only questions that I believe that were raised, aside from the question of off-scale selling, which, of course, has been cured in the preparation of Respondent's Exhibit 186, had to do with the establishing of measuring factors for the separation of certain
2804 classes of expenses, in which considerable estimating had to be done, Mr. Freeman, and the respondent's accountants had to resort to some manner of estimating.

There naturally would be a question of going back and estimating where costs would fall some years after the fact. I rather think in that connection that Ernst & Ernst accountants, and Mr. Johannsen, and whoever else in that company were engaged in this, did probably the best job that they could do in retrospect.

I wonder if that answers your question.

Q. No, it does not.

A. I am sorry.

Q. I am trying to pin down, so that we can understand just what your objection is, I gathered from your last answer that it was partially because the accountants, in making their study, had to make estimates as distinguished from concrete time studies. Is that one of your criticisms?

A. To some extent, yes, sir, I wouldn't hold entirely and rigidly to that question of time studies, which involves executives, particularly. Sometime analyses, tests and checks might be just as good as that. They lose their value to some extent, that is, the estimates resulting from these analyses, tests and checks, when they have to be made, some few years or some several years after the fact.

Q. Well, then so that we get at the point of your criti-

cism, estimates are permissible, except that it is your
2805 position that age or the lapse of time may have some bearing on the accuracy of the estimates; is that correct?

A. Well, reasonably so, but I should like to add this. Estimates should be reasonably supported by something and I don't think they should be just open guesses.

Now, with respect to the lapse of time, people leave the employment of a company occasionally, sometimes a man dies, and those things, and the longer the time from the happening of the thing, the harder it is to get down and establish an estimate.

Q. Now, you have read Respondent's Exhibit 170 and you do know the facts and the documents and the data that were used by Ernst & Ernst in making their studies; so that what you said now about death and leaving the employ and so forth is not a factor in connection with Exhibit 170, is it? In other words, I am talking about Exhibit 170 and not what may generally be the case.

A. Well, I thought you were speaking generally a bit ago.

Q. Well, I am talking about your criticism of our Exhibit 170.

A. I think if you will kind of refer to my testimony given—and I will be happy to look it up and re-read it into the record if you would like—

Q. We don't want to hear you for the second time. It is just as well at page 1485 as it is at 1263.

2806 A. The answers to all these questions are all in the record and I will be happy to look them up and give them to you.

Q. Will you answer my question as to whether or not you have checked Exhibit 170 to determine the basis upon which the accountants made their analysis, the factual basis?

A. Yes, sir, and I think that was also testified to on January 10.

Mr. Freeman: I move the last portion of that answer be stricken as not responsive. He has already answered the question.

Trial Examiner Sheppard: Well, what is your other question there?

Mr. Freeman: Will you read the question?

(The question was read as follows:

"Will you answer my question as to whether or not you

have checked Exhibit 170 to determine the basis upon which accountants made their analysis, the factual basis?")

Mr. Freeman: Now, that can be answered yes or no. Either has or he hasn't.

Trial Examiner Sheppard: I will let him answer if he wants to answer.

Mr. Haycraft: He answered yes, that it is in his testimony of such and such a date. Now, it is perfectly proper.

2807 Trial Examiner Sheppard: I don't see what it is all about at all. I just want to let Mr. Warmack testify as he sees fit.

Q. Go ahead.

A. The answer is yes, and that answer was likewise given in detail and expanded upon on and around page 2434 of the record. That is the testimony given in this case on January 6, 1945, in Minneapolis.

By Mr. Freeman:

Q. Now, with respect to time study, did I understand you to say that executives need not, in accordance with your opinion, keep time records with respect to each of their duties or time spent on a given job?

A. That is entirely up to the executives or the management of the company as to whether they want them to keep time records or whether they do not. It is wholly within the discretion of the company.

Q. Well, now, in connection with making out prices and establishing price differentials, you understand from a practical standpoint that prices are extended for a year period and that the prices are established as of the first of each year?

A. In which instance, sir?

Q. In the industry here involved.

A. That is my understanding.

2808 Q. Now, in connection with establishing a price by way of example as of January 1, 1941, for the year 1941, how would you determine in advance how much time any salesman was going to spend on any one customer in order to take that into consideration in establishing different price brackets?

A. Assuming that I want that information, sir?

Q. What was that?

A. Assuming that I would want that information as of January 1, 1941?

Q. Well, put yourself in the same position as this respondent.

A. Yes, sir?

Q. Who has to make its prices on January 1 in order to tell its customers what the price of a set of controls is going to be for the ensuing year.

A. That is based on cost differentials.

Q. Yes.

A. I would set it up in the preceding period, which would be considered, according to my knowledge, if I were the respondent, as representative of a year's business and I would collect and assemble cost data which, as of January 1, 1941, would show me what the cost differential had been up to that point or for some reasonable time or for some reasonably recent representative time of selling these controls; and I would have that information available on
2809 that date or soon thereafter to furnish to the management.

Q. Then that wouldn't be actual time studies at all, would it? That would be time studies in connection with other transactions, would it not?

A. Well, I think you confuse the issue entirely. You can set up a time study, Mr. Freeman, in 1939, 1940 or 1945 if you are operating under normal conditions. Now you say it wouldn't be a time study. The data I just spoke of could be arrived at by the use of time studies if the company elected to inaugurate and put into effect the gathering of such data.

Q. That isn't your position, from your last answer, that in order to determine price on January 1, 1941, for the ensuing year you would have to go back and take time studies which were made in 1940 or some representative period preceding January 1, 1941, for fixing your price for the year 1941?

A. The answer to that question would be this, that you couldn't possibly know, as a matter of fact, or know of your own knowledge, Mr. Freeman, exactly what it is going to cost you in 1941 before those costs are incurred. You can only base your facts upon what it has cost you and what the cost differentials are for what they might consider a representative period in the past.

Q. So that when you say you would go back and determine what it has cost you—and I am using the words
2810 that you used—in the past for a representative period,

you used that as a basis for determining on January 1 what the probable costs are going to be for 1941, correct?

A. I will have to inquire with reference to that question. Do you mean to assume that as of January 1, 1941, you have made no cost surveys?

Q. I am talking about making time studies and all of the nice things you said should have been done in the year 1940 and then we come to January 1, 1941, where we have to establish prices for the year 1941.

Now, I am asking you, is it your position that we should use the 1940 cost experiences in setting forth the prices as of January 1, 1941 and those prices that are to follow for the full year of 1941?

A. It is my opinion that that would be the only thing you could do, assuming, of course, in giving that answer, that you would properly establish those costs before having set your prices on your quantity price brackets applicable to each of the prices.

Q. So that we definitely understand, then, it is your position that having made the studies complete for the year 1940, kept time records, proper allocations, accounting methods all accurate, then you could use that subject matter accumulated from actual experience in the year 1941 for establishing your 1941 prices and cost differentials?

2811 A. It is my opinion that cost differentials established by the use of time studies, analyses, tests and checks and the fact thereby, if established properly, that the costs may be reasonably accurate, that cost may be used to show what cost differential exists or may be expected to exist in future operations.

And it would be that on which I should think prices might be set and consideration be given for the setting of prices.

And I would like to go one step further on that point, Mr. Freeman. Suppose that you made a proper cost analysis for the year 1940 and the year 1941 you didn't make one, that is, such an analysis. And maybe the year 1942 you didn't; and assume that we are continuously operating under normal conditions. It is my notion that unless there is something that the management knows which would make or alter those costs by the way of merchandising, that they probably could use it for 1945, even, giving effect to any changes that the company would naturally know came about.

Occasionally I think the company should make a cost study but I certainly don't mean to sit here and state that

they ought to make one every day or every year or every month.

Q. Well, now, your thought just expressed—and I am glad to say we agree with you—is that having made a cost study in 1940 that you could use that as the basis for
2812 your 1941 prices, possibly for your 1943 prices in the absence of some abnormal situation?

A. Yes.

Q. And right on down?

A. That's right, and when those abnormal situations arise, give effect to them; if necessary, maybe make some little supplemental study or something, if necessary, if it is of material import.

But I certainly do not, Mr. Freeman, advocate making an extensive cost survey too often because those things cost a lot of money.

Q. So that in respect to just what you have said, using the 1940 study—

A. Yes, sir.

Q. —for fixing prices in 1943 or 1942—

A. Well, that should be considered; that cost should be considered.

Q. Yes. When you consider the 1940 study for your 1942 prices, aren't you then fixing your 1942 prices in retrospect?

A. You are having to fix them based upon past experience, but there is a lot of difference in setting a price based upon sound material which is brought up to date and going back and bringing the material up to date about four years after it happened.

Q. Well, then, you didn't quite mean in retrospect, did you?

2813 A. I don't know what you mean.

Q. What did you mean by retrospect when you used that word in connection with Respondent's Exhibit 170?

A. Where did I use it?

Q. Are you telling us now that you never used the term retrospect in connection with your criticism of Respondent's Exhibit 170?

A. No, sir. I just thought you might point in the record to where the word was used and we will see exactly how it was used.

Q. Will you answer my question?

Mr. Haycraft: He answered it, Mr. Examiner. He said no.

Trial Examiner Sheppard: Is that right, Mr. Warmack?

The Witness: Yes, sir. Counsel for the respondent spoke with reference to the previous testimony given by me and I think that I should like to look at that and see just what questions were asked me with respect to this question of retrospect. I don't see the connection exactly and if he could show me that I would be happy.

Mr. Freeman: I wonder if the reporter would read my question.

(The reporter read as follows:

"Q. Are you telling us now that you never used
2814 the term retrospect in connection with your criticism of Respondent's Exhibit 170?")

A. I will answer that and say I certainly am not saying I never used the term retrospect.

Mr. Freeman: That is an answer to the question.

A. (Continuing.) I only inquired where it was used.

Mr. Haycraft: See, Mr. Examiner, it was an earlier question asking whether or not he meant what he said when he used the word "retrospect." He was entitled, I submit, to ask counsel to find in the record where he used it.

Mr. Freeman: That wasn't what I asked him. I just asked him if he used the term. That is all.

Mr. Haycraft: In an earlier question you asked him.

Trial Examiner Sheppard: If everybody is satisfied, the Examiner is. Show a little recess.

(A brief recess was taken.)

Mr. Haycraft: That is all.

Trial Examiner Sheppard: Any other questions?

Mr. Haycraft: Well, the Commission rests.

Trial Examiner Sheppard: Is there anything further?

Mr. Freeman: No.

Trial Examiner Sheppard: Off the record.

(Discussion off the record.)

Trial Examiner Sheppard: On the record again.
2815 The Examiner closes the taking of testimony in the Minneapolis-Honeywell case as of this date, and I will formally and finally close the case by order, gentlemen, sending all of you a copy of the order when I do close it. Now we stand adjourned.

(Whereupon, at 11:45 a. m., October 4, 1945, the hearing in the above-entitled matter was adjourned.)

BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—4920) * *

ORDER CLOSING TAKING OF TESTIMONY.

The taking of testimony in the above-entitled proceeding is closed as of this date.

W. W. Sheppard,
Trial Examiner.

Dated:
February 14, 1946.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 11

FEDERAL TRADE COMMISSION, PETITIONER

vs.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 14, 1951
CERTIORARI GRANTED MARCH 3, 1952

In the

United States Court of Appeals

For the Seventh Circuit

No. 9584

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order to Cease and Desist Entered by the Federal Trade Commission.

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102 COMMISSION'S EXHIBIT NO. 1.

FEDERAL TRADE COMMISSION.

Minneapolis-Honeywell Regulator Company. } Docket No. 4920.

STIPULATION AS TO FACTS.

103 August 6, 1943.

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the Matter of
Minneapolis-Honeywell Regulator Company. } Docket No. 4920.

STIPULATION AS TO THE FACTS.

Pursuant to the provisions of the Federal Trade Commission Act and of the Act of Congress of October 15, 1914, commonly known as the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936, the Federal Trade Commission on February 23, 1943, issued its complaint against respondent and caused such complaint to be served as required by law, in which it was charged that said respondent was and had been using unfair methods of competition in commerce in violation of the provisions of said Federal Trade Commission Act and in acts, practices and methods resulting in a substantial lessening of competition between respondent and its competitors and tending to create a monopoly in respondent in commerce in violation of the provisions of the said Clayton Act. The respondent, having filed its answer to the complaint herein and being desirous of expediting said proceeding and avoiding the expense incident to the taking of testimony and solely for the purpose of this proceeding and without making any
104 admission of fact for any other purpose whatsoever;

It Is Hereby Stipulated And Agreed by and between W. T. Kelley, Chief Counsel for the Federal Trade Commission, and Messrs. Cravath, de Gersdorff, Swaine & Wood of New York City and Messrs. Bair & Freeman of Chicago, Illinois, attorneys for respondent, that subject to the approval of the Federal Trade Commission, the statements of agreed facts contained herein may be made and taken as a part of the record herein and may be taken as facts in this proceeding, the same as and with the same effect as if evidence to such effect had been adduced at hearings in the usual course, and reserving the right of the parties to object to the materiality or relevancy, but not the competency, of anything herein contained; and that the Commission may proceed upon said statements of facts and such additional proofs as the parties may produce to make its report stating its findings as to the facts (including inferences which it may draw from such statements of agreed facts and its conclusions based thereon) with the right of the parties to produce additional proofs and to present oral arguments and file briefs.

Paragraph One: When used in this Stipulation, the following terms shall have the meanings respectively assigned to them below:

(a) "Oil burners" means automatically operated and controlled oil burners only of the pressure and rotary types for domestic heating plants, and does not include any other types of oil burners, such as vaporizing, pot and distillage types and industrial or commercial oil burners;

(b) "Automatic temperature controls" means automatic temperature controls for oil burners of the kind herein defined.

Paragraph Two: Respondent Minneapolis-Honeywell Regulator Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its general office and principal place of business in the City of Minneapolis, State of Minnesota. It is now and for more than three years last past has been engaged in the manufacture of automatic controls for oil, gas and coal heating plants and certain industrial operations and in the sale of automatic temperature controls for oil burners principally to oil burner manufacturers and also to wholesalers (who are sometimes called jobbers) and dealers in oil burners and automatic temperature con-

trols located in the various states of the United States, territories thereof and in the District of Columbia. Respondent causes its automatic temperature controls when sold to be transported from the places of manufacture by respondent in the States of Minnesota and Indiana and through distribution points in certain other states of
106 the United States to the purchasers thereof located in states other than the States of Minnesota and Indiana. Prior to the year 1942 there was a constant current of trade and commerce in automatic temperature controls between and among the various states of the United States, territories thereof and in the District of Columbia, and respondent in the course and conduct of its said business was in substantial competition in the sale of automatic temperature controls in commerce between and among the various states of the United States, territories thereof and in the District of Columbia, with other corporations, persons, firms and partnerships. Respondent is one of the principal manufacturers of automatic temperature controls in the United States, the total volume of its sales of said products annually during the years 1939, 1940 and 1941, constituting approximately 60% of the total number of automatic temperature controls sold annually in the United States to manufacturers of oil burners and to wholesalers, contractors and dealers in oil burners and automatic temperature controls. The total volume of respondent's sales of said products annually during the years of 1939, 1940, and 1941, constituted approximately 25% of the total number of automatic temperature controlling devices (including but not limited to automatic temperature controls as herein before defined) sold annually in the United States to manufacturers of all types of burners of oil for domestic heat-
107 ing plants, including vaporizing, pot, and distillate types, and to contractors, dealers and wholesalers in such burners and controls.

Paragraph Three: Respondent, in the sale of automatic temperature controls as aforesaid, during the years 1936 to 1941, inclusive, entered into annual contracts or agreements with manufacturers of oil burners for numbers of sets or units of automatic temperature controls. The number of manufacturers of oil burners having such contracts with said respondent during said years constituted more than 50% of all the manufacturers of oil burners within the United States.

Paragraph Four: In the operation of oil burners, three types of automatic temperature controls are required and used and are usually, but not necessarily, sold in sets consisting of:

(1) A thermostat, which is a control device placed in the room or space to be heated;

(2) A limit control, which is a control device placed on the heating plant to prevent the temperature or pressure in the heating plant from exceeding a certain safe level, such devices manufactured and sold by respondent including an Airstat for warm air heating plants, an Aquastat for hot water heating plants, and a Pressuretrol or a
108 Vaporstat for steam and vapor heating plants; and

(3) A primary control, which is a control device controlling the cycle of operation of the oil burner so as to start and stop it when heat is needed or no longer needed (as governed by the thermostat) and to prevent a hazardous condition from occurring when there is a failure of combustion, the primary controls manufactured and sold by respondent being called Protectorelays.

In addition some manufacturers of oil burners make installations employing a fan control which controls the operation of a fan for driving warm air to the space to be heated, and also make installations employing several thermostats, the thermostats being then used as zone controls in the heating of multiple spaces. The primary control, sometimes referred to as a combustion control, master control or safety control, is an essential element in every oil burner installation (but is not an essential element in oil burner installations of other types, such as vaporizing, pot and distillate types).

Paragraph Five: Respondent's primary controls for oil burners as defined in Paragraph One hereof, and known as Type RA 116A and RA 117A, which constitute the great majority of the primary controls sold by respondent and
Installation Instructions for which are attached hereto
109 as Exhibits A and B, are covered, in whole or in part, by the following patents owned or controlled by respondent:

Number	Name	Date
Re. 18,771	Phelan et al.	March 21, 1933
No. 1,847,033	Phelan et al.	Feb. 23, 1932
1,883,245	Bogle	Oct. 18, 1932
1,893,875	Aldrich	Jan. 10, 1933

Number	Name	Date
1,908,493	Bogle	May 9, 1933
1,946,598	Taylor	Feb. 13, 1934
1,969,961	Bogle	Aug. 14, 1934
1,969,967	Dever	Aug. 14, 1934
1,969,968	Dever	Aug. 14, 1934
1,969,974	Erickson	Aug. 14, 1934
1,990,813	Bower	Feb. 12, 1935
2,021,407	Erickson	Nov. 19, 1935
2,022,188	Denison	Nov. 26, 1936
2,196,671	Gille et al.	April 9, 1940
2,241,838	Wilson	May 13, 1941
2,257,439	Wilson	Sept. 30, 1941
2,274,177	Wilson	Feb. 24, 1942
2,290,399	Wilson	July 21, 1942

Paragraph Six: Respondent's thermostats for oil burners as defined in Paragraph One hereof, and known as Type T-11, which constitute the great majority of thermostats sold by respondent and Installation Instructions for which are attached hereto as Exhibit C, are covered, in whole or in part, by the following patents owned or controlled by respondent:

Number	Name	Date
Des. 96,822	Dreyfuss	Sept. 10, 1935
No. 1,818,697	Denison	Aug. 11, 1931
2,170,310	Shivers	Aug. 22, 1939
2,171,272	Kronmiller	Aug. 29, 1939
2,171,273	Cunningham	Aug. 29, 1939

110 Paragraph Seven: Respondent manufactures and sells thermostats and primary controls for a particular and distinctive control circuit for electrically controlling the operation of an oil burner, and such thermostats and primary controls of its manufacture are designed especially to work one with the other in that circuit for bringing about such electrical control of the oil burner. Respondent furnishes oil burner manufacturers and other customers with such electrical circuit layouts for controlling the operation of an oil burner and its thermostats and primary controls are particularly designed to work one with the other in a proper cooperative relationship for electrically bringing about the sequence of operation and control of an oil burner as set out in such electrical circuit layouts. Some

of the thermostats manufactured and sold by the respondent may be used with limit controls and primary controls manufactured and sold by competitors. Also some of the primary controls manufactured and sold by the respondent may be used with limit controls and thermostats manufactured and sold by competitors. Thermostats and primary controls manufactured by respondent for use with oil burners give more satisfactory and efficient performance in the ordinary installation where the proper primary control of respondent's manufacture and the proper thermostat of respondent's manufacture are used in the same installation than where improper primary controls and
111 thermostats made by different manufacturers are mixed in the same installation. From the point of view of the user the most satisfactory and efficient operation of an oil burner as customarily installed is attained

(a) either when it is equipped with a proper primary control and proper thermostat manufactured by the same manufacturer (the limit control of the proper type may be of another's manufacture), or

(b) where it is equipped with a proper primary control, proper thermostat and proper limit control manufactured by different reliable manufacturers;

and it has been for many years the practice of many manufacturers of oil burners to equip their burners with sets of automatic temperature controls in such fashion that all controls (primary, thermostat and limit control) on a single burner are made by the same manufacturer, whether they be controls manufactured by respondent or by one of its competitors. On the other hand, some manufacturers of oil burners have equipped their oil burners with sets of automatic temperature controls in such fashion that some of the controls on a single burner were made by different manufacturers.

Thermostats and limit controls of the proper type manufactured and sold by a number of competitors of the
112 respondent could be and are satisfactorily and safely used by some manufacturers of oil burners, furnace manufacturers and contractors interchangeably for thermostats and limit controls of the same type sold by respondent on installations where respondent's primary controls are used.

Paragraph Eight: Respondent in the course and conduct of its said business in December, 1936, entered into or

attempted to enter into written agreements for the year 1937 with certain of its oil burner manufacturer customers, which agreements contained the following provisions:

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls."

In the blank space between the words "contract" and "sets" the number of sets was usually inserted, but with the following customers the words—"season requirements," "estimated requirements" or a similar phrase—were inserted:

Automatic Burner Corp.
Chicago, Illinois
Gould Oil Burner Corp.
Cambridge, Massachusetts
Wayne Oil Burner Corp.
Fort Wayne, Indiana
Wisconsin Oil Burner Co.
Madison, Wisconsin
113 Malleable Iron Fitting Co.
Branford, Connecticut
York Oil Burner Co. Inc.
York, Pennsylvania
Reif-Rexoil Inc.
Buffalo, New York

In addition to the foregoing, the 1937 contracts with the following manufacturers of oil burners (constituting 79 of the 165 manufacturers of oil burners with whom the respondent entered into contracts for the year 1937):

Acme Tool & Gage Co.,
Pawtucket, R. I.
Alida Mfg. Co.
Brooklyn, N. Y.

Arcweld Mfg. Co.
Seattle, Washington
Auburn Burner Corp.,
Auburn, Ind.
Automatic Burner Corp.
Chicago, Ill.
Bedard Johnson Co.,
Minneapolis, Minn.
Berggren Engr. Co.,
Brooklyn, N. Y.
Braden Engrg., Inc.
Providence, R. I.
Brown Oil Burner Eq. Co.
Cambridge, Mass.
Buck Engineering Co., Inc.
Freehold, N. J.
Burner Parts & Serv.
Lancaster, Pa.
Campbell Machinery
Minneapolis, Minn.
Citro Oil Burner Corp.
Pompton Lakes, N. J.
Concord Oil Corp.
Brooklyn, N. Y.
D'Elia Oil Burner Co.
Bridgeport, Conn.
David Duff & Sons
New Bedford, Mass.
Eisler Engineering Co.
Newark, N. J.
Electromatic Oil Burner Co.
Malverne, N. Y.
Enterprise Oil Burner Corp.
San Francisco, Calif.
Fairfield Oil Htg. Co.
Greenwich, Conn.
Fargo Foundry Co.
Fargo, N. D.
Gar Wood Industries, Inc.
Detroit, Mich.
General Oil Burner Corp.
Baltimore, Md.
General Oil Heating Corp.
West New York, N. Y.

114 Capitol Oil Burner Co.,
Hartford, Conn.
Carlson Bros. Tool & Machine Co.
Boston, Mass.
Carter-Korth Oil Burner Co.
Roselle Park, N. J.
Harrison-Sales Co.
Seattle, Wash.
Hart Oil Burner Corp.
Peoria, Ill.
Harvey-Whipple, Inc.
Springfield, Mass.
Hayward Mfg. Co., Inc.
Brooklyn, N. Y.
Hi-Point Corp.
Bellefontaine, Ohio
Hoben Mfg. Co.
Waltham, Mass.
Holtum Mfg. Co.,
Freeport, Ill.
Homestead Engrg. Corp.
Brooklyn, N. Y.
Hubbard Oil Burner Co.
Minneapolis, Minn.
Hupp Oil Burner Co.
Brooklyn, N. Y.
Hyle Oil Burner Co.
Baltimore, Md.
Jacobson Mfg. Co.
Racine, Wisc.
Kelly Oil Sales Corp.
Arlington, Mass.
La Grace Oil Burner Co.
Woonsockett, R. I.
Liberty Research Lab., Inc.
Farmingdale, N. Y.
Gold Star Oil Burner Mfg. Co.
Yonkers, N. Y.
Goodrich Oil Burner Mfg. Corp.
New Haven, Conn.
Greenwood Engineering Co.
Glenarm, Md.
Lynn Products Co. Inc.
Lynn, Mass.

Malleable Iron Fittings Co.
Branford, Conn.
Master Oil Burner Co.
Seattle, Wash.
Messer Co.,
Newark, N. J.
Micro-Westco, Inc.
Bettendorf, Ia.
Mohawk Oil Burner Mfg. Co.
New York, N. Y.
Montag Stove & Furnace Wks.,
Portland, Ore.
Muehlbach, G. T.
Minneapolis, Minn.
National Devices Co.,
Bellmore, N. Y.
Neis & Brechtl,
West Allis, Wis.
Oil Equipment Laboratories
Elizabeth, N. J.
Old Colony Machine Works Co.
Fall River, Mass.
Osher and Reiss, Inc.
Brooklyn, N. Y.
Packard Oil Burner Mfg. Co.
Bridgeport, Conn.
Pan-American Engineering Corp.
Berkeley, Cal.
115 Penn Petroleum Products Co.,
Providence, R. I.
Petroleum Heat & Power Co.
Stamford, Conn.
Progressive Mach.
Minneapolis, Minn.
Quiet Heet Mfg. Corp.
Newark, N. J.
Quiet Heet Oil Burner Co.
Brooklyn, N. Y.
Reliable Oil Burner Corp.
Madison, Wis.
Rossoe Mfg. Co.
Seattle, Wash.
Silent Flash Oil Burner Corp.
Brooklyn, N. Y.

S-K Co.
Camden, N. J.
Simplex Oil Heating Corp.
New York, N. Y.
Standard Products Co.
Clinton, Mass.
Sunray Oil Burner Corp.
Rockaway Park, N. Y.
Todd Combustion Equipment, Inc.
New York, N. Y.
Volcano Burner Corp.
New York, N. Y.
Wayne Oil Burner Corp.
Ft. Wayne, Ind.
Harry C. Weiskittel Co. Inc.
Baltimore, Md.
Westchester Home Eqpt. Co.
Mt. Vernon, N. Y.
Wisconsin Oil Burner Co.
Madison, Wis.
York Oil Burner Co. Inc.
York, Pa.

contained the following provision:

"The Purchaser agrees that at least ninety-five (95) percent of his control requirements, consisting of Thermostats, Primary Controls and Limiting Devices, will be purchased from the Company."

116 On January 28, 1937, the respondent sent the following letter to customers with whom contracts had been made containing the said provision:

"A revision is being made in our 1937 contract form eliminating the following paragraph:

"'The Purchaser agrees that at least ninety-five (95) percent of his control requirements, consisting of Thermostats, Primary Controls and Limiting Devices, will be purchased from the Company.'

"We are sure that you will have no objection to this elimination and will request, therefore, that you have it stricken from your copy.

Yours very truly,

Minneapolis-Honeywell Regulator Co.
C. E. Swanson—
Original Equipment Div."

CES:MB

Respondent in the year 1938 entered into agreements with 131 oil burner manufacturer customers, which included the following provision:

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls."

117 In the blank space between the words "contract" and "sets" the number of sets or estimated number of sets was usually inserted, but with the following customers the words—"season requirements", "estimated requirements" or a similar phrase—were inserted:

Bedard & Johnson
Minneapolis, Minn.
Berggren Engr. Co.
Brooklyn, N. Y.
Book Corp.
Madison, Wisc.
Cleveland Steel Prod. Corp.
Cleveland, Ohio.
Diesel Burners, Inc.
Moosup, Conn.
Electrol, Inc.
Clifton, N. J.
Gould Eng. Corp.
Cambridge, Mass.
The Heil Co.
Milwaukee, Wisc.
Hi-Point Corp.
Bellefontaine, Ohio.
Petroleum Heat and Power Co.
Stamford, Conn.
Scott-Newcomb, Inc.
St. Louis, Mo.
Williams Oil-O-Matic Heating Corporation,
Bloomington, Ill.

Respondent in the year 1939 in 132 of its agreements with its oil burner manufacturer customers included the following provision:

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and to avoid any such difficulty and divided service responsibility, it is agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices."

Respondent in the year 1940 in 132 of its agreements with its oil burner manufacturer customers included the 118 following provision:

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of satisfactory operation nor assume any service responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices."

Respondent in the year 1941 in 122 of its agreements with its oil burner manufacturer customers included the following provision:

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this agreement ..... sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsat-

factory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of satisfactory operation or assume any service responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices."

Respondent in the normal course of its business during the years 1936 through 1941 also entered into contracts with certain manufacturers of oil burners, other than those contracting with respondent as aforesaid, which contracts 119 contained substantially the following provision (which is the exact language contained in such contracts for the year 1941):

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this agreement ..... units or more of the Company's automatic temperature controls. The Company's thermostats and primary controls are specifically designed to operate one with the other, and because it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, the Company does not give any assurance of satisfactory operation nor assume any service responsibility if its controls are used with other makes."

Since 1938 no contracts have been entered into by respondent with its oil burner manufacturer customers, which included in the blank space between the words "contract" or "agreement", and "sets" or "units" as the case may be the words "seasons requirements", "estimated requirements" or a similar phrase.

Paragraph Nine: Respondent in the sale of its said automatic temperature controls for oil burners has recognized three channels of trade and distribution in the heating trade, to-wit, (1) manufacturers of heating equipment who ordinarily sell their products, including controls as original equipment therewith, to wholesalers, (2) wholesalers or jobbers who ordinarily sell such heating units and also separate controls to dealers, and (3) dealers who are retailers selling such heating units and separate controls to the ultimate user. Respondent has sold automatic temperature controls to manufacturers of oil burners for use

as original equipment therewith, to wholesalers for re-
sale to dealers and to dealers for resale to the ulti-
120 mate user. Such controls are ordinarily sold by whole-
salers and dealers for repair, replacements or as auxiliary equipment beyond that furnished by the original oil burner manufacturers as part of their original equipment.

Respondent during the years 1936 through 1941 has been selling its automatic temperature controls of like grade and quality to some of its customers at lower prices than it sells said products of like grade and quality to other of its customers, and many of its oil burner manufacturer customers who pay different prices for such controls are competitively engaged one with another in the sale of oil burners, including the accompanying controls as original equipment therewith, within the United States. Respondent publishes list prices for its said products with discounts or net prices regularly allowed to oil burner manufacturers, wholesalers or jobbers and to dealers. Said discounts to dealers and to wholesalers or jobbers vary from 25% to 43.75% (or 25% and 25%), depending on or varying with the trade channel in which the purchaser is engaged, such as dealer, and wholesaler or jobber. In the case of the wholesaler said discount also varies with the quantity purchased and the service rendered to the respondent.

Respondent does not recognize as an oil burner manufacturer any purchaser who will not agree to buy at least
50 sets or 150 units annually, although it sells a few con-
121 trols to purchasers not belonging in any of the aforesaid trade channels, such customers who buy less than 50 units annually receiving a discount of 25% and 15% from list, and such customers agreeing to purchase at least 50 units annually receive a discount of 25% and 25% from list.

Respondent's several manufacturers' quantity brackets determining its net prices for automatic temperature controls sold to manufacturers of oil burners and such net prices in the years 1937, 1938, 1939, 1940 and 1941, together with the discount equivalent of the lower prices to such manufacturers purchasing in larger quantities, are set forth in the following table:

Commission's Exhibit No. 1.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY.

Statement showing annual volume and price brackets for sets[1] and discount equivalent off highest net prices to manufacturers for each year—1937 to 1941, inclusive.

	1937			1938			1939			
Bracket Number	Annual Volume (Sets)[1]	Net Price Scale[2]	Discount Equivalent off highest net price to manufacturers of $23.85	Annual Volume (Sets)[1]	Net Price Scale[2]	Discount Equivalent off highest net price to manufacturers of $21.05	Annual Volume (Sets)[1]	Net Price Scale[2]	Discount Equivalent off highest net price to manufacturers of $18.10	Annual Volume (Sets)[1]
1	50– 99	$23.85	—	50– 749	$21.05	—	50– 349	$18.10	—	50– 349
2	100– 349	22.60	5.24%	750– 2,999	19.35	8.08%	350– 999	17.25	4.70%	350– 999
3	350– 3,999	21.30	10.69%	3,000– 7,499	18.35	12.83%	1,000– 4,999	16.65	8.01%	1,000– 2,499
3A	— – —	—	—	— – —	—	—	— – —	—	—	2,500– 4,999
4	4,000– 7,499	19.85	16.77%	7,500–14,999	17.25	18.05%	5,000– 9,999	15.95	11.88%	5,000– 7,499
4A	— – —	—	—	— – —	—	—	— – —	—	—	7,500– 9,999
5	7,500–14,999	17.85	25.16%	15,000–up	16.25	22.80%	10,000–up	14.90	17.67%	10,000–up
6	15,000-up	16.55	30.61%	15,000–up[3]	14.90	29.22%	— – —	—	—	— – —

1. Volumes shown hereon are for "Sets" only and are not for separate "Units". Respondent's automatic temperature controls in all five years w units or by sets, and the several manufacturers' price brackets were similar for those contracting to purchase sets and those contracting to purcha particular bracket being three times the minimum number of sets necessary to reach that bracket. For example, Bracket 1 prices applied to a c

2. The prices set forth above are in each case the sum of the respective net prices in the particular year of a primary control, limit control and t ing the discount of 25% and 25%, the prices of the same sets were as follows: 1939—$20.82; 1940—$20.82; 1941—$20.25. Customers in this class $25.65, and during 1938 a discount of 45%, making a net price of $27.23.

3. A special concession in price was offered to 4 customers under condition that they place order for 10,000 sets prior to September 1, 1938.

Table No. 1

MPANY.

nd discount equivalent
to 1941, inclusive.

	1940			1941		
ers	Annual Volume (Sets)[1]	Net Price Scale[2]	Discount Equivalent off highest net price to manufacturers of $18.10	Annual Volume (Sets)[1]	Net Price Scale[2]	Discount Equivalent off highest net price to manufacturers of $17.35
	50– 349	$18.10	—	50– 349	$17.35	—
	350– 999	17.25	4.70%	350– 999	16.45	5.19%
	1,000– 2,499	16.65	8.01%	1,000– 2,499	15.90	8.36%
	2,500– 4,999	16.25	10.22%	2,500– 4,999	15.35	11.33%
	5,000– 7,499	15.85	12.43%	5,000– 7,499	14.90	14.12%
	7,500– 9,999	15.15	16.30%	7,500– 9,999	14.25	17.87%
	10,000–up	14.65	19.06%	10,000–up	13.75	23.05%

s in all five years were priced on a unit basis irrespective of whether purchased by
ntracting to purchase units, the minimum number of units necessary to reach a
prices applied to a customer contracting to purchase either 50 sets or 150 units.

l, limit control and thermostat making up a representative set. For customers receiv-
stomers in this class received during 1937 a discount of 40-5%, making a net price of

tember 1, 1938.

123 Some manufacturers paying higher prices for respondent's automatic temperature controls were able to, and often did, sell their oil burners complete with controls at prices below those which other similar manufacturers paying lower prices for respondent's automatic temperature controls sold their oil burners.

Some manufacturers paying lower prices for respondent's automatic temperature controls were able to, and often did, sell their oil burners complete with controls at prices below those which other similar manufacturers paying higher prices for respondent's automatic temperature controls sold their oil burners.

The prices for standard primary controls, limit controls and thermostats for oil burners charged by respondent to any wholesaler who contracts with respondent to purchase annually $750 worth of its controls and to place an initial order for and maintain in its inventory controls in the amount of $200, were 7.5% of the list price less than the prices to wholesalers who did not elect so to contract.

Dated this 6th day of August, 1943.

Federal Trade Commission,
By W. T. Kelley,
Chief Counsel.

Cravath, de Gersdorff, Swaine & Wood,
Bair & Freeman,
Attorneys for Respondent.

Approved:
Federal Trade Commission,
By Otis B. Johnson,
Secretary.

(P.1663)

STIPULATION - EXHIBIT A

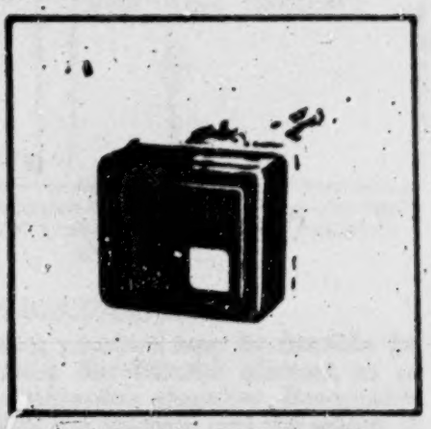
INSTALLATION INSTRUCTIONS

TYPE [redacted] PROTECTORELAY*

This Protectorelay is designed primarily for [redacted] mounting and will operate quickly and reliably in low [redacted] temperatures. It is normally installed in a horizontal position, but can be mounted at an angle if necessary. The new type bimetal element imparts straight-line action to the simplified Pyrostat mechanism. The terminal block and conduit spuds facilitate wiring.

Failure of the burner to ignite and properly maintain combustion will cause the safety switch to trip and shut down the burner preventing any abnormal discharge of oil. The Protectorelay will "lock out" necessitating manual reset before the burner may again be started. The safety switch is compensated for varying basement temperature and its timing is unaffected by varying motor loads since the heating element of the safety switch is in series with the relay coil.

The Protectorelay recycles on power or flame failure and is for use on constant ignition burners.



SPECIFICATIONS

TYPE—
R4116A for constant ignition oil burners

VOLTAGE AND FREQUENCY—115 volts, 60 cycle standard. Other A C voltages and frequencies at extra cost. For D C specify R4116A Protectorelay and T498A Thermostat.

ELECTRICAL RATING—½ H P A C

IGNITION RATING—3 amps @ 115 volts.

SAFETY SWITCH TIMING—Approximately 90 seconds.

ELEMENT INSERTION LENGTH (with mounting plate screwed)—Adjustable, 3½" to 6½" standard. Special insertion lengths available 2½" to 5" at no extra cost, 2½" to 10½" at extra cost.

CASE DIMENSIONS—Height 8¼", width 4¼", depth 3½".

WHEN ORDERING SPECIFY:
1. Type Number.
2. Voltage and frequency.
3. Special insertion length, if required.

HEATERS THAT MUST BE USED IN HEAT ACCELERATED THERMOSTATS FOR THIS PROTECTORELAY		
	115, 230 Volts 50, 60 Cycle	115, 230 Volts 25 Cycle
T11A, T109A T111A, T179A	Green Coded Heater	Black & Green Coded Heater
T108A	Black & Green Coded Heater	Blue & Brown Coded Heater

INSTALLATION

If special mounting provisions are supplied by the furnace, boiler or burner manufacturer follow their recommendations carefully. Where no special instructions are furnished, proceed as follows:

LOCATION IN STACK:

Select a location for the Protectorelay in the stack as near as possible to the boiler or furnace. The bimetal element should be in the direct path of the hot stack gases. However, the element must not be located where its temperature will exceed 1000° F.—and if a draft regulator is used, the location of the Protectorelay must always be between it and the furnace or boiler. (See Fig. 1). The Protectorelay should preferably be installed with the element tube horizontal.

(See "SPECIAL APPLICATIONS"—next page).

MOUNTING:

1. At the proper location drill a 1¾" hole. Then, using the mounting bracket as a template, mark the location of the mounting screw holes.
2. Drill the holes and securely fasten the bracket to the stack with the screws furnished.
3. Slide the protecting tube into the stack until the bimetal element is in the center. (See Fig. 2). It is important that the element be located in the center of the stack in order that it will be in the direct path of the hot flue gases.

If the Protectorelay is to be mounted in an elbow it is very important to locate the element so that it is positioned not farther into the stack than the center of the elbow. In fact a location farther toward the outside of the elbow is preferable since that is the hottest part of the gas flow.

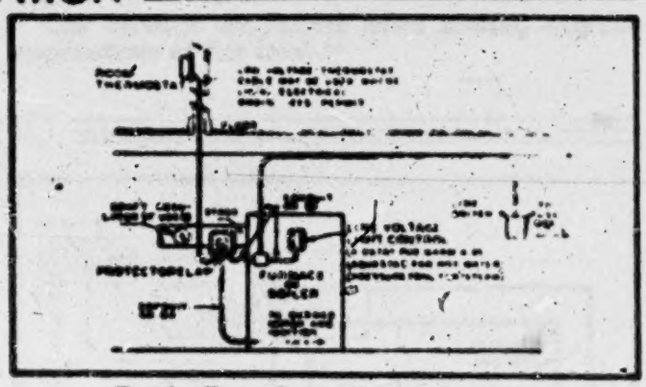


Fig. 1—Typical installation diagram.

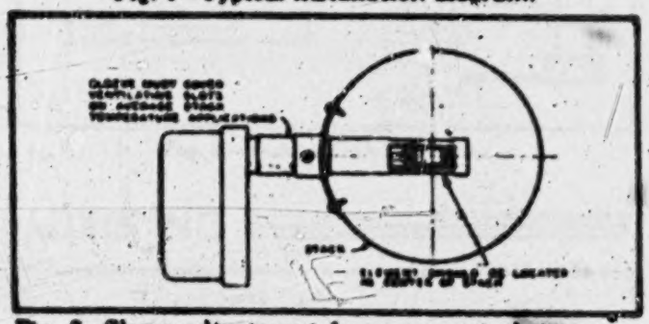


Fig. 2—Sleeve adjustment for average stack temperatures. (ventilating slots completely covered).

It will be noted that the protecting tube is equipped with a movable sleeve covering the ventilating slots in the tube. If an average stack temperature is expected, be sure the ventilating slots are covered by the sleeve. (See Fig. 2). Then tighten the lock screw in the mounting bracket.

*Trade Mark.

March 6, 1941
Obsolete Form 95-1219A
Dated January 16, 1941

(P.1664)

Note: In a few stack mounted applications where unusually high stack temperatures are encountered, it may be necessary to open or partially open the ventilating slots in the tube to safeguard the element. To open ventilating slots, loosen bracket lock screw and slide sleeve away from case. Be sure that mounting bracket does not cover slots. (See Fig. 3). Then retighten bracket lock screw.

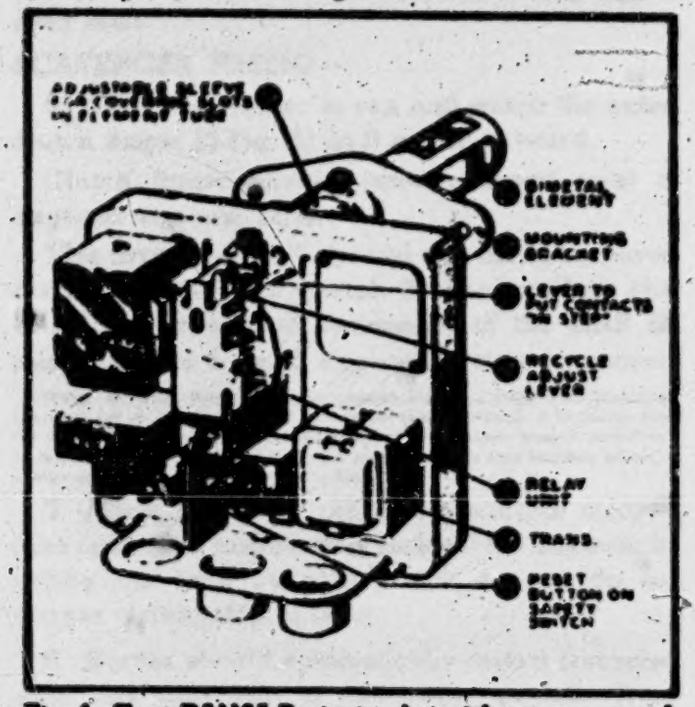


Fig. 4—Type RA116A Protectorelay with cover removed.

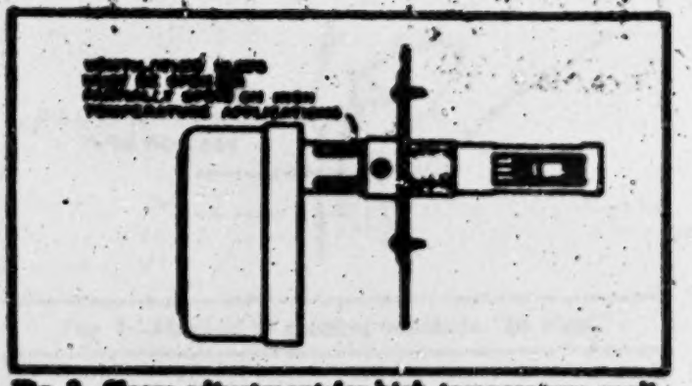


Fig. 3—Sleeve adjustment for high temperature applications, (ventilating slots partially or completely open).

SPECIAL APPLICATIONS:

On some heating plants it may be feasible (or necessary) to locate the bimetal element in or adjacent to the combustion chamber. Reasonable temperature tests of the element and the effects of radiant energy should be carefully determined on these applications.

The ventilating slots in the tube should be opened to cool the element and some form of shield to protect the element from radiant heat should be provided. These measures will prolong the life of the element. To open ventilating slots, slide sleeve away from case—be sure mounting bracket does not cover slots.

Our services are invited when making original applications of this kind.

WIRING

Important: All wiring must be done in accordance with local electrical ordinances.

Use No. 14 rubber covered wire for all line voltage wiring. Flexible cable, if used should have enough slack to permit removal of the Protectorelay for servicing. Standard thermostat cable may be used between the thermostat and the Protectorelay where local codes permit. We recommend placing the high limit control in the "hot" line to terminal No. 1 as shown. However, it may be connected in the low voltage white wire to the thermostat.

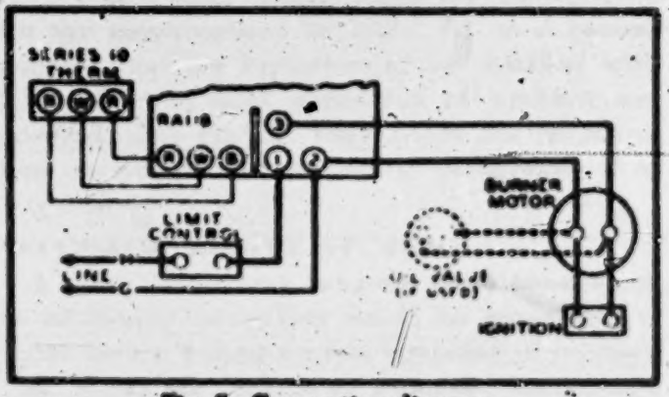


Fig. 5—Connection diagram.

TESTING AND ADJUSTING

It is very important that the Protectorelay be tested and adjusted in actual operation.

ADJUSTMENTS FOR AVERAGE STACK TEMPERATURES:

(a) Leave the recycling stop lever at the factory setting—"inward (minimum) position". (See Fig. 6).

(b) Be sure that the ventilating slots are covered by the sleeve. (See Fig. 2).

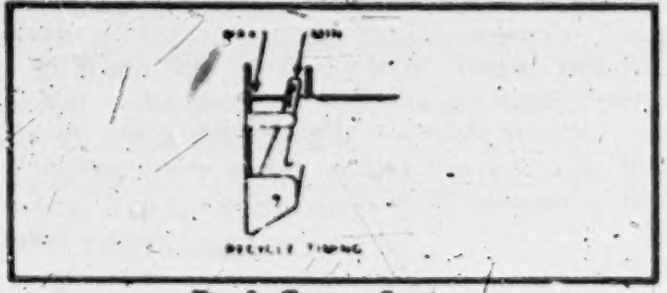


Fig. 6—Factory Setting.

(P. 1167)

TO START BURNER—

1. **Place Protectorelay Contacts in Starting Position: (See Fig. 7).**

2. **Depress and release reset button (5-Fig. 4).**

3. **Open the hand valve in the oil supply line.**

4. **Move the indicator on the high limit control and room thermostat to the high end of the scale.**

5. **Close the line switch. Burner should immediately start.**

SCAVENGER TIMING—

6. **Allow the burner to run and watch the outer clutch finger (3-Fig. 8) as it moves outward.**

Clutch finger should move outward until it engages stop arm (2).

The drive shaft (4) should continue to move outward after the clutch finger reaches the stop. This continued movement of the shaft (it need only be a small amount) is very important.

Note: If clutch finger does not engage stop arm (with recycling stop lever (1) set at "minimum" and ventilating slots covered), it indicates that the bimetal element is not getting enough heat to insure proper operation. In this event the Protectorelay should be moved to a new location where a higher element temperature will be found.

7. **Allow burner to run a few minutes more—then open (and immediately reclose) the line switch, noting the time by your watch as you do so. Burner should stop at once.**

8. **Burner should automatically restart (recycle) after this shutdown or scavenger period. Time the restart.**

9. **Too Fast Recycling:**

(w) If the burner restarts too soon (we recommend not less than 1 minute), open the line switch and wait 5 minutes for the heating plant to cool.

(x) Move stop lever (1) outward one notch. Then close the line switch. Burner should start immediately.

(y) Watch clutch finger (3) as it moves outward. Clutch finger should move outward until it engages stop arm (2). The drive shaft (4) should continue to move outward after the clutch finger reaches the stop. This continued movement of the shaft (it need only be a small amount) is very important. Then open (and immediately reclose) the line switch noting the time by your watch as you do so. Burner should stop at once.

(z) Burner should automatically restart and the time should be noted. If the scavenger period is still too short, repeat tests (paragraphs "w, x and y") until a suitable recycling time is obtained. Move stop lever only one notch at a time.



Fig. 7—Method of placing contacts "in step."

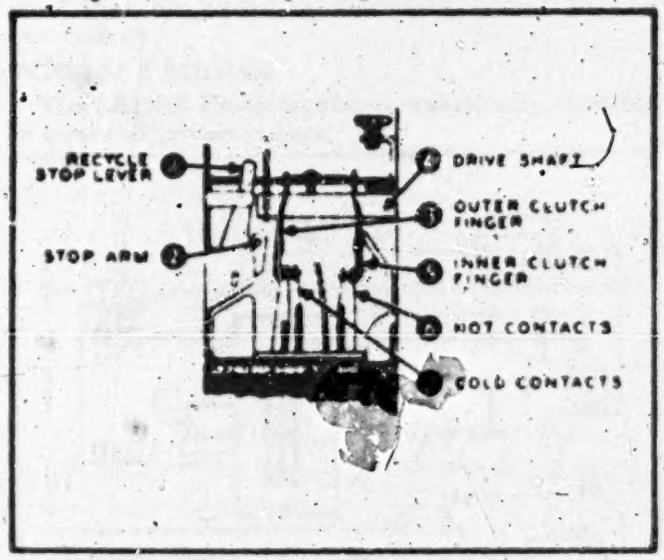


Fig. 8 – Recycling time adjustment.

ADJUSTMENTS FOR HIGH TEMPERATURE CONDITIONS:

1. **Where high temperatures are encountered (in the neighborhood of 1000° F.), it is recommended that the Protectorelay be installed with the ventilating slots uncovered or partially uncovered. (See Fig. 3). Then check the recycling time as outlined in preceding paragraphs 1 to 9 inclusive.**

TO CHECK SAFETY SWITCH:

1. **With the burner running, close hand valve in oil supply line. (This would be equivalent to flame failure during normal operation of burner).**

2. **When the flame is extinguished hot contacts (6-Fig. 8) should open, after a slight drop in stack temperature and stop the burner.**

3. **The burner should remain off until the stack cools enough so that the "cold contacts" (7-Fig. 8) make.**

4. **When the "cold contacts" make, and the burner motor starts up with the oil supply valve closed, check the timing of the safety switch.**

5. **The safety switch should trip and stop the burner motor in approximately 90 seconds at the rated voltage.**

(P. 1666)

OPERATION—CIRCUIT

OPERATION (Refer to Fig 9)

When burner is idle, cold contacts "6" and "7" (Fig 9) are closed, hot contact "8" is open, safety switch contact "5" is closed and the relay is "out".

When thermostat calls for heat, relay pulls in, closing contact "12" starting the burner motor and bringing on the ignition. Contacts "9", "10" and "11" are also closed, thereby establishing a holding circuit.

On the initial rise in stack temperature hot contact "8" makes shunting out the safety switch heater. A further rise in stack temperature causes cold contacts "6 and 7" to break. The burner is now in normal operation.

The initial rise in room temperature will open thermostat contact "B". The relay will remain in through a holding circuit established through "R" and "W" thermostat contacts and contacts "9" and "11" of the relay. Opening of contact "B" sends all of the current through the thermostat heater thereby causing an accelerated shutdown.

When the thermostat is satisfied contact "W" will open causing the relay to drop out stopping the burner.

IGNITION FAILURE:

If combustion fails to take place on startup, hot contact "8" will not make—thus current continues to flow to the safety switch heater and in approximately 90 seconds the safety switch contact "5" will open, stopping burner. The reset button (8-Fig 4) must then be manually depressed before restart is permitted.

FLAME FAILURE:

If a flame failure occurs when burner is running normally, hot contact "8" will open on the initial drop in stack temperature. The relay will immediately drop out stopping the burner. At the expiration of the scavenger period (normally about one minute), cold contacts "6" and "7" will make, restarting the burner. If combustion takes place, burner will continue to run—but if oil fails to ignite, a safety shutdown will occur in approximately 90 seconds. The reset button (8-Fig 4) must then be manually depressed before burner can restart.

POWER FAILURE:

The RA116A Protectorelay automatically recycles in event of power failure.

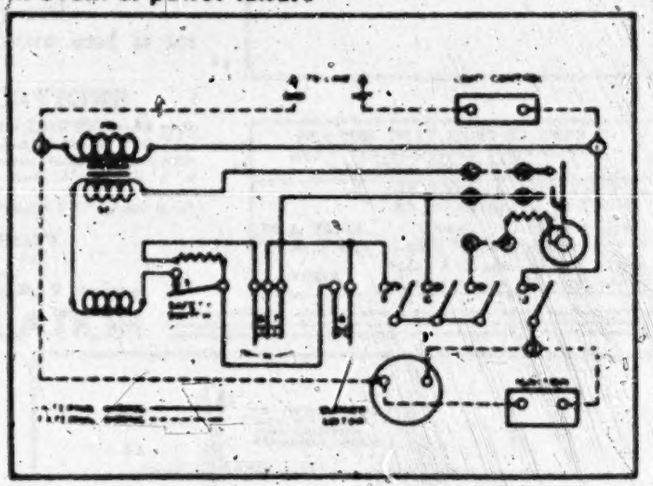


Fig. 9—Schematic circuit of RA116A.

SERVICE SUGGESTIONS

CAUTION: Do not under any circumstances use oil on this Protectorelay.

It is important that the cover be left on the Protectorelay to protect it from dust and mechanical injury.

If the Protectorelay Fails to Operate after the line switch is closed, and with the high limit control and thermostat calling for heat, depress and release reset button (8-Fig 4). Burner motor should start immediately. If burner does not start, place the Protectorelay contacts in the starting position—See Fig 7. Burner motor should immediately start. If combustion does not take place open the line switch. Check power supply, wiring, ignition and oil supply.

Note: If it is necessary to place the contacts "in step" (Fig 7) in order to start the burner, refer to heading "TESTING AND ADJUSTING" and carefully check the complete operating cycle as outlined.

If the burner motor does not start when the contacts are placed "in step" (Fig 7), place a jumper across the red, white and blue terminals of the Protectorelay. If the relay does not pull in (with current "on" and with cold contacts (7-Fig 8) closed), the Protectorelay is defective and should be replaced. If the relay does pull in, remove the jumper and check all connections between the thermostat and Protectorelay and examine the contacts of the thermostat (and low voltage limit control if used) to make sure they are closed. Finally, check the low voltage cable if necessary.

Chattering operation (rapid opening and closing) of the relay indicates an open "red" wire circuit or interchanging of the blue with either the red or white wire somewhere in the low voltage circuit.

If the Protectorelay Goes On Safety, after the burner has started up normally, the trouble may be due to any one or more of the following: Down drafts or air leaks in the smoke pipe, slow temperature rise of the flue gas where the Protectorelay element is located, plugged oil line, ignition failure, or accumulation of soot on the bimetal element.

(P-1667)

STIPULATION - EXHIBIT B

INSTALLATION INSTRUCTIONS

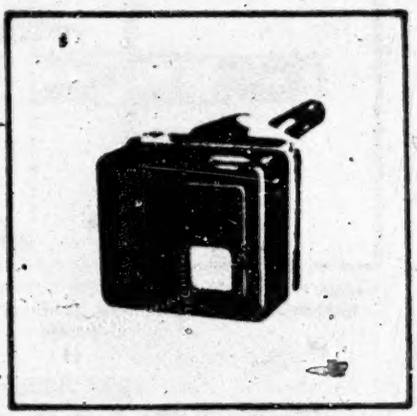
MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

TYPE RA117A PROTECTORELAY

This Protectorelay is designed primarily for stack mounting and will operate quickly and reliably in low stack temperatures. It is normally installed in a horisontal position, but can be mounted at an angle if necessary. The new type bimetal element imparts straight-line action to the simplified Pyrostat mechanism. The terminal block and conduit spuds facilitate wiring.

Failure of the burner to ignite and properly maintain ignition will cause the safety switch to trip and shut down the burner preventing any abnormal discharge of oil. The Protectorelay will "lock out" necessitating manual reset before the burner may again be started. The safety switch is compensated for varying basement temperature and its timing is unaffected by varying motor loads since the heating element of the safety switch is in series with the relay coil.

The Protectorelay recycles on power or flame failure and is for use on intermittent ignition burners.



SPECIFICATIONS

TYPE
RA117A for intermittent ignition oil burners

VOLTAGE AND FREQUENCY – 115 volts, 60 cycle standard. Other A.C. voltages and frequencies at extra cost. For D.C. specify R417A Lightswitch and T46A Thermostat

ELECTRICAL RATING – 1, R.P.A.C.

IGNITION RATING – 1 amps. @ 115 volts

SAFETY SWITCH TIMING – Approximately 90 seconds

ELEMENT INSERTION LENGTH (with ventilating slots covered) – Adjustable, 2 1/2" to 6 1/2" standard. Special insertion lengths available 2 1/2" to 9" at no extra cost, 2 1/2" to 10 1/2" at extra cost

CASE DIMENSIONS – Height 5 1/2", width 6 1/2", depth 3 1/2"

WHEN ORDERING SPECIFY
1. Type Number
2. Voltage and frequency
3. Special insertion length, if required.

HEATERS THAT MUST BE USED IN HEAT ACCELERATED THERMOSTATS FOR THIS PROTECTORELAY		
	115, 2.00 Volts 50, 60 Cycle	115, 2.35 Volts 25 Cycle
T11A, T108A, T111A, T178A	Green Coded Heater	Black & Green Coded Heater
T108A	Black & Green Coded Heater	Blue & Brown Coded Heater

INSTALLATION

If special mounting provisions are supplied by the furnace, boiler or burner manufacturer follow their recommendations carefully. Where no special instructions are furnished, proceed as follows:

LOCATION IN STACK:

Select a location for the Protectorelay in the stack as near as possible to the boiler or furnace. The bimetal element should be in the direct path of the hot stack gases. However, the element must not be located where its temperature will exceed 1000° F.—and if a draft regulator is used, the location of the Protectorelay must always be between it and the furnace or boiler. (See Fig. 1). The Protectorelay should preferably be installed with the element tube horisontal.

(See "SPECIAL APPLICATIONS"—next page).

MOUNTING:

1. At the proper location drill a 1⅝" hole. Then, using the mounting bracket as a template, mark the location of the mounting screw holes.
2. Drill the holes and securely fasten the bracket to the stack with the screws furnished.
3. Slide the protecting tube into the stack until the bimetal element is in the center. (See Fig. 2). It is important that the element be located in the center of the stack in order that it will be in the direct path of the hot flue gases.

If the Protectorelay is to be mounted in an elbow it is very important to locate the element so that it is positioned not farther into the stack than the center of the elbow. In fact a location farther toward the outside of the elbow is preferable since that is the hottest part of the gas flow.

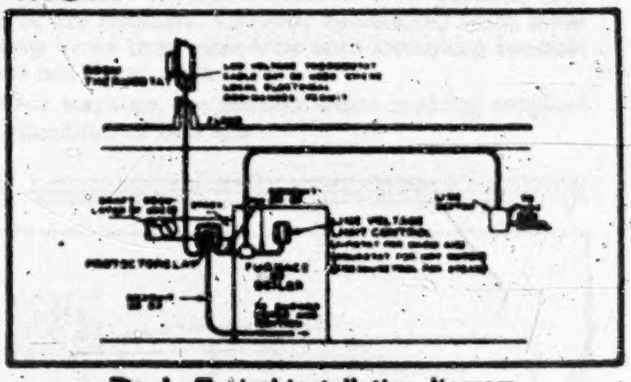


Fig. 1—Typical installation diagram.

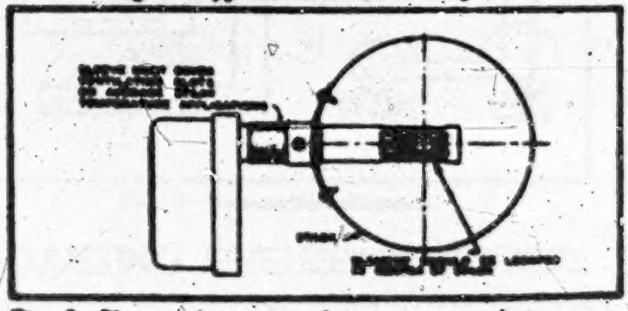


Fig. 2—Sleeve adjustment for average stack temperatures, (ventilating slots completely covered).

It will be noted that the protecting tube is equipped with a movable sleeve covering the ventilating slots in the tube. If an average stack temperature is expected, be sure the ventilating slots are covered by the sleeve. (See Fig. 2). Then tighten the lock screw in the mounting bracket.

(P. 1168)

Note: In a few stack mounted applications where unusually high stack temperatures are encountered, it may be necessary to open or partially open the ventilating slots in the tube to safeguard the element. To open ventilating slots, loosen bracket lock screw and slide sleeve away from case. Be sure that mounting bracket does not cover slots. (See Fig. 3). Then retighten bracket lock screw.

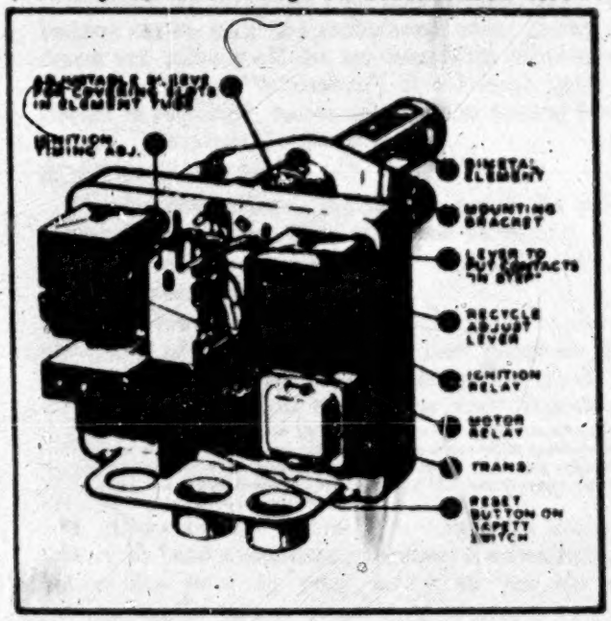


Fig. 4—Type RA117A Protectorelay with cover removed.

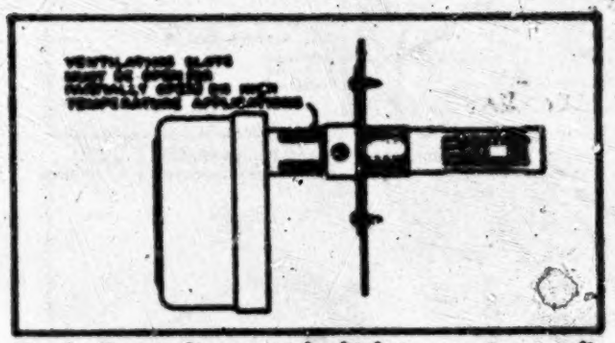


Fig. 3—Sleeve adjustment for high temperature applications. (ventilating slots partially or completely open).

SPECIAL APPLICATIONS:

On some heating plants it may be feasible (or necessary) to locate the bimetal element in or adjacent to the combustion chamber. Reasonable temperature tests of the element and the effects of radiant energy should be carefully determined on these applications.

The ventilating slots in the tube should be opened to cool the element and some form of shield to protect the element from radiant heat should be provided. These measures will prolong the life of the element. To open ventilating slots, slide sleeve away from case—be sure mounting bracket does not cover slots.

Our services are invited when making original applications of this kind.

WIRING

Important: All wiring must be done in accordance with local electrical ordinances.

Use No. 14 rubber covered wire for all line voltage wiring. Flexible cable, if used should have enough slack to permit removal of the Protectorelay for servicing. Standard thermostat cable may be used between the thermostat and the Protectorelay where local codes permit. We recommend placing the high limit control in the "hot" line to terminal No. 1 as shown. However, it may be connected in the low voltage white wire to the thermostat.

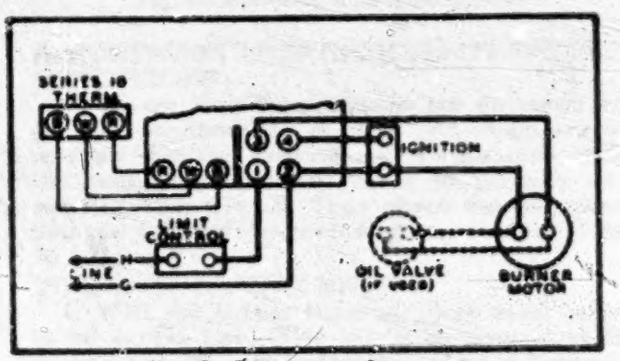


Fig. 5—Connection diagram.

TESTING AND ADJUSTING

It is very important that the Protectorelay be tested and adjusted in actual operation.

ADJUSTMENTS FOR AVERAGE STACK TEMPERATURES:

(a) Leave the recycling stop lever at the factory setting—"inward (minimum) position". (See "B" Fig. 6).

(b) Leave the ignition timing lever at the factory setting—"outward (minimum) position". (See "A" Fig. 6).

(c) Be sure that the ventilating slots are covered by the sleeve. (See Fig. 2).

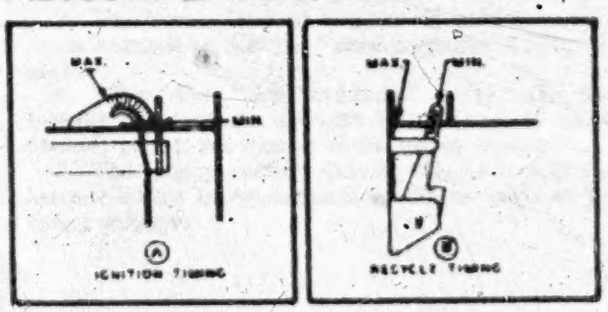


Fig. 6—Factory Settings.

(P. 1669)

TO START BURNER—

1. Place Protectorelay Contacts in Starting Position: (See Fig. 7).
2. Depress and release reset button (8-Fig. 4).
3. Open the hand valve in the oil supply line.
4. Move the indicator on the high limit control and room thermostat to the high end of the scale.
5. Close the line switch. Burner should immediately start.

IGNITION TIMING—

6. Note the length of time that elapses, after the burner starts, until the right hand relay (5-Fig. 4) drops out cutting off the ignition. This adjustment is factory set at "minimum". If a longer ignition period is required, move the ignition timing lever toward "maximum". (See Fig. 8).

SCAVENGER TIMING—

7. Allow the burner to run and watch the outer clutch finger (3-Fig. 9) as it moves outward.

Clutch finger should move outward until it engages stop arm (2).

The drive shaft (4) should continue to move outward after the clutch finger reaches the stop. This continued movement of the shaft (it need only be a small amount) is very important.

Note: If clutch finger does not engage stop arm (with recycling stop lever (1) set at "minimum" and ventilating slots covered), it indicates that the bimetal element is not getting enough heat to insure proper operation. In this event, the Protectorelay should be moved to a new location where a higher element temperature will be found.

8. Allow burner to run a few minutes more—then open (and immediately reclose) the line switch, noting the time by your watch as you do so. Burner should stop at once.

9. Burner should automatically restart (recycle) after this shutdown or scavenger period. Time the restart.

10. Too Fast Recycling:

(w) If the burner restarts too soon (we recommend not less than 1 minute), open the line switch and wait 5 minutes for the heating plant to cool.

(x) Move stop lever (1) outward one notch. Then close the line switch. Burner should start immediately.

(y) Watch clutch finger (3) as it moves outward. Clutch finger should move outward until it engages stop arm (2). The drive shaft (4) should continue to move outward after the clutch finger reaches the stop. This continued movement of the shaft (it need only be a small amount) is very important. Then open (and immediately reclose) the line switch noting the time by your watch as you do so. Burner should stop at once.

(z) Burner should automatically restart and the time should be noted. If the scavenger period is still too short, repeat tests (paragraphs "w, x and y") until a suitable recycling time is obtained. Move stop lever only one notch at a time.

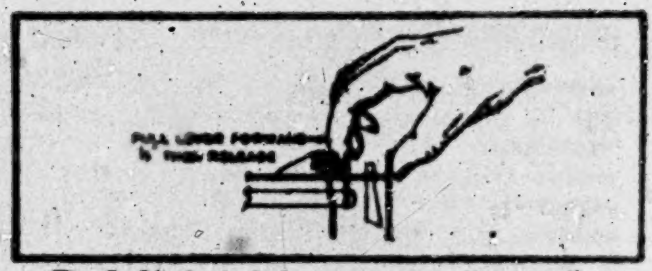


Fig. 7—Method of placing contacts "in step."

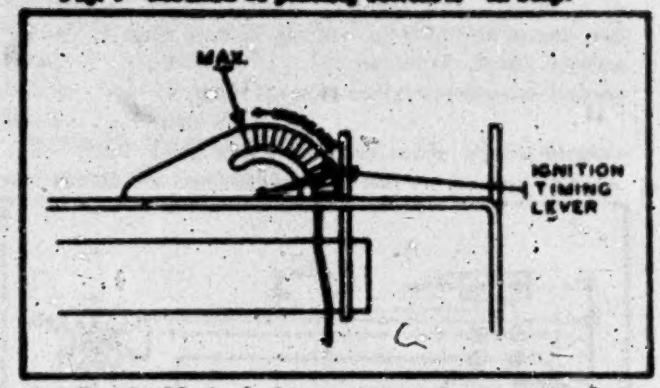


Fig. 8—Method of increasing ignition timing.

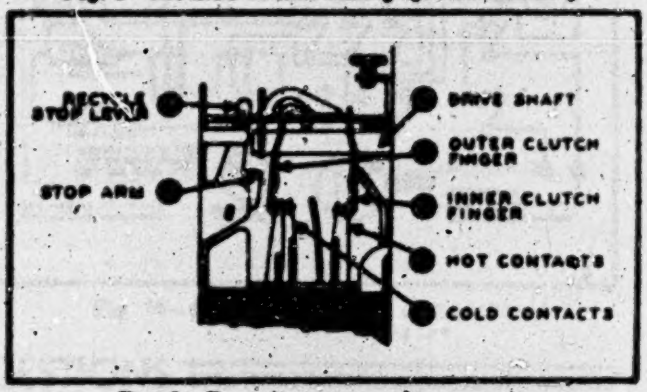


Fig. 9—Recycling time adjustment.

ADJUSTMENTS FOR HIGH TEMPERATURE CONDITIONS:

1. Where high temperatures are encountered (in the neighborhood of 1000° F.), it is recommended that the Protectorelay be installed with the ventilating slots uncovered or partially uncovered. (See Fig. 3). Then check the recycling time as outlined in preceding paragraphs 1 to 10 inclusive.

TO CHECK SAFETY SWITCH:

1. With the burner running, close hand valve in oil supply line. (This would be equivalent to flame failure during normal operation of burner).
2. When the flame is extinguished hot contacts (6-Fig. 9) should open after a slight drop in stack temperature and stop the burner.
3. The burner should remain off until the stack cools enough so that the "cold contacts" (7-Fig. 9) make.
4. When the "cold contacts" make, and the burner motor starts up with the oil supply valve closed, check the timing of the safety switch.
5. The safety switch should trip and stop the burner motor in approximately 90 seconds at the rated voltage.

Cameraman's Note:

This is poor copy, but

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(A-1670)

OPERATION—CIRCUIT

OPERATION (Refer to Fig. 10)

When burner is idle, cold contacts "6" and "7" are closed, hot contact "8" is open, safety switch contact "5" is closed and both relays are "out".

When thermostat calls for heat, right hand relay pulls in, closing contact "15" bringing on ignition. Contacts "9", "10" and "11" are also closed, thereby completing circuit to left hand relay starting up burner motor through contact "16". On initial rise in stack temperature hot contact "8" makes, shunting out safety switch heater. The continued rise in stack temperature causes cold contacts "7" and "6" to break in that order, dropping out right hand relay, cutting off ignition. The burner is now in normal operation.

The initial rise in room temperature will open thermostat contact "B". Left hand relay will remain "in" through holding circuit completed through "R" and "W" thermostat contacts. Opening of contact "B" sends all the current through thermostat heater.

When thermostat is satisfied contact "W" will open causing left hand relay to drop out stopping burner.

IGNITION FAILURE: If combustion fails to take place on start-up, hot contact "8" will not make—thus current continues to flow to safety switch heater and in approximately 90 seconds safety switch contact "5" will open, shutting down burner. Reset button (8-Fig. 4) must then be manually depressed before restart is permitted.

FLAME FAILURE: If a flame failure occurs when burner is running normally, hot contact "8" will open on the initial drop in stack temperature. Left hand relay will drop out stopping burner immediately. At the expiration of the scavenger period (normally about 1 minute), cold contacts "6" and "7" will make, starting the burner. If combustion takes place, burner will continue to run—but if oil fails to ignite, a safety shutdown will occur in approximately 90 seconds. Reset button (8-Fig. 4) must then be manually depressed before burner can start up.

POWER FAILURE: The RA117A Protectorelay automatically recycles in event of power failure.

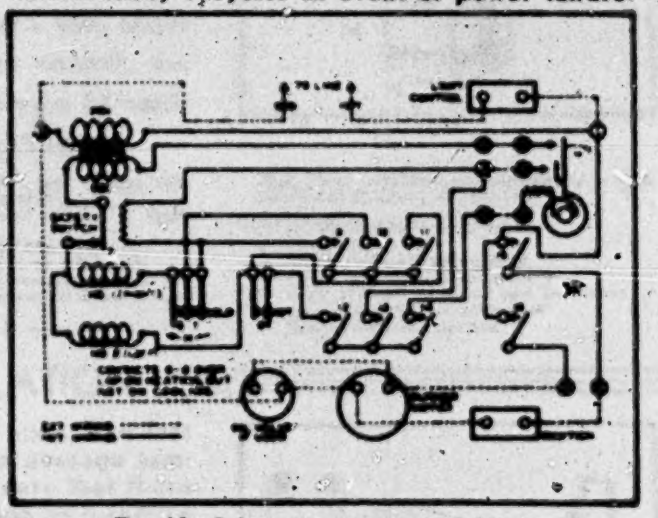


Fig. 10—Schematic circuit of RA117A.

SERVICE SUGGESTIONS

CAUTION: Do not under any circumstances use oil on this Protectorelay.

It is important that the cover be left on the Protectorelay to protect it from dust and mechanical injury.

If the Protectorelay Fails to Operate after the line switch is closed, and with the high limit control and thermostat calling for heat, depress and release reset button (8-Fig. 4). Burner motor should start immediately. If burner does not start, place the Protectorelay contacts in the starting position—See Fig. 7. Burner motor should immediately start. If combustion does not take place open the line switch. Check power supply, wiring, ignition and oil supply.

Note: If it is necessary to place the contacts "in step" (Fig. 7) in order to start the burner, refer to heading "TESTING AND ADJUSTING" and carefully check the complete operating cycle as outlined.

If the burner motor does not start when the contacts are placed "in step" (Fig. 7), place a jumper across the red, white and blue terminals of the Protectorelay. If the relay does not pull in (with current "on" and with cold contacts (7-Fig. 9) closed), the Protectorelay is defective and should be replaced. If the relay does pull in, remove the jumper and check all connections between the thermostat and Protectorelay and examine the contacts of the thermostat (and low voltage limit control if used) to make sure they are closed. Finally, check the low voltage cable if necessary.

Chattering operation (rapid opening and closing) of the relay indicates an open "red" wire circuit or interchanging of the blue with either the red or white wire somewhere in the low voltage circuit.

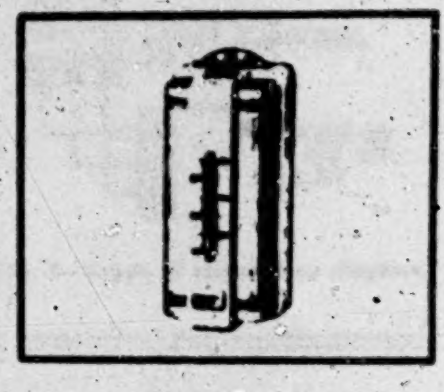
If the Protectorelay Goes On Safety, after the burner has started up normally, the trouble may be due to any one or more of the following: Down drafts or air leaks in the smoke pipe, slow temperature rise of the flue gas where the Protectorelay element is located, plugged oil line, ignition failure, or accumulation of soot on the bimetal element.

INSTALLATION INSTRUCTIONS

TYPE T11A ACRATHERM*

The Acratherm is a bi-metal actuated room temperature controller, equipped with open contacts of platinum iridium. It should be used only in conjunction with other Series 10 devices such as Series 10 Protectorelays, Gas Valves, etc.

The T11A Acratherm contains an "Accelerator" (artificial heating element) which operates to prevent "overshooting" of room temperatures by accelerating shutdown of the burner after a very slight rise in the room temperature. To obtain satisfactory control, the correct "heater plug" for the device controlled must always be used.



SPECIFICATIONS

TYPES—
T11A Acratherm (Heat Accelerated).

FINISH—Silver. (Special finishes available at extra cost. Submit sample.)

RANGE 50 to 85° F. (Special range of 13 to 30° C available at no extra cost. Other ranges available 35 to 60°, 40 to 75°, 65 to 98° F or their centigrade equivalents at extra cost.

DIFFERENTIAL—Adjustable.

ELECTRICAL RATING—Low voltage only. Type T11A not applicable to D.C.

DIMENSIONS—Height 4 ¼", width 1 ⅝", depth 1 ⅛".

SPECIAL FEATURES AVAILABLE
Locking Cover available at no extra cost.
Blank Cover (less thermometer) at no extra cost.
Pointer "make" at high end of scale at extra cost.
Night Shut-off available at no extra cost.

Wall Plate (1-2390) for adapting to a wall switch box available at extra cost.

WHEN ORDERING SPECIFY
1. Type Number.
2. Finish if other than standard.
3. Range if other than 50 to 85° F.
4. Type Number, voltage and frequency of device Acratherm is to control.
5. Special features required.

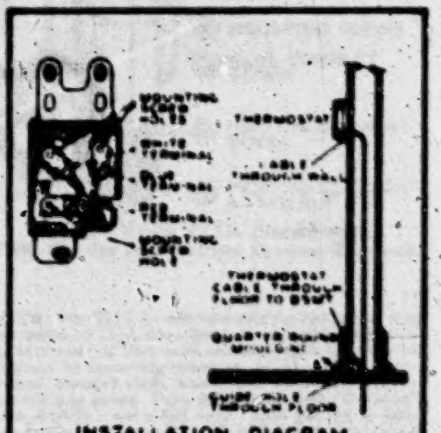
INSTALLATION

LOCATION: The Acratherm should be mounted about five feet above the floor where it will be affected only by the average temperature of the room (not on an outside wall). Make sure that there will be free circulation of air at this location unobstructed by furniture or doors. Do not mount the Acratherm where it may be affected by drafts, hot or cold air from water pipes or ducts, radiant heat from the sun or fireplace, etc.

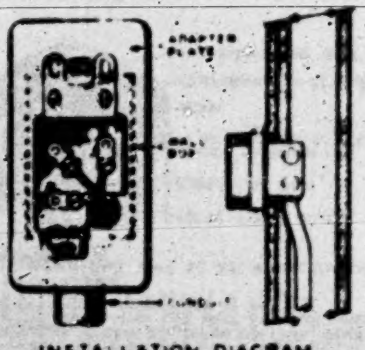
TO INSTALL THERMOSTAT CABLE proceed as follows:

1. Remove quarter round from the base board directly beneath the Acratherm location, and drill a small guide hole through the floor and basement ceiling on an angle. (See diagram).
2. At the point where the guide hole pierced the basement ceiling, drill a ½" hole up through the floor into the space between the walls of the partition.
3. Insert a stiff wire at least 6 ft. long through this hole and up into the partition to determine whether any obstruction is present. If there is, a new location for the Acratherm should be selected.
4. Bore a ½" hole through the plaster about five feet above the floor where the Acratherm is to be mounted.
5. Attach a short length of chain to the end of a strong cord and insert it into the hole in the plaster, allowing it to drop to the floor inside the partition.
6. From the basement insert a stiff wire, the end of which is formed into a hook, up through the ceiling into the partition and draw the chain down into the basement.
7. Fasten the end of a thermostat cable to the cord securely. Then from the room above draw the cord and cable up through the hole in the plaster.
8. Leave about 6" of cable to make connections and then plug up the hole in the plaster to prevent drafts from the basement affecting the operation of the Acratherm.

FOR LOW VOLTAGE WIRING IN CONDUIT, the Acratherm should be mounted on a standard wall switch box as shown in the diagram, using standard adapter plate available for that purpose.



INSTALLATION DIAGRAM FOR LOW VOLTAGE CABLE



INSTALLATION DIAGRAM FOR LOW VOLTAGE WIRING IN CONDUIT

Trade Mark.

(P. 1672)

MOUNTING

TO REMOVE COVER AND WALL PLATE: Loosen the screw at the bottom end of the Acratherm, and pull outward and upward on the lower end of the cover. Loosen three mounting screws (9-Figs. 1 and 3) and separate the wall plate from thermostat base.

Fasten wall plate firmly to the wall with wood screws, making sure that the screws enter the lath, and that the plate is vertical. The cut away corner of the wall plate should be adjacent to the hole in the plaster as shown in the diagram. Connect the three wire cable to the terminals "color to color", after skinning the ends of the wires. Be sure that no bare wire touches any other bare wire or any part of the Acratherm except the terminal screw. Replace base and cover.

CAUTION: All wiring must comply with local ordinances.

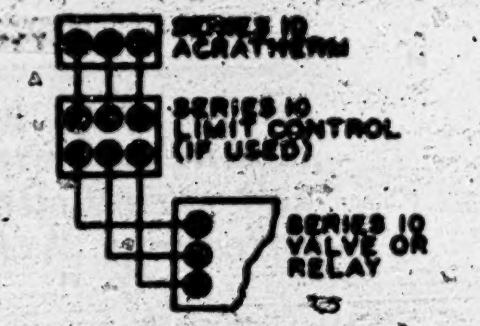


Fig. 2—Series 10 connection diagram

SETTING AND ADJUSTING

TO SET THE ACRATHERM it is only necessary to turn the temperature dial to the point at which the room temperature is to be maintained.

The T11A Acratherm is adjusted to turn on the burner when the room temperature drops to the point at which the temperature dial is set. When the room temperature rises a fraction of a degree above this point, the artificial heater will function and allow an accelerated shutdown of the burner.

When the artificial heater is not used the thermostat should be adjusted to turn off the burner when the room temperature rises to the point at which the temperature dial is set, and to turn on the burner when the room temperature drops 1½ degrees below this point. (See note under Fig. 3).

DIFFERENTIAL: The differential dial on the white contact screw (7-Fig. 3) is adjusted at the factory so that satisfactory operation will be obtained with the average warm air, vapor, or two pipe steam systems. For one pipe systems we recommend that the differential (only when an artificial heater is used) be increased slightly by turning the differential dial counter-clockwise about one half of one division until the differential pointer is midway between numerals 3 and 4. This will increase the length of the "on" period.

If the duration of burner operation provided by the factory adjustment of the T11A Acratherm is too long or too short it may be lengthened by turning the differential dial (on the white contact screw) counter-clockwise about one half division, or shortened by turning the dial clockwise about one half division.

CALIBRATION: The Acratherm is an extremely sensitive instrument and is therefore affected almost immediately by the heat from your body or breath while you stand close to it. For this reason the factory adjustment should not be changed unless the Acratherm is found to be out of calibration after it has actually been in operation under normal conditions. If the Acratherm is out of calibration it can be readjusted by following the instructions given in Figure 4.

CLEANING: When dust or dirt accumulates on the contacts of the Acratherm, remove it by drawing a piece of hard finish paper (such as a common business card with a hard smooth surface) between the contacts. Never use emery cloth or abrasives.

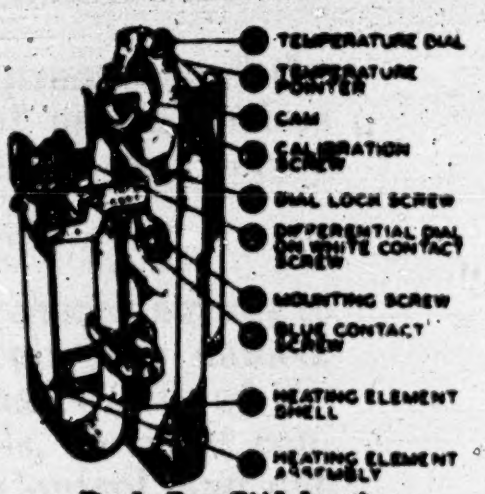


Fig. 3—Type T11A Acratherm
(T10A Similar but without Heating Element)

NOTE: The T11A Acratherm may be converted to a non-resistance T10A Acratherm by removing the heating element (11). The shell assembly (12) can then be removed by removing screw on inside end of bottom of shell. Discard shell, heater and insulating washer and replace screw. Turn differential dial (7) clockwise slightly—not a full turn—until pointer is midway between numerals 1 and 2. Tighten lock screw (3) and then turn calibration screw (5) counter-clockwise so that "mark" on cam moves about ½ of one division (one and one-half degrees)



TO CALIBRATE
SET TEMPERATURE DIAL AT 55° AND TIGHTEN DIAL LOCK SCREW
IF ACRATHERM MAINTAINS A LOWER TEMPERATURE THAN THE DIAL SETTING TURN CALIBRATION SCREW SO "MARK ON CAM" MOVES CLOCKWISE (1 DIVISION FOR EACH 2 DEGREES)
IF ACRATHERM MAINTAINS A HIGHER TEMPERATURE THAN THE DIAL SETTING TURN CALIBRATION SCREW SO "MARK ON CAM" MOVES COUNTER-CLOCKWISE (1 DIV FOR EACH 2°)
LOOSEN DIAL LOCK SCREW AND RESET TEMPERATURE DIAL AT DESIRED ROOM TEMPERATURE

Fig. 4

134 COMMISSION'S EXHIBIT NO. 2.

Minneapolis-Honeywell Regulator Company.

Manufacturers Control Contract.

Purchaser: Submitted January 3rd, 1938.

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Automatic Burner Corporation of Chicago, Illinois, 1823 Carroll Ave., hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract 7500 Estimated sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

Prices on Material Shipped From Factory.

T11 Acratherm	$ 3.30
T105 Chronotherm	19.50
T109 Da-Nite Acratherm	6.65
R116 Protectorelay	10.00 x
R117 Protectorelay	11.20 x
R416 Lockswitch for DC only	12.00 x
R417 Lockswitch for DC only	13.20 x

x Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.

	1-9	10-24	25-up
C402 Low Water Cutoff	10.30	9.80	9.25
C602 Low Water Cutoff	11.40	10.75	10.20
C622 High Press, Low Water Cutoff	12.10	11.60	10.95
C627 Low Water Cutoff	10.30	9.80	9.25

Limit Controls.

L404 Pressuretrol	3.25
L408 Vaporstat	5.25
L409 Surface Aquastat	3.25
L411 Vacuumstat	5.25
L415 Airstat	4.25
L419 Airstat	3.25
L416 Immersion Aquastat	4.00
L165A Immersion Aquastat	4.00

Deduct 50¢ net from Limit Control prices for shipment of 10 or more of the same type at one time.
Company's Copy

See Page 2 for Prices from Branch Stocks and C. O. D. Shipments.

135 Controls for Low-High Burner.

R157 Relay	15.75
R157 Relay, with 3 relay units	23.85
48H Stackswitch	7.05 x

C. O. D. Shipments of Materials from Factory.

If the Purchaser requests C. O. D. shipment of standard devices or devices purchased at the odd model discount to his dealer from factory the Company will add a handling charge of 5%. There will be no charge for dealer shipments made on an open account basis from factory.

Prices from Branch Stocks.

All prices herein are predicated on delivery from factory, and are f. o. b. factory. The Company maintains limited stocks at its various branch offices and emergency shipments of standard equipment made the manufacturer therefrom will be invoiced at the prices shown herein, plus 5% to cover transportation, handling, warehousing, etc., but no handling charge will apply to instruments shipped at the odd model discount shown below.

C. O. D. Shipments of Materials from Branch Stocks.

If a Company branch makes a C. O. D. shipment of standard equipment to the Purchaser's dealer a charge of 10% will be made. Open account shipments will carry only the 5% charge mentioned above. Devices sold at odd model discount shipped the dealer on a C. O. D. basis will carry a 5% charge, but if shipped on an open account basis no added charge will be made.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-....., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15-10% unless otherwise shown on the price sheets.

136 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f. o. b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such

137 award, but shall not be responsible, or any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Resale Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with such products, and violation of this, or other conditions of this agreement gives the Company the right to immediately cancel same.

Deliveries.

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filing orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Purchaser's field men.

Period of Contract.

This contract shall become effective at the accepted date, and expire on Dec. 31, 1938 unless sooner cancelled as hereinabove provided. The validity, enforceability and inter-

pretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Illinois.

Accepted at Chicago, Illinois.

Automatic Burner Corporation,
By J. H. Hirsch, *Pres.*,
Purchaser.

Dated 1-7-38.

Minneapolis-Honeywell Regulator Company,
By Chas. L. Saunders,
Its Resident Vice-President.

Dated at Chicago, Illinois. 1-7-38.

138 COMMISSION'S EXHIBIT NO. 3.

Minneapolis-Honeywell Regulator Company.

Manufacturers' Control Contract.

Purchaser: Submitted January 3rd, 19....

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Quiet Heet Manufacturing Corporation of 125 Green Street, Newark, New Jersey, hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract 7500 sets of the Company's

automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

Prices on Material Shipped From Factory.

T11 Acratherm				$ 3.30
T105 Chronotherm				19.50
T109 Da-Nite Acratherm				6.65
R116 Protectorelay				10.00 x
R117 Protectorelay				11.20 x
R416 Lockswitch for DC only				12.00 x
R417 Lockswitch for DC only				13.20 x
	1-9	10-24	25-up	
C402 Low Water Cutoff	10.30	9.80	9.25	
C602 Low Water Cutoff	11.40	10.75	10.20	
C622 High Pressure Low Water Cutoff	12.10	11.60	10.95	
C627 Low Water Cutoff	10.30	9.80	9.25	

Limit Controls.

L404 Pressuretrol	3.25
L408 Vaporstat	5.25
L409 Surface Aquastat	3.25
L411 Vacuumstat	5.25
L415 Airstat	4.25
L419 Airstat	3.25
L416 Immersion Aquastat	4.00
L165A Immersion Aquastat	4.00

Deduct 50¢ net from Limit Control prices for shipment of 10 or more of the same type at one time.

Company's Copy

See Page 2 for Prices from Branch Stocks and C. O. D. Shipments.

x Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.

139 C. O. D. Shipments of Materials from Factory.

If the Purchaser requests C. O. D. shipment of standard devices or devices purchased at the odd model discount to his dealer from factory the Company will add a handling charge of 5%. There will be no charge for dealer shipments made on an open account basis from factory.

Prices from Branch Stocks.

All prices herein are predicated on delivery from factory, and are f. o. b. factory. The Company maintains limited stocks at its various branch offices and emergency shipments of standard equipment made the manufacturer therefrom will be invoiced at the prices shown herein, plus 5% to cover transportation, handling, warehousing, etc., but no handling charge will apply to instruments shipped at the odd model discount shown below.

C. O. D. Shipments of Materials from Branch Stocks.

If a Company branch makes a C. O. D. shipment of standard equipment to the Purchaser's dealer a charge of 10% will be made. Open account shipments will carry only the 5% charge mentioned above. Devices sold at odd model discount shipped the dealer on a C. O. D. basis will carry a 5% charge, but if shipped on an open account basis no added charge will be made.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-....., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15-10% unless otherwise shown on the price sheets.

140 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f.o.b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in

lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors). Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will
141 pay such award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees

upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Resale Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with such products, and violation of this, or other conditions of this agreement gives the Company the right to immediately cancel same.

Deliveries.

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of cooperating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Purchaser's field men.

Period of Contract.

This contract shall become effective at the accepted date, and expire on Dec. 31, unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of New Jersey.

Accepted at Newark, New Jersey.

Quiet Heat Manufacturing Corporation,
By J. L. Lewis
Purchaser.

Dated 1/27/38.

Minneapolis-Honeywell Regulator Company,
By Arman Nichelson,
Its Vice President.

Dated at New York, N. Y., Jan. 27, 1938.

142 COMMISSION'S EXHIBIT NO. 4.

Minneapolis-Honeywell Regulator Company.

Manufacturers' Control Contract.

Purchaser: Submitted May 31st, 1938.

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Electrol, Inc., of 934 Main Ave., Clifton, N. J., hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and,

whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract season's requirements estimated 2250 units of the Company's automatic temperature controls.

Prices on Material Shipped From Factory.

	SHB HJB
T11 Acratherm	4.05
T105 Chronotherm	19.50
T109 DaNite Acratherm	8.55
R116 Protectorelay	10.90 x
R117 Protectorelay	12.25 x
R416 Lockswitch for DC only	12.90 x
R417 Lockswitch for DC only	14.25 x

	1-9	10-24	25-up
C402 Low Water Cutoff	10.30	9.80	9.25
C602 Low Water Cutoff	11.40	10.75	10.20
C622 High Press. L.W.C.	12.10	11.60	10.95
C627 Low Water Cutoff	10.30	9.80	9.25

Limit Controls.

L404 Pressuretrol	3.55
L408 Vaporstat	5.45
L409 Surface Aquastat	3.55
L411 Vacuumstat	5.45
L415 Airstat	4.35
L419 Airstat	3.55
L416 Immersion Aquastat	4.30
L165A Immersion Aquastat	4.30

Deduct 50¢ net from Limit Control prices for shipment of 10 or more of the same type at one time.

Company's Copy.

See Page 2 for Prices from Branch Stocks and C. O. D. Shipments.

x Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.

143 C. O. D. Shipments of Materials from Factory.

If the Purchaser requests C. O. D. shipment of standard devices or devices purchased at the odd model discount to his dealer from factory the Company will add a handling charge of 5%. There will be no charge for dealer shipments made on an open account basis from factory.

Prices from Branch Stocks.

All prices herein are predicated on delivery from factory, and are f. o. b. factory. The Company maintains limited stocks at its various branch offices and emergency shipments of standard equipment made the manufacturer therefrom will be invoiced at the prices shown herein, plus 5% to cover transportation, handling, warehousing, etc., but no handling charge will apply to instruments shipped at the odd model discount shown below.

C. O. D. Shipments of Materials from Branch Stocks.

If a Company branch makes a C. O. D. shipment of standard equipment to the Purchaser's dealer a charge of 10% will be made. Open account shipments will carry only the 5% charge mentioned above. Devices sold at odd model discount shipped the dealer on a C. O. D. basis will carry a 5% charge, but if shipped on an open account basis no added charge will be made.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form S A 573-....., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15-10% unless otherwise shown on the price sheets.

144 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f. o. b. point of manufacture.

Prices relating to relay or motor operated devices and or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110

volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms.

Shipments shall be made f. o. b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f. o. b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such
145 award, but shall not be responsible, or any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the

sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Resale Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with such products, and violation of this, or other conditions of this agreement gives the Company the right to immediately cancel same.

Deliveries.

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Purchaser's field men.

Period of Contract.

This contract shall become effective at the accepted date, and expire on Dec. 31, 1938, unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of New Jersey.

Accepted at Clifton, N. J.

Electrol, Inc.,
By S. H. Brown, *V. P.*
Purchaser.

Dated Sept. 27, 1938.

Minneapolis-Honeywell Regulator Company,
By Arnold Nickelson,
Its Vice President.

Dated at New York, N. Y., 9/29/38.

Salesman W. J. Brown.

146 COMMISSION'S EXHIBIT NO. 5.

Minneapolis-Honeywell Regulator Company.

Manufacturers' Control Contract.

Purchaser: Submitted January 3, 1938.

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and May Oil Burner Corporation of Baltimore, Md., hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract 7500 sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

Prices on Material Shipped From Factory.

T10 or T11 Acratherm			3.30	
T100 Time-O-Stat			5.65	
T105 Heat Accelerated Chronotherm			19.50	
T177 Clock Thermostat			19.95	
T45 Thermostat			3.30	
T109 DaNite Acratherm			6.65	
R117A Protectorelay			11.20	x
R417 Lockswitch for DC only			13.20	x
R100A Protectorelay, 110/60			22.15	
R100A Protectorelay 150 Volt DC			25.15	
R100A Protectorelay 220 Volt DC			25.85	
R100A Protectorelay 220/50, 110/25, 220/25, 130/50, 220/60, 110 Volt DC			23.40	
R100A Protectorelay, 32 Volt DC			24.65	
C40-3 Pyrostat			6.20	x
C57-1 Protectostat			7.05	x
	1-9	10-24	25-up	
C402 Low Water Cutoff	10.30	9.80	9.25	
C602 Low Water Cutoff	11.40	10.75	10.20	
C622 High Press. L. W. C.	12.10	11.60	10.95	
C627 Low Water Cutoff	10.30	9.80	9.25	

(Over)

Company's Copy.

See Page 2 for Prices from Branch Stocks and C. O. D. Shipments.

147 Limit Controls.

L404 Pressuretrol	3.25
L408 Vaporstat	5.25
L409 Surface Aquastat	3.25
L411 Vacuumstat	5.25
L415 Airstat	4.25
L419 Airstat	3.25
L416 Immersion Aquastat	4.00
L165A Immersion Aquastat	4.00
R111	6.60

Deduct 50¢ net from Limit Control prices for shipment of 10 or more of the same type at one time.

x Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.

C. O. D. Shipments of Materials from Factory.

If the Purchaser requests C. O. D. shipment of standard devices or devices purchased at the odd model discount to his dealer from factory the Company will add a handling charge of 5%. There will be no charge for dealer shipments made on an open account basis from factory.

Prices from Branch Stocks.

All prices herein are predicated on delivery from factory, and are f. o. b. factory. The Company maintains limited stocks at its various branch offices and emergency shipments of standard equipment made the manufacturer therefrom will be invoiced at the prices shown herein, plus 5% to cover transportation, handling, warehousing, etc., but no handling charge will apply to instruments shipped at the odd model discount shown below.

C. O. D. Shipments of Materials from Branch Stocks.

If a Company branch makes a C. O. D. shipment of standard equipment to the Purchaser's dealer a charge of 10% will be made. Open account shipments will carry only the 5% charge mentioned above. Devices sold at odd model discount shipped the dealer on a C. O. D. basis will carry a 5% charge, but if shipped on an open account basis no added charge will be made.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-....., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15-10% unless otherwise shown on the price sheets.

148 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f.o.b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110

volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 400° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such
149 award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees

to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Resale Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with such products, and violation of this, or other conditions of this agreement gives the Company the right to immediately cancel same.

Deliveries.

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Purchaser's field men.

Period of Contract.

This contract shall become effective at the accepted date, and expire on Dec. 31, 1938 unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Maryland.

Accepted at Baltimore, Md.

May Oil Burner Corp.,
By E. A. Bemis, P. A.
Purchaser.

Dated Feb. 14, 1938.

Minneapolis-Honeywell Regulator Company,
By Henry F. Dever,
Its Branch Manager.

Dated at Phila., Pa., 2/24/38.

Salesman J. C. D.

150 COMMISSION'S EXHIBIT NO. 6.

Minneapolis-Honeywell Regulator Company.

Manufacturers Control Contract

Purchaser: Submitted Feb. 15, 1938.

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Williams Oil-O-Matic Heating Corporation of Bloomington, Illinois, hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract Season's requirement sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

Prices on Material Shipped From Factory.

T11	Acratherm			2.95
T105	Chronotherm			17.40
T109	DaNite Acratherm			6.35
R116	Protectorelay			9.40 x
R117	Protectorelay			10.55 x
R416	Lockswitch for DC only			11.40 x
R417	Lockswitch for DC only			12.55 x
		1-9	10-24	25-up
C402A	Low Water Cutoff	10.30	9.80	9.25
C602A	Low Water Cutoff	11.40	10.75	10.20
C622A	High Press. L. W. C.	12.10	11.60	10.95
C627A	Low Water Cutoff	10.30	9.80	9.25

Limit Controls.

L404	Pressuretrol	3.25
L408	Vaporstat	5.25
L409	Surface Aquastat	3.25
L411	Vacuumstat	5.25
L415	Airstat	4.25
L419	Airstat	3.25
L416	Immersion Aquastat	4.00
L165A	Immersion Aquastat	4.00

Deduct 50¢ net from Limit Control prices for shipment of 10 or more of the same type at one time.

Company's Copy

See Page 2 for Prices from Branch Stocks and C. O. D. Shipments.

151 C. O. D. Shipments of Materials from Factory.

If the Purchaser requests C. O. D. shipment of standard devices or devices purchased at the odd model discount to his dealer from factory the Company will add a handling charge of 5%. There will be no charge for dealer shipments made on an open account basis from factory.

Prices from Branch Stocks.

All prices herein are predicated on delivery from factory, and are f. o. b. factory. The Company maintains limited stocks at its various branch offices and emergency shipments of standard equipment made the manufacturer

x Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.

therefrom will be invoiced at the prices shown herein, plus 5% to cover transportation, handling, warehousing, etc., but no handling charge will apply to instruments shipped at the odd model discount shown below.

C. O. D. Shipments of Materials from Branch Stocks.

If a Company branch makes a C. O. D. shipment of standard equipment to the Purchaser's dealer a charge of 10% will be made. Open account shipments will carry only the 5% charge mentioned above. Devices sold at odd model discount shipped the dealer on a C. O. D. basis will carry a 5% charge, but if shipped on an open account basis no added charge will be made.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-....., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15-10% unless otherwise shown on the price sheets.

152 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f. o. b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements; Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations, or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such

153 award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Resale Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with such products, and violation of this, or other conditions of this agreement gives the Company the right to immediately cancel same.

Deliveries.

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Purchaser's field men.

Period of Contract

This contract shall become effective at the accepted date, and expire on Dec. 31, 193[illegible] unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Illinois.

Accepted at Bloomington, Illinois.

Williams Oil-O-Matic Heating Corp.,
By (Signature illegible),
Purchaser.

Dated Feb. 16, 1938.

Minneapolis-Honeywell Regulator Company,
By Chas. L. Saunders.

154 COMMISSION'S EXHIBIT NO. 7.

Minneapolis-Honeywell Regulator Company.

Manufacturers' Control Contract.

Purchaser: Submitted January 3rd, 1938.

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Herco Oil Burner Corp. of Lancaster, Pa., hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in connection with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named,

during the life of this contract Est. at 500 sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

Prices on Material Shipped From Factory.

T11	Acratherm	$ 4.25
T105	Chronotherm	20.50
T109	DaNite Acratherm	9.05
R116	Protectorelay	12.40 x
R117	Protectorelay	13.75 x
R416	Lockswitch for DC only	14.40 x
R417	Lockswitch for DC only	15.75 x

	1-9	10-24	25-up
C402 Low Water Cutoff	10.30	9.80	9.25
C602 Low Water Cutoff	11.40	10.75	10.20
C622 High Pressure Low Water Cutoff	12.10	11.60	10.95
C627 L. W. Cutoff	10.30	9.80	9.25

Limit Control

L404	Pressuretrol	3.55
L408	Vaporstat	5.75
L409	Surface Aquastat	3.55
L411	Vacuumstat	5.75
L415	Airstat	4.60
L419	Airstat	3.55
L416	Immersion Aquastat	4.60
L165A	Immersion Aquastat	4.60

Deduct 50¢ net from Limit Control prices for shipment of 10 or more of the same type at one time.

Company's Copy

See Page 2 for Prices from Branch Stocks and C. O. D. Shipments.

x Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.

155 Retroactive Clause:

In the event that the purchaser accepts and pays for 750 control sets during the life of this contract, a material credit, to be absorbed by future purchases will be issued, amounting to 5% of the net sales to the purchaser, and future shipments during the life of the contract will be invoiced at the prices then in effect for 750 control sets.

C. O. D. Shipments of Materials from Factory

If the Purchaser requests C. O. D. shipment of standard devices or devices purchased at the odd model discount to his dealer from factory the Company will add a handling charge of 5%. There will be no charge for dealer shipments made on an open account basis from factory.

Prices from Branch Stocks—

All prices herein are predicated on delivery from factory, and are f. o. b. factory. The Company maintains limited stocks at its various branch offices and emergency shipments at standard equipment made the manufacturer therefrom will be invoiced at the prices shown herein, plus 5% to cover transportation, handling, warehousing, etc., but no handling charge will apply to instruments shipped at the odd model discount shown below.

C. O. D. Shipments of Materials from Branch Stocks

If a Company branch makes a C. O. D. shipment of standard equipment to the Purchaser's dealer a charge of 10% will be made. Open account shipments will carry only the 5% charge mentioned above. Devices sold at odd model discount shipped the dealer on a C. O. D. basis will carry a 5% charge, but if shipped on an open account basis no added charge will be made.

Miscellaneous Control Prices

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-....., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15% unless otherwise shown on the price sheets.

156 Conditions

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f.o.b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Next extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or

replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such
157 award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Resale Agreement

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with such products, and violation of this, or other conditions of this agreement gives the Company the right to immediately cancel same.

Deliveries

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30)

days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Purchaser's field men.

Period of Contract

This contract shall become effective at the accepted date, and expire on Dec. 31, 1938 unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Pennsylvania.

Accepted at Lancaster, Pa.

Herco Oil Burner Corp.,
By F. E. Herco, *Pres.*,
Purchaser.

Dated Feb. 3—38.

Minneapolis-Honeywell Regulator Company,
By Henry F. Dever,
Its Branch Manager.

Dated at Phila., Pa., 2-4-38.

Salesman J. C. Dorsey.

158 COMMISSION'S EXHIBIT NO. 8.

Minneapolis-Honeywell Regulator Company

Manufacturers' Control Contract

Purchaser: Submitted January 3rd, 1938

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Paragon Oil Company of 15 Bridgewater Street, Brooklyn, New York, hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract Est. at 1500 sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 200%) as many Limit Controls as Primary Controls.

Prices on Material Shipped From Factory.

T11	Acratherm	$ 4.05
T105	Chronotherm	19.50
T109	DaNite Acratherm	8.55
R116	Protectorelay	10.90 x
R117	Protectorelay	12.25 x
R416	Lockswitch for DC only	12.90 x
R417	Lockswitch for DC only	14.25 x

		1-9	10-24	25-up
C402	Low Water Cutoff	10.30	9.80	9.25
C602	Low Water Cutoff	11.40	10.75	10.20
C622	High Press. Low Water Cutoff	12.10	11.60	10.95
C627	Low Water Cutoff	10.30	9.80	9.25

Limit Controls.

L404	Pressuretrol	3.55
L408	Vaporstat	5.45
L409	Surface Aquastat	3.55
L411	Vacuumstat	5.45
L415	Airstat	4.35
L419	Airstat	3.55
L416	Immersion Aquastat	4.30
L165A	Immersion Aquastat	4.30

Deduct 50¢ net from Limit Control prices for shipment of 10 or more of the same type at one time.

Company's Copy.

See Page 2 for Prices from Branch Stock and C. O. D. Shipments.

159 C. O. D. Shipments of Materials from Factory.

If the Purchaser requests C. O. D. shipment of standard devices or devices purchased at the odd model discount to his dealer from factory the Company will add a handling charge of 5%. There will be no charge for dealer shipments made on an open account basis from factory.

Prices from Branch Stocks.

All prices herein are predicated on delivery from factory, and are f. o. b. factory. The Company maintains limited stocks at its various branch offices and emergency shipments of standard equipment made the manufacturer there-

x Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.

from will be invoiced at the prices shown herein, plus 5% to cover transportation, handling, warehousing, etc., but no handling charge will apply to instruments shipped at the odd model discount shown below.

C. O. D. Shipments of Materials from Branch Stocks.

If a Company branch makes a C. O. D. shipment of standard equipment to the Purchaser's dealer a charge of 10% will be made. Open account shipments will carry only the 5% charge mentioned above. Devices sold at odd model discount shipped the dealer on a C. O. D. basis will carry a 5% charge, but if shipped on an open account basis no added charge will be made.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-....., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15-5% unless otherwise shown on the price sheets.

160 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f.o.b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined about will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such

161 award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Resale Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with such products, and violation of this, or other conditions of this agreement gives the Company the right to immediately cancel same.

Deliveries.

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Purchaser's field men.

Period of Contract.

This contract shall become effective at the accepted date, and expire on Dec. 31, 1938, unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of New York.

Accepted at Brooklyn, New York

Paragon Oil Company
By S. S. Sandberg,
Pur. Agent.

Minneapolis-Honeywell Regulator Company,
By Arnold Nichelson.

Dated at 3/3/38

Salesman George Meder.

162 COMMISSION'S EXHIBIT NO. 9.

Minneapolis-Honeywell Regulator Company.

Manufacturers' Control Contract

Purchaser: Submitted Jan. 3, 1938

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Petroleum Heat & Power Co., of Stamford, Conn., hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract the Purchaser's requirements estimated at 7500 sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

Prices on Material Shipped From Factory.

T11	Acratherm	3.30
T105	Heat Accelerated Chronotherm	19.50
T177	Clock Type Thermostat	19.95
T42	Thermostat	4.25
T45	Thermostat	3.30
T100	Time-O-Stat	5.65
T109	DaNite Acratherm	6.65
R113	Protectorelay (for use with C40 Pyrostat or C57 Protectostat	19.25
R157	Protectorelay (for use with C56 Pyrostat)	15.75
R114	Protectorelay	14.85
R118	Protectorelay	13.50
R116	Protectorelay	10.00
R117	Protectorelay	11.20
R416	Lockswitch for DC only	12.00
R417	Lockswitch for DC only	13.20
R100A	Protectorelay	22.15
C40-3	Pyrostat	6.20
C56-1	Pyrostat	7.05
C57-1	Protectostat	7.05
48MR	Stackswitch	9.00

		1-9	10-24	25-up
C402	Low Water Cutoff	10.30	9.80	9.25
C602	Low Water Cutoff	11.40	10.75	10.20
C622	High Press. L.W.C.	12.10	11.60	10.95
C627	Low Water Cutoff	10.30	9.80	9.25

Company's Copy.

See Page 2 for Prices from Branch Stocks and C. O. D. Shipments.

Limit Controls.

163 L401A	Combination Control	6.20
L404	Pressuretrol	3.25
L408	Vaporstat	5.25
L409	Surface Aquastat	3.25
L411	Vacuumstat	5.25
L415	Airstat	4.25
L419	Airstat	3.25
L412A	Furnacestat	4.25
L416	Immersion Aquastat	4.00
L165A	Immersion Aquastat	4.00

Deduct 50¢ net from Limit Control prices for shipment of 10 or more of the same type at one time.

C. O. D. Shipments of Materials from Factory.

If the Purchaser requests C. O. D. shipment of standard devices or devices purchased at the odd model discount to his dealer from factory the Company will add a handling charge of 5%. There will be no charge for dealer shipments made on an open account basis from factory.

Prices from Branch Stocks.

All prices herein are predicated on delivery from factory, and are f. o. b. factory. The Company maintains limited stocks at its various branch offices and emergency shipments of standard equipment made the manufacturer therefrom will be invoiced at the prices shown herein, plus 5% to cover transportation, handling, warehousing, etc., but no handling charge will apply to instruments shipped at the odd model discount shown below.

C. O. D. Shipments of Materials from Branch Stocks.

If a Company branch makes a C. O. D. shipment of standard equipment to the Purchaser's dealer a charge of 10% will be made. Open account shipments will carry only the 5% charge mentioned above. Devices sold at odd model discount shipped the dealer on a C. O. D. basis will carry a 5% charge, but if shipped on an open account basis no added charge will be made.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-...., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15-10% unless otherwise shown on the price sheets.

164 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f.o.b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the

165 Company will pay such award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Resale Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with such products, and violation of this, or other conditions of this agreement gives the Company the right to immediately cancel same.

Deliveries.

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Purchaser's field men.

Period of Contract.

This contract shall become effective at the accepted date, and expire on Dec. 31, 1938 unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Connecticut.

Accepted at Stamford, Conn.

Petroleum Heat & Power Co.,
By C. G. Shields,
Vice-President,
Purchaser.

Dated January 3rd, 1938.

Minneapolis-Honeywell Regulator Company,
By Arnold Nichelson,
Its Vice-President.

Dated at New York, N. Y. Jan. 22, 1938.

Salesman H. E. Chaplus.

166 COMMISSION'S EXHIBIT NO. 10.

Minneapolis-Honeywell Regulator Company.

Manufacturers' Control Contract.

Purchaser: Submitted January 3rd, 1938.

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Cleveland Steel Products Corporation of 7306 Madison Ave., Cleveland, Ohio, hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purcha er has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase Season's Requirements, subject to the reservations hereinafter named, during the life of this contract Est. at 3000 sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

Prices on Material Shipped From Factory.

T11	Acratherm			3.75
T105	Chronotherm			19.50
T109	DaNite Acratherm			7.90
R116	Protectorelay			10.40 x
R117	Protectorelay			11.75 x
R416	Lockswitch for DC only			12.40 x
R417	Lockswitch for DC only			13.75 x
		1-9	10-24	25-up
C402	Low Water Cutoff	10.30	9.80	9.25
C602	Low Water Cutoff	11.40	10.75	10.20
C622	High Press. L. W. C.	12.10	11.60	10.95
C627	Low Water Cutoff	10.30	9.80	9.25

Limit Controls.

L404	Pressuretrol	3.35
L408	Vaporstat	5.45
L409	Surface Aquastat	3.35
L411	Vacuumstat	5.45
L415	Airstat	4.35
L419	Airstat	3.35
L416	Immersion Aquastat	4.30
L165A	Immersion Aquastat	4.30

Deduct 50¢ net from Limit Control prices for shipment of 10 or more of the same type at one time.

Company's Copy.

See Page 2 for Prices from Branch Stocks and C. O. D. Shipments.

167: Note: National Metaphrams are not to be considered as units in fulfilling this contract.

C. O. D. Shipments of Materials from Factory.

If the Purchaser requests C. O. D. shipment of standard devices or devices purchased at the odd model discount to his dealer from factory the Company will add a handling charge of 5%. There will be no charge for dealer shipments made on an open account basis from factory.

x Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.

Prices from Branch Stocks.

All prices herein are predicated on delivery from factory, and are f. o. b. factory. The Company maintains limited stocks at its various branch offices and emergency shipments of standard equipment made the manufacturer therefrom will be invoiced at the prices shown herein, plus 5% to cover transportation, handling, warehousing, etc., but no handling charge will apply to instruments shipped at the odd model discount shown below.

C. O. D. Shipments of Materials from Branch Stocks.

If a Company branch makes a C. O. D. shipment of standard equipment to the Purchaser's dealer a charge of 10% will be made. Open account shipments will carry only the 5% charge mentioned above. Devices sold at odd model discount shipped the dealer on a C. O. D. basis will carry a 5% charge, but if shipped on an open account basis no added charge will be made.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-....., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15-10% unless otherwise shown on the price sheets.

168 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f. o. b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric

Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms.

Shipments shall be made f. o. b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, in-

voices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f. o. b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any

combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such
169 award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Resale Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with such products, and violation of this, or other conditions of this agreement gives the Company the right to immediately cancel same.

Deliveries.

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will

welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Purchaser's field men.

Period of Contract.

This contract shall become effective at the accepted date, and expire on Dec. 31, 1938, unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Ohio.

Accepted at Cleveland, Ohio.

Cleveland Steel Products Corp.,
By J. L. O'Brien,
Purchaser.

Dated April 14, 1938.

Minneapolis-Honeywell Regulator Company,
By Wesley R. Moore,
Its Branch Manager.

Dated at Cleveland, Ohio, April 16th, 1938.

178 COMMISSION'S EXHIBIT NO. 13.

Minneapolis-Honeywell Regulator Company.

Manufacturers' Control Contract.

Purchaser: Submitted....., 19.....

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and ..... of ..... hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

Prices on Material Shipped From Factory.
1937.

Company's Copy.

179 Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-....., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of ..... unless otherwise shown on the price sheets.

180 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f. o. b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net

each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices from Branch Stocks.

Prices shown do not include thermostat cable or fittings.

Emergency shipments of equipment to the Purchaser from a Branch Office of the Company shall be billed with discounts in effect at such Branch Office.

Terms.

Shipments shall be made f. o. b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the

Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f. o. b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such
181 award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that its becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Sales Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with his products.

Prices contained in this agreement cover shipments made to the Purchaser, and the Company will add a handling charge of 10% to cover shipments that the Purchaser requests be made to his dealers. All shipments are F. O. B. factory.

Deliveries.

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Manufacturer's field men.

Period of Contract.

This contract shall become effective at the accepted date, and expire on ..... unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of .....

Accepted at (City)..... (State).....

.....

By.....

Purchaser.

Dated .....

Minneapolis-Honeywell Regulator Company,

By.....

Its

Dated at (City)..... (State)..... (Date).....

Salesman.....

182 COMMISSION'S EXHIBIT NO. 14.

Minneapolis-Honeywell Regulator Company.

Manufacturers' Control Contract.

Submitted....., 19....

Purchaser:

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and ..... of ....., hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and the prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract..... sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and to avoid any such difficulty and divided service responsibility, it is agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices.

Prices on Material Shipped From Factory.
1939.

Company's Copy

Caution!

Important!

It is always unsatisfactory—often dangerous—to use mixed controls on the same installation, and it is of mutual interest to avoid this. The Company can give no assurance of satisfactory operation, or assume any service responsibility, if its controls are used with other makes.

183 Waiver of Special Terms.

It is contemplated that during the life of this contract the Purchaser may submit orders under this contract on its own purchase order forms and that such forms may contain statements, clauses, or conditions modifying, adding to, repugnant to, or inconsistent with the terms and provisions of this contract. It is the intention of the parties, however, and it is expressly agreed that notwithstanding any such statements, clauses or conditions contained in any of the order forms of the Purchaser the liabilities of the Company shall be determined solely by this contract, and in accepting and consummating any such order the Company shall be deemed not to have in any way changed, enlarged, or modified its liabilities or obligations as fixed by this contract.

Direct Dealer Shipments.

If the Purchaser requests C. O. D. or open account shipment of standard devices from Branch stock to his dealer, the Company will add ten percent to the prices shown herein to cover transportation, warehousing, etc. Five percent will be added to devices purchased at the Odd Model discount and shipped from Branch stock on a C. O. D. or open account basis to the dealer.

There will be no added charge for dealer shipments made on an open account basis from factory, but C. O. D. shipments to the dealer from factory will carry a five percent charge.

Purchaser's Prices from Branch Stock.

All prices herein are f.o.b. factory and are predicated on the fact that the Purchaser will buy in representative quantities and carry sufficient stock to serve his dealers. The Company maintains only limited stocks at its stocking Branch offices, and emergency shipments of standard equipment made to the Purchaser therefrom will be invoiced at the prices shown herein, f.o.b. Branch, plus five percent to cover transportation, handling, warehousing, etc. There will be no added charge for instruments shipped at the Odd Model discount.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-....., which are hereby made a part of this agreement, will be furnished at list prices stated less Odd Model discount of ..... unless otherwise shown on the price sheets.

184 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f.o.b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110

volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153, R154 and R183, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such
185 award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees

to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment and Cancellation of Contract.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except for use in conjunction with such products.

It is agreed that this contract shall be subject to cancellation by the Company without cause upon thirty (30) days written notice.

Deliveries.

Serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designed in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings.

Period of Contract.

This contract shall become effective at the accepted date, and expire on ..... unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of .....

Accepted at (City ..... (State) .....

.....

By .....

Purchaser.

Dated .....

Minneapolis-Honeywell Regulator Company,

By .....

Its .....

Dated at .....

City State Date

Salesman .....

186 COMMISSION'S EXHIBIT NO. 15.

Minneapolis-Honeywell Regulator Company.

Manufacturers' Control Contract.

Submitted ....., 19....

By Choate

Purchaser:

Agreement, entered into between Mineeapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and ..... of ....., hereinafter called the Purchaser,

Wherein It Is Mutually Agreed As Follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of satisfactory operation nor assume any service responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices.

Prices on Material Shipped From Factory.

1940.

Company's Copy.

187 Waiver of Special Terms.

It is contemplated that during the life of this contract the Purchaser may submit orders under this contract on its own purchase order forms and that such forms may

contain statements, clauses, or conditions modifying, adding to, repugnant to, or inconsistent with the terms and provisions of this contract. It is the intention of the parties, however, and it is expressly agreed that notwithstanding any such statements, clauses or conditions contained in any of the order forms of the Purchaser the liabilities of the Company shall be determined solely by this contract, and in accepting and consummating any such order the Company shall be deemed not to have in any way changed, enlarged, or modified its liabilities or obligations as fixed by this contract.

Purchaser's Price from Branch Stock.

All prices herein are f. o. b. point of manufacture and are predicated on the fact that the Purchaser will carry sufficient stocks to serve his dealers, and that emergency pick-ups only will be made from the Company's stocking Branch offices or warehouses. Standard equipment from Branch or warehouse stocks will carry a 5% charge to cover transportation, handling, warehousing, etc., but there will be no added charge for devices sold at the Odd Model Discount.

Direct Dealer Shipments.

Direct dealer shipments of standard devices from Branch or warehouse stocks; C. O. D. or open account, will add 10% to the prices shown herein or 5% if pick-up is made at the Branch. Direct dealer shipments of devices sold at the Odd Model Discount, C. O. D., or open account, and shipped, or picked up, from Branch stock will carry a 5% charge. Shipments made to dealers from Factory on open account will carry no added charges, but C. O. D. shipments will carry a 5% charge.

Conditions.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser. Prices on devices shown herein employing relay, motor or magnetic principle of operation are for 110 Volt, 60 Cycle specifications, unless otherwise specified. Chronotherm prices cover 110 Volt, 60 Cycle only. An extra charge will

be made for other voltages and frequencies not shown above, and also for special scales, extensions and other deviations from standard.

Prices do not include thermostat cable or fittings.

Terms.

Shipments shall be made f. o. b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with tthe Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f. o. b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired, or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied

by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices, and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

188 In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchaser's place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for

the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment and Cancellation of Contract.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except for use in conjunction with such products.

It is agreed that this contract shall be subject to cancellation by the Company without cause upon thirty (30) days' written notice.

Deliveries.

Serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designed in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order, or that the Company will not be obligated to fill any orders including blanket orders outstanding, calling for a total

of more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets ..... Form SA 573....., which are hereby made a part of this agreement, will be furnished at list prices stated less Odd Model discount of ..... unless otherwise shown on the price sheets.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings.

Period of Contract.

This contract shall become effective at the accepted date, and expire on..... unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of .....

Accepted at (City)..... (State).....

.....

By.....

Purchaser.

Dated .....

Minneapolis-Honeywell Regulator Company

By.....

Its .....

Dated at .....

City State Date

Salesman.....

189 COMMISSION'S EXHIBIT NO. 16.

Submitted by Choate

Purchaser:

Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and ..... of....., hereinafter called the Purchaser,

Wherein It Is Mutually Agreed As Follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this agreement..... sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of satisfactory operation nor assume any service responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices.

Prices On Material Shipped From Factory.
1941.

Company's Copy.

190 Waiver of Special Terms.

It is contemplated that during the life of this agreement the Purchaser may submit orders under this agreement on its own purchase order forms and that such forms may contain statements, clauses, or conditions modifying, adding to, repugnant to, or inconsistent with the terms and provisions of this agreement. It is the intention of the parties, however, and it is expressly agreed that notwith-

standing any such statements, clauses or conditions contained in any of the order forms of the Purchaser the liabilities of the Company shall be determined solely by this agreement, and in accepting and consummating any such order the Company shall be deemed not to have in any way changed, enlarged, or modified its liabilities or obligations as fixed by this agreement.

Purchaser's Price from Warehouse Stock.

All prices herein are f. o. b. point of manufacture and are predicated on the fact that the Purchaser will carry sufficient stocks to serve his dealers, and that emergency pick-ups only will be made from the Company's New York or Chicago warehouse door or other stocking points. Standard equipment purchased from these stocks will carry a 5% charge to cover transportation, handling, warehousing, etc., but there will be no added charge for devices sold at the Odd Model discount.

Direct Dealer Shipments.

Direct C. O. D. dealer emergency shipments of standard devices from New York or Chicago warehouse door or other stocking points will add 10% to the prices shown herein, and open account dealer shipments will add 5%. Direct dealer shipments of devices from warehouse, factory, or other stocking points sold at the Odd Model discount C. O. D. will carry a 5% charge. Shipments made to dealers from factory on open account will carry no added charge.

Conditions.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser. Prices on devices shown herein employing relay, motor or magnetic principle of operation are for 110 Volt, 60 Cycle specifications, unless otherwise specified. Chronotherm prices cover 110 Volt, 60 Cycle only. An extra charge will be made for other voltages and frequencies not shown above, and also for special scales, extensions and other deviations from standard. Pilotstats and Metaphrams are not to be considered as units toward the fulfillment of this agreement.

Terms.

Prices do not include thermostat cable or fittings.

Shipments shall be made f. o. b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f. o. b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired, or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this agreement provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices, and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

191 In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchaser's place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to

discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment and Cancellation of Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except for use in conjunction with such products.

It is agreed that this agreement shall be subject to cancellation by the Company without cause upon thirty (30) days' written notice.

Deliveries.

Serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designed in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the agreement providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order, or that the Company will not be obligated to fill any orders including blanket orders outstanding, calling for a total of more than one-twelfth of the amount of this agreement during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this agreement.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets ..... Form SA 573....., which are hereby made a part of this agreement, will be furnished at list prices stated less Odd Model discount of 25 and 25% unless otherwise shown on the price sheets.

Service Responsibility.

The prices shown in this agreement do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings.

Period of Agreement.

This agreement shall become effective at the accepted date, and expire on ..... unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this agreement shall be determined and governed by the laws of the State of .....

Accepted at (City)..... (State).....
Date .....

.....
Purchaser.

By.....
throughe group meetings.
Title .....

Minneapolis-Honeywell Regulator Company
By.....
Its .....

Dated at (City)..... (State)..... (Date).....
Salesman.....

192 COMMISSION'S EXHIBIT NO. 17-A.

Sept. 16, 1936.

Cleveland Steel Products Corp.,
Cleveland, Ohio.

Att.: Mr. J. L. O'Brien—Torridheet Div.

Dear J. L.:

When I was in Cleveland recently, W. J. told me that your shipments this year so far exceeded last by something over 60% and when I received our September 1st figures I was somewhat concerned to learn that to Sept. 1st this year we had shipped you a total of 2612 instruments whereas in 1935 for the same period we had shipped you 2638. In other words, while your business has increased materially yet our shipments to you remain about on a par with last year.

You will recall that I chatted just briefly with you with reference to Mercoid's control situation and you advised you were still using the balance of the order which you placed last year, and which if I remember correctly represented a balance of approximately 500 sets of controls.

We are getting letters from our salesmen and branches who are calling on your dealers to the effect that you are encouraging them to use Mercoid controls on the gun type job—and we have replied in each instance stating that you were trying to use up your inventory of Mercoid devices and not in any manner to attempt to disrupt the situation.

Your dealers have told us that you have a price difference between our controls and Mercoid's, whereas W. J. told me no such price difference existed—and if you don't mind I would like to have the story of this control situation as it exists today so that we won't be giving out any erroneous information to our men in the field that might later prove embarrassing.

Another incident that just came to my attention yesterday concerned the Detroit Michigan Stove Co. These people have been customers of ours for a long time and our salesman in calling noted Mercoid controls on their job naturally asked why they were not using Minneapolis-Honeywell. They replied that it was your policy to ship

Mercoid controls with the gun burner—and again we find ourselves in the position where we must tell the Detroit branch the status of your dealings with Detroit Michigan Stove Co. because they expressed a preference for our controls and would no doubt standardize on them if they could do so.

193 I just cite this as another incident where we would like to be in a position to give our field men instructions as to what to do.

Yours very truly,
Minneapolis-Honeywell Regulator Co.
A. H. Lockrae—Asst. Mgr. of Sales,
AHL:DR Original Equipment Division.

194 COMMISSION'S EXHIBIT NO. 18-A.

October 19, 1936.

File No. 1-11923

W. L. Huff Exhibit No. 8-B
I. D. Royal, Attorney
Federal Trade Commission

Mr. J. L. O'Brien,
Toridheet Division,
Cleveland Steel Products Corp.,
Cleveland, Ohio.

Dear J. L.:

I was in Cleveland Tuesday, and was awfully sorry you were out of town—but I did have a nice visit with W. J.

Among other things, he told me that your gun type burners were running about three to one for the rotary—and your control purchases this year from us are just about on a par with 1935.

The last time I saw you we talked briefly with reference to the Mercoid control situation and you advised you were still using the balance of the order which you placed last year, and which if I remember correctly represented a balance of between 500 and 1000 sets of controls. Inasmuch as we have shipped you about 1200 sets thus far, and the gun type burners running three to one against the rotary, this would mean you have used between 3000 and 4000 gun type controls and we have not enjoyed this business

as we were led to believe. I would like awfully well to discuss this situation with you—not that it really matters now that it is so late in the season but I am curious to know why your plans were changed.

The matter of immediate interest is being created from reports we are getting from our salesmen and branches to the effect that you are encouraging your dealers to use competitive controls on the gun type burner—in fact some dealers reported their reluctance to use anything but M-H controls and then had your assurance that if the competitive control was not satisfactory in every way our control would be furnished without charge. We have replied in each instance advising you were trying to use up your inventory of Mercoid controls and we have instructed our men in no manner to attempt to disrupt the situation.

On my previous visit to Cleveland, W. J. made the statement that our controls and the competitive controls were being offered the dealer at the same price—and if you don't mind I'd like to know just what your dealer prices are, or the difference between the price of our controls and competitive controls to the dealer so that we won't be giving further erroneous information to our men in the field that might prove embarrassing.

195 We will be very pleased indeed to hear from you regarding the above, and with kindest personal regards, and again regretting that I missed you, we are

Yours most truly,

Minneapolis-Honeywell Regulator Co.,
A. H. Lockrae—Asst. Mgr. of Sales,
Original Equipment Division.

AHL:DR

196 COMMISSION'S EXHIBIT NO. 19-A.

(Letterhead of Cleveland Steel Products Corporation.)

November 5, 1936.

File No. 1-11923

W. H. Huff Exhibit 8-C
I. D. Royal, Attorney
Federal Trade Commission

Minneapolis-Honeywell Regulator Co.,
Minneapolis, Minn.

Attention Mr. A. H. Lockrae.

Dear Lock:

When I returned from the East I found your letter of October 19 and I am sorry that I was not here when you arrived, as I think possibly there would not have been quite as much of a misunderstanding as there seems to be at the present time. I think we can straighten this matter out to your complete satisfaction the first time you are in Cleveland. However, in the meantime I will simply say that we have not yet taken the 1,000 controls referred to at the time I talked to you last winter.

Concerning the reports which you are getting from your salesmen and branches to the effect that we are urging our dealers to use competitive controls on the gun type burner; I of course cannot answer this very definitely without having more concrete information, except that I will say that as near as I know we have not made any effort to encourage our dealers to use competitive controls, unless the fact that our burner with competitive controls at a lower price than with Minneapolis Honeywell controls might be interpreted in that way. We have freely offered our burners with Minneapolis controls but at a higher price, and I am sure that I know of no case where we have ever urged a dealer to take competitive controls with the assurance that if competitive controls were not satisfactory in every way, Minneapolis Honeywell controls would be furnished without charge.

I don't like to have a statement of this kind in your minds and I realize that a mere statement by me that it is not so will not carry conviction, therefore, I would

suggest that you give me specific instances where this has happened and I will follow it up and find out whether some of our field men may have done such a thing without recommendation or authority from this office.

I note in your letter that you say that W. J. made a statement that your controls and the competitive controls were being offered the dealer at the same price, but this of course, is not so and W. J. did not intend to be understood in that way, as our price sheet very definitely
197 carries a difference between the two controls and there is no secret about this price sheet. The difference between your controls and the competitive controls being published at $5.00.

If the information that I have asked for is something which you do not care to write to me, I of course will wait for an opportunity to talk to you personally, but I hope you will feel free to write to me fully in regard to the statement made in your letter so that I can follow the matter up. In the meantime my kindest personal regards and will await seeing you on your next trip to Cleveland.

Sincerely,

J. L. O'Brien,
Toridheet Division, Cleveland Steel Products Corporation.

JLO:EP

198 COMMISSION'S EXHIBIT NO. 20.

Nov. 19, 1936.

Cleveland Steel Products Corp.,
Cleveland, Ohio.

Att.: Mr. J. L. O'Brien—Toridheet Division.

Dear J. L.:

I have been away from the office so much that this is the first opportunity I have had to acknowledge your letter of Nov. 5, and as I am planning to be in Cleveland within the next couple of weeks I am not going into detail now.

I just want to say that your letter certainly satisfies us, and with kindest personal regards beg to remain

Yours very truly,
Minneapolis-Honeywell Regulator Co.,
A. H. Lockrae—Asst. Mgr. of Sales,
Original Equipment Division.

AHL:DR

(P. 1775)

COMMISSION'S EXHIBIT NO. 21.

USE THIS FORM TO REPORT ALL CALLS ON MANUFACTURERS FOR BOTH O. E. AND INDUSTRIAL DIVISIONS

MANUFACTURERS CONTACT REPORT*

MINNEAPOLIS-HONEYWELL REGULATOR CO.

FOR BOTH O. E. AND INDUSTRIAL DIVISIONS

ALWAYS MAKE ORIGINAL AND DUPLICATE FOR HOME OFFICE. TRIPLICATE FOR BRANCH OFFICE.

NAME	Ernest Oil Burner Co		DATE OF VISIT	11/5/37	TERR. NO. B1
ADDRESS	110 Brooding		CITY	Cambridge	STATE Mass
	J. E. Ernest	TITLE Pres	MAILING LIST ADD TO / TAKE OFF	X	SPECIFY LIST C B M
	Art Farnsworth	TITLE Sales Mgr	MAILING LIST ADD TO / TAKE OFF	X	SPECIFY LIST O B M
		TITLE	MAILING LIST ADD TO / TAKE OFF		SPECIFY LIST

CHECK X WHICH ONE: OIL BURNER X | COAL BURNER | GAS BURNER | WARM AIR | NTG. VENT. & A. C. EQUIPT. | REFRIGERATION | MISC.

IF SERVICE CALL CHECK X ☐

CHECK X WHAT YOU STRESSED DURING INTERVIEW

ALRATHERM
AIR CONDITIONING CONT'L
BIG BUILDING STORY
BROWN INSTRUMENTS
CHRONOTHERM
CIRCULATOR
COMBUSTION REGULATION
HUMIDITY CONTROLS
LIMIT CONTROLS
L W CUTOFF
MODUSTAT
PRIMARY CONTROLS
REFRIGERATION CONTROLS
REPLACEMENT SALES
SERIES 90 CONTROLS
SUMMER WINTER
TIME STAT
UNIT AIR PACKAGES
WEATHERSTAT
ZONE CONTROL
ADVERTISING AND SALES PROMOTION
FIELD ORGANIZATION
MISCELLANEOUS

DETAILS OF INTERVIEW

WHAT DID YOU SAY? | WHAT WAS THEIR REACTION?

After some wait during which I provided Farnsworth to send him a supply of leaflets, Mr Ernest came in and we had no difficulty in getting together on the 1002 set contract after I followed the 2 instruction and eliminated the 75% clause. Ernest told me that with the exception of Reynolds burners he would use our controls exclusively this season. He showed me an order for 400 burners from Reynolds, so I guess the report I had about getting Reynolds burners for Boston was true. Ernest has just been elected Vice President of the Boston Oil Burners Association

SPECIAL COPY FOR H.A. Taylor | SALESMAN'S SIGNATURE C.S. Loyd

SALESMEN DO NOT WRITE BELOW THIS LINE

LOCKHART | CLIFFORD | SWANSON | BRANCH RECORDS | H. O. RECORDS
PAULING | ROBISON | SCOBBIE | CHECKED BY BRANCH EXECUTIVE | READY FOR H. O. FILE
BENTON | HAINES | GRANT | 11-8-37
KINGSLAND | MCGRATH | DETAILED ON CARD BY O. S. R. CLERK | DETAILED ON CARD H. O. S. R. CLERK

200 COMMISSION'S EXHIBIT NO. 22.

Minneapolis-Honeywell Regulator Company.

Branch Inter-Office Memorandum.

Date January 14, 1937
In Reply Quote File mk

To Minneapolis—A. H. Lockrae

From Philadelphia—J. C. Dorsey

Subject R.-S. Products Contract

We have a newly written contract in the first bracket for the above company. We notice it has the 95% clause in it. I am positive they will not sign it with this existing clause as they recently told me they expect to stick with Mercoid this year, but had high hopes of using more of our controls than they did.

With the increased price in this year's contract it is quite questionable whether or not they will sign the contract. I realize that we can not give them a lower price but I am writing to ask your permission to eliminate the 95% clause should they hesitate to sign the contract on this account.

1-18-37

Thanks for the above. There is no objection at all to eliminating the 95% clause. Just mark it out with a pen and sign your name to it. This should be done on both the white and blue copies.

A. H. Lockrae.

201 COMMISSION'S EXHIBIT NO. 23-A.

Minneapolis-Honeywell Regulator Company.

Manufacturers' Control Contract.

Purchaser: Submitted December 2, 1936.

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Cleveland Steel Products Corp. of Cleveland, Ohio, hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract 1000 sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many ~~Room~~ Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

Prices on Material Shipped From Factory.

T10 or T11 Acratherm	3.80
T100 Time-O-Stat	5.45
7710 Clock Type Thermostat	19.95

T105 Heat Accelerated Chronotherm	19.50
T45 Thermostat	4.30
R121 Protectorelay (R117-3 until available)	13.30
R122 Protectorelay (R116-4 until available)	11.90
R417 Lockswitch for DC	12.95
L402-1 Low Water Curoff (L620-3 until available)	11.50
L622-1 Low Water Curoff 150# Pressure	13.00
L627-2 Low Water Curoff	10.60

Limit Controls.

L401-3 Combination Control	6.60
P404-2 Pressuretrol (L404 until available)	3.35
L408 Vaporstat	5.00
L409 Surface Aquastat	3.35
L411, Vacuumstat	5.00
L415 Airstat	4.30
L419 Airstat	3.35
B6510 Immersion Aquastat	5.25
L416 Immersion Aquastat	5.25

Deduct 50¢ net from the Limit Control prices for shipment of 10 or more of the same type at one time.

COMMISSION'S EXHIBIT NO. 23-B.

Company's copy.

.202 ~~*The Purchaser agrees that at least ninety-five (95) percent of his control requirements consisting of Thermostats, Primary Controls and Limiting Devices will be purchased from the Company.*~~ Deleted 1/15/37. AHS.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-....., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15-5% unless otherwise shown on the price sheets.

203 COMMISSION'S EXHIBIT NO. 23-C.

Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f.o.b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 60 cycle
110 volt, 30 cycle	220 volt, 50 cycle
110 volt, 25 cycle	220 volt, 40 cycle
220 volt, 30 cycle	220 volt, D. C.
220 volt, 25 cycle	32 volt, D. C.
110 volt, D. C.	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical. Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices from Branch Stocks.

Prices shown do not include thermostat cable or fittings.

Emergency shipments of equipment to the Purchaser from a Branch Office of the Company shall be billed with discounts in effect at such Branch Office.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory return to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or

material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such
204 award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

COMMISSION'S EXHIBIT NO. 23-D.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Sales Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with his products.

Prices contained in this agreement cover shipments made to the Purchaser, and the Company will add a handling charge of 10% to cover shipments that the Purchaser requests be made to his dealers. All shipments are F. O. B. factory.

Deliveries.

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Manufacturer's field men.

Period of Contract.

This contract shall become effective at the accepted date, and expire on 12-31-37 unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Ohio.

Accepted at Cleveland, Ohio.

Cleveland Steel Products Corp.,
By J. L. O'Brien,
Purchaser.

Dated Jan. 15, 1937.

Minneapolis-Honeywell Regulator Company,
By F. R. Rodgers,
Its Board Mgr.

Dated at Cleveland, O., 1/15/37.

205 COMMISSION'S EXHIBIT NO. 24A.

(Letterhead of The Timken Silent Automatic Company, Detroit, Michigan.)

December 24, 1936

Mr. Harold Sweatt, President
Minneapolis-Honeywell Company
Minneapolis, Minn.

Dear Mr. Sweatt:

This letter is being addressed to you personally as it covers a subject that I think perhaps would be better to discuss with you across the table, but in view of the difficulty of our arranging such a conference I am in hopes it will be treated confidentially and that your reply will be addressed to me, personally.

Mr. Pauling paid us a visit last week and I was sorry that I did not get to see him as I was out of town, but I understand that he talked to Mr. Crawford and Mr. Goldie. Mr. Pauling seems to have forgotten an agreement reached with Mr. Roberts early this year, which agreement was the basis for our favoring you with our business during 1936. I believe our purchases from you during this year will

exceed $300,000.00. Mr. Pauling told Mr. Roberts, who later conveyed the information to me in his own handwriting on a note which I still possess, that he would give us a $1.00 reduction on each set of controls purchases for our GC burners up to a total of 7500 burners.

This concession was apparently made to persuade us to drop another make of control which we were then using on this burner and to standardize on your controls, which we did with the exception of some few that were bought for experimental purposes and some small quantities that were purchased because of the customers specifying another make of control than yours. Now, Mr. Sweatt, we feel that we are entitled to this reduction which we have earned, and we know that you will see to it that we get it.

The other subject we wish to discuss is the prices for 1937. Mr. Pauling presented us with figures which he claimed to be the lowest available and we have given these some study. He states that these are now based on the cost of individual instruments rather than an arbitrary break-down of a set price, and if such is the case I am rather surprised to find some of them increased over your 1936 schedule. It would appear from information obtained from other sources that you have reduced prices on instruments that are competitive and on others you have increased the price. This would appear to show that prices are being revised in respect to competition instead of cost.

We are not making any rash statements as to how 206 many sets of controls we will buy during 1937. We feel, however, that we will maintain our position and that our business will be very attractive to even as large a company as yours. We are in hopes the we can continue to purchase material from you, but we first must be certain that we have obtained the best possible price on this important part of our equipment. We naturally are giving considerable thought to other makes of controls and therefore hope you will submit your best proposition to us shortly so that we can give it careful consideration before the final decision is reached. I would appreciate it if you would write me personally about both of these matters.

Very truly yours,

Walter F. Rockwell

Vice President

H

207 COMMISSION'S EXHIBIT NO. 25.

December 29, 1936

Timken Silent Automatic Company,
100—400 Clark Avenue,
Detroit, Michigan.

Att: Walter F. Rockwell, Vice-President

Dear Mr. Rockwell:

Inasmuch as Mr. H. W. Sweatt is away on his vacation and will not return for several weeks, I am taking the liberty of answering your letter of Dec. 24.

I am indeed sorry that you were not in Detroit last week when Mr. Pauling was there as I am very sure that this whole matter could have been cleared up in very short space of time, as I well remember Mr. Pauling's discussion of this matter at the time it was up.

Mr. Roberts went over with Mr. Pauling a plan which he had in mind for increasing the sale of the gun type burner by offering it as a private brand burner to various companies such as Reynolds, Mueller, etc. At the time of this conversation the Reynolds Co. had specified a competitive type of control and Mr. Roberts was in hopes that he would be able to get them to standardize on our controls along with the balance of the production. The exact proposition which Mr. Pauling made to Mr. Roberts was that if he was successful in putting this over and you were able to standardize on our controls for this burner he would grant him a reduction in price on our R116 constant ignition relay of $1.00 per burner up to a maximum of 7500 burners, and this relay was to be furnished with a special nameplate for the Triangle burner—not the standard Timken nameplate.

From the above you will note that this was purely a tentative proposition based on a special program, utilizing a special relay, and, as you know, this program Mr. Roberts found impossible to carry out, and none of these relays were furnished to you by us.

In reference to prices for 1937. To completely clarify this matter I feel that we must perhaps go back and review our 1936 setup. In 1936 we had two types of contracts to offer; one to a concern not desiring to incorporate our

boiler controls in their contract and the other for concerns such as yourselves who contracted to purchase boiler controls along with their Thermostats and primary controls. In the latter case a deduction of 65¢ was made on the primary controls while as a matter of fact it was actually a reduction on the price of the boiler controls, altho the deduction was made from the price of the primary control rather than the boiler control. In setting up our schedule for 1937 we unscrambled this rather complicated setup as it worked to the disadvantage of certain of our customers who thru their methods of distribution were unable to sell boiler controls along with their burners. Hence, in our
1937 set up, an equalization was made on boiler con-
208 trols and primary controls to reflect this change. In other words, Mr. Rockwell, if you had not purchased our boiler controls last year you would have paid us $9.65 for the primary control. This year the 65¢ which I have referred to above has been deducted from your boiler control prices and the relay reduced from $9.65 to $9.45. You will further note from the contract which was left with you last week that there are quite substantial reductions on many of the accessory items not covered in a standard set of controls, of which you purchase a substantial quantity.

We are extremely gratified in the face of the increased costs during the past year that we are able to offer our customers an actual reduction in their costs at the present time.

We wish to again express our appreciation of the very nice volume of business that we have enjoyed from your company during the past year and our sincere hope that these mutually pleasant relationships will continue in 1937. Mr. Pauling is planning on being in Detroit next week and I would appreciate it very much if you advise us what day or days you will be in Detroit, as he is extremely anxious not to miss you on his next visit.

Very truly yours,
Minneapolis-Honeywell Regulator Co.,
C. B. Sweatt,
Vice President.

CBS:DR

209 COMMISSION'S EXHIBIT NO. 26.

Minneapolis-Honeywell Regulator Company.

Branch Inter-Office Memorandum.

Date April 12, 1938.

To A. H. Lockrae—Minneapolis

From J. C. Todd—San Francisco

Subject Williams Oil-O-Matic Heating Corp.

I have followed up your bulletin on subject dated 3/29/38, and in talking with George Sweeney of E. A. Cornely Company, I find that his latest price information from Williams is to the effect that our set of controls cost dealer $7.30 more than competitive controls. It is, of course, possible that Cornely Company have overlooked recent price information from Williams, however, we have contacted two of William's dealers in this territory and they have assured us they will order Minneapolis-Honeywell controls.

Jim
J. C. Todd.

JCT:FK

4-18-38

Referring to the above. Cornely is certainly looking at last year's price list. The new Williams' price list which he must have plainly shows the burners are available with the Acratherm and R117 or the Acratherm and R116 at $2.50 extra.

A. H. Lockrae.

210 COMMISSION'S EXHIBIT NO. 27

March 30, 1938

W. A. Reichow—Davenport
D. E. Sall—Peoria
Chas. L. Saunders—Chgo
A. H. Lockrae—Mpls.

Wholesale Salesmen
Chas. C. Cochran—Chicago
Special Drive On Oil-O-Matic Outlets.

All of you have Art Lockrae's bulletin of March 29th on the Williams-Oil-O-Matic price set up and now that we definitely have something to work on, let's put every possible bit of push back of this and see how good a job we can do in selling our Oil-O-Matic dealers on M-H equipment over the merchandise that is normally shipped with their burners.

You will note that there is a $2.50 net extra charge to the dealers on either the constant or intermittent relay as compared with some competitive equipment. The chronotherm, as you will note, is priced at $21.00 extra over the acratherm, and is approximately 25-15% from list. The same thing holds true on our boiler controls. For example, on a pressure control we could figure $5.10 against a net of $4.50 on the Mercoid control which we know is not comparable to ours due to the bourdon type construction. The Penn pressure control will be shown at 30-15% off of list which is $8.00 making a net of $4.76 to the dealer, but there again we have a very definite advantage in that Penn offers the open contact switch which does not compare with our mercury switch.

Therefore, you can see that on a complete set of M-H controls the dealer's cost will run in the neighborhood of $3.00 extra. On those accounts that hesitated last year due to the $7.50 extra charge they certainly should be interested now, and the job is up to us to get them to follow through and be in a position to follow the same talking points most of their competitors now have. It will also enable their salesmen to devote their time to selling the burner and not unselling the customer on M-H in order to sell the burner with Penn or Mercoid equipment.

A few suggestions to improve our relationship with these dealers is to show them our available literature and build up our service schools, arrange educational sales meetings, and anything else that will tie us up a little closer to the Williams' dealers in every way.

311 COMMISSION'S EXHIBIT NO. 28.

7-8-38

New York—H. E. Chapler
J. W. Pauling—Home Office
Malleable Iron & Fitting Co.

Dear Chap:

I agree with you that it would be a good gesture on our part to set Malleable Iron into #3 bracket if there is any change whatever of their anyway near approaching the quantity. How many burners do you think they will sell this year? Give me your thoughts as to their future prospects and your reason for thinking they will earn a better price by increased volume, or is it your thought just to extend them the 3rd bracket for the reason stated in your memo.

1793

COMMISSION'S EXHIBIT NO. 29.

USE THIS FORM TO REPORT ALL CALLS ON MANUFACTURERS FOR BOTH O E AND MODUTROL DIVISIONS

MANUFACTURERS CONTACT REPORT
MINNEAPOLIS-HONEYWELL REGULATOR CO.

ALWAYS MAKE ... TRIPLICATE ... BRANCH OFFICE

FIRM: MALLEABLE IRON FITTINGS CO.

CLASSIFICATION: A B C D

DATE: ... 19 ... 8

STREET ADDRESS: ... CITY: ... STATE:

INDIVIDUAL SEEN	TITLE	CHECK X FOR ACTUAL INT.	MAILING LIST ACTION WANTED
MR. HARBERT GILLIS		ADD TO	
		TAKE OFF	
		ADD TO	
		TAKE OFF	
		ADD TO	
		TAKE OFF	
		ADD TO	
		TAKE OFF	

DOCKETED 4-10

IN THE MATTER OF Rapids, Honeywell

DATE 8-15-43 Lophead

By C Beadle

CHECK X WHICH ONE	OIL BURNER	COAL BURNER	GAS BURNER	WARM AIR	HTG VENT & A C EQUIPT	REFRIGERATION	MISC

IF SERVICE CALL CHECK X ☐

DETAILS OF INTERVIEW

CHECK X WHICH PRODUCTS YOU STUDIED

AIR CONDITIONING CONTROL
(A) COMPRESSOR CONTROL
(B) CONDENSER CONTROL
(C) AUTOMATIC CHANGEOVER
(D) MULTIPLE STEP CONTROLLER

GAS BURNING STUDY

GROUND INSTRUMENTS

CIRCULATOR

COMBUSTION REGULATION

DAY ACCELERATOR STUDY
(A) RATIOTROL
(B) CONVENTIONAL
(C) DA-GUYD ACCELEROMETER
(D) TIME-O-STAT

EMERGENCY CONTROLS

LIGHT CONTROLS

L. W. CUTOFF

METERFLOW REGULATORS

PNEUMATIC CONTROLS

PRIMARY CONTROLS

REFRIGERATION CONTROLS

REPLACEMENT SALES

SERVICE ON CONTROLS
(A) TIME REGULATION
(B) POSITIVE ACTION
(C) MODERN PLASTICS
(D) MECHANICAL VALVE CONSTRUCTION

ST. ... B-VENTER

... AND PACKAGED

THERMOSTAT

ZONE CONTROL

MISCELLANEOUS

ADVERTISING AND SALES PROMOTION

FIELD ORGANIZATION
M.H.R. DA-GUYD O-T-M IDEAS

We made this call with Mr. Fiegenbaum of the Hartford Office.

Mr. Gillis complained that business was very poor and that he did not see any prospects for better business this fall, stating that the hurricane and flood had affected business badly.

I do know Mr. Gillis has been rather very bitter in his denunciation of LaPlous and his price, and has censured us severely for selling this class of business. He is of the opinion that if we could get about 15 good sized manufacturers (oil burner) together, that we could put enough pressure on us and other accessory manufacturers, so that we and others would discontinue selling LaPlous this class of business. Of course we told Mr. Gillis that there were certain laws and legal complications, but he said that these barriers were certainly not insurmountable as far as we were concerned.

Cameraman's Note:

This is poor copy, but is the best obtainable.

SPECIAL COPY FOR

SALESMAN'S SIGNATURE

C. B. Savage	A. B. Lockner	A. B. Savage	
J. W. Pooling	C. D. Lyford	[illegible]	
C. D. Lyford	W. L. McGrath		

BRANCH RECORDS

CHECKED BY BRANCH EXECUTIVE

213 COMMISSION'S EXHIBIT NO. 30.

November 24, 1939

Boston

Miss Copeland
H. L. Chapler—NY

J. Feigenbaum—Hartford
C. E. Swanson—Minneapolis
Malleable Iron Fittings Co.

I wrote you on Nov. 6th that we would check the above company's purchases again to see if they had purchased a sufficient number of controls to be entitled to Br. II prices. In checking on this again, we find that while there was an invoice on Nov. 8th, this only involved one limit control so it hasn't changed the picture appreciably.

Do you expect that this company will require 250 more primary controls and 128 more thermostats before the end of the year so that they will be entitled to Br. III prices? In view of the lateness of the season, we are not going ahead and checking any further on this retroactive credit unless we hear from you.

h

214 COMMISSION'S EXHIBIT NO. 31.

Miss Copeland: Will you check this about Nov. 20th?

H. E. Chapler NYC
Art Lockrae with file
Miss Copeland

John Feigenbaum—Hartford
C. E. Swanson—Minneapolis
Malleable Iron Fittings Co.

Regarding your contact report of the 27th on the above company, our records which are as of Oct. 17th, show the following purchases:

851	Plain Thermostats
21	Clock "
54	L165
302	L170
809	Misc. Limit Controls
31	Combustion Controls
112	Misc. Controls
5	R100
24	R103
725	R117

This breaks itself down to 872 thermostats, 1164 limit controls, and 754 primary controls so you see they are quite a bit short of the required pyrostat purchases, even though their total purchases are 2934. They still must go 250 more primary controls and 128 more thermostats to be entitled to the retroactive credit to Br. III.

By copy of this memo, I am asking Miss Copeland to check this account again in another two weeks, thinking that at that time, they might have purchased a sufficient quantity of controls to be entitled to the next higher bracket.

215 COMMISSION'S EXHIBIT NO. 32-A.

March 25, 1939
WJB:HL

Home Office—A. H. Lockrae
New York Office—W. J. Brown

cc: J. W. Pauling—Mpls.
J. Feigenbaum—Hartford
H. E. Chapler—New York

Enclosed is a friendly message from Herbert Gillis of the Malleable Iron Fittings Company, manufacturers of the Branford Burner, for your information. This bulletin was sent to all their dealers the first part of last week.

We are sending copies of same to J. E. Pauling, J. Feigenbaum and H. E. Chapler.

216 COMMISSION'S EXHIBIT NO. 32-B.

Branford Bulletins.

Malleable Iron Fittings Co.

Announcement.

Mercoid Controls Optional.

To Branford Dealers:

We are pleased to announce a change in policy with respect to the controls furnished as standard equipment with Branford oil burners. Heretofore we have furnished Minneapolis Honeywell controls exclusively as standard equipment, but for several months past when an immersion aquastat has been called for we have shipped that made by Mercoid. This was done because of the superior performance we have obtained from the Mercoid aquastat.

We shall hereafter equip the Branford burner with either Mercoid or Minneapolis-Honeywell controls as standard equipment, according to the preference of the dealer, so in the future when you order please specify the make of controls you prefer. There will be an allowance of

$2.00 from the prices on all models when Mercoid controls are specified, which is the difference in our cost, and we are passing that difference along to you. The enclosed folder describes the Mercoid controls most commonly required, all of which we shall carry in stock for immediate shipment.

Reasons for New Policy.

First: After numerous tests over a long period of time we are convinced that Mercoid controls are superior in design and construction to any other controls on the market, and that the principle of the mercury tube switch has distinct advantages over the open contact type. While offered at a reduced price we consider the Mercoid controls actually worth more, and we would prefer them at equal prices. In burner applications in our own factory we are using Mercoid controls almost exclusively, on the basis of better performance.

Second: The less service work you have on controls, and the fewer replacements, the less inconvenience and expense we have, and therefore we prefer to have you specify the controls which are nearest to trouble-free. In our opinion changes made in the past year or two in the controls we have been furnishing, presumably to reduce cost of production, have been detrimental to their performance. We were called upon for more replacements of controls during 1938 than ever before, and wish to correct this condition.

Third: A number of our dealers prefer Mercoid controls and we wish to allow them to exercise their preference.

217 Fourth: Every rag-tag cheap assembled burner on the market is trying to ride on the coat tails of Minneapolis Honeywell and their national advertising, claiming their burners are just as good as any other because they have the same controls. These burners have shown such miserable performances in the field that we consider the association of the M-H name with our product to be a liability instead of an asset as it used to be considered before it was allowed to be kicked around in such bad company.

Fifth: We can conscientiously recommend Mercoid controls and will assume full responsibility for their performance.

From our long experience we are convinced that the consumer neither knows nor cares anything about the controls

furnished with his burner. That they operate satisfactorily is his only concern. The belief that their national advertising has created a popular demand for M-H controls is a straw man set up by the dealer himself, and he will find that if he recommends any other on a basis of superior performance the consumer will almost invariably accept his recommendation.

Then Mercoid controls are specified we shall furnish as standard equipment the Type H Sensatherm (thermostat), the KMI relay, and the DA31 limit control for steam or the Fig. 35 for hot water or M-51 for warm air. We shall also carry in stock the immersion aquastat for summer hot water control, and will always furnish this make unless otherwise specified for reasons given you in a previous bulletin.

We strongly urge you to specify Mercoid controls with your next few burners so you can see for yourself their performance and be guided accordingly on future orders.

Yours very truly,
Oil Burner Division,
Malleable Iron Fittings Company,
Herbert Gillis,
Manager Sales Promotion.

HG/MJ
k

218 COMMISSION'S EXHIBIT NO. 33-A.

January 10, 1940

J. J. Feigenbaum—Hartford
A. H. Lockrae—Minneapolis
W. G. Jennings—Boston
H. E. Chapler, New York

Dear John:

Your letter of the 13th received with reference to Malleable Iron Fittings, and I have had a digest made of their purchases during 1939. The figures clearly indicate Mr. Gillis' contention and yours to be right—for we actually sold them 926 thermostats and 791 relays. We don't question Malleable Iron's carrying over a substantial stock or that they sold over 1000 sets of our controls last year.

The new third bracket contract is being sent you herewith.

AHL:NLA

219 COMMISSION'S EXHIBIT NO. 33-B.

Malleable Iron Fittings Co.
Branford, Conn.
D 12 # 10-21096

PT	905	926
CT	21	
L165	54	
L170	352	
LC	829	
CC	68	
Misc.	162	
R100	5	791
R103	24	
R114	36	
R117	725	
R123	1	
	3182	

220 COMMISSION'S EXHIBIT NO. 33-C.

Minneapolis-Honeywell Regulator Company
District Office

Inter-Office Memorandum

Minneapolis Office—Original Equipment Dept.
From Hartford Office—J. J. Feigenbaum
Subject: Malleable Iron Fittings Co.
Branford, Conn.

Date January 13, 1940

C. C. to C. S. Hoyt
H. E. Chapler

A bracket # 2 contract for the subject company was mailed to this office to be presented for signature.

We called upon Mr. Gillis and found him very much disturbed that contract was not made out for more attractive prices. His argument is that they had quite an

inventory of our equipment at the end of 1938. As near as we can ascertain, they purchased about 800 sets of controls from us in 1939. Gillis claims that this amount plus what they had on hand means that they used close to 1000 sets in 1939.

Our relations with Malleable Iron Fittings were somewhat strained during the early part of 1939 and we are still on thin ice. "Mercoid" managed to get in there during the past year with their Vis-a-flame on core-oven applications and were also successful in selling a few sets of controls for other purposes. It is my understanding that Mercoid's setup with M.I.F. is based on the number of burners they manufacture a year and not on the number of sets of controls they purchase from them.

We have discussed this matter with Mr. H. E. Chapler and with Mr. Jennings and we all feel that in view of the above circumstances it will be advisable to make out a new contract placing them on a Bracket # 3 basis. Please forward same to this office.

John.

221 COMMISSION'S EXHIBIT NO. 34.

Minneapolis-Honeywell Regulator Company

This Communication Receives Same Handling As A Telegram

Air-Mail-O-Gram

Date March 1, 1941

To H. E. Chapler—38 Highview Ave.,
From A. H. Lockrae—Minneapolis
Subject: Anchor Post

C. C. to H. E. Chapler—New York

Air Mail

Dear Chap:

I thought John was arranging to stop at Baltimore on his way south, but I just found out that he didn't do this. I don't think we should let the Anchor Post situation dangle until the Oil Burner Convention, and feel that it would be very good business for you to make an appointment with Bill Brannan and get onto this job quickly.

I think you have talked to John, but at any rate, he told me that he met Brannan at Detroit not long ago and that he seemed to be very receptive. Of course, price has been the stumbling block, and John and I agreed that we would be willing to go to a Bracket V basis if Anchor Post would assure us of the business.

A visit from you would at least start the ball rolling.

If Anchor is going to adopt a policy of splitting their business, I don't think we are going to be able to get very far with them, but I think a visit from you would bring a lot of things to light, and I think you will agree that we ought not to postpone this thing any longer.

Best regards.

AHL:NLA

222 COMMISSION'S EXHIBIT NO. 35-A.

H. E. Chapler—New York
A. H. Lockrae—Minneapolis

March 7, 1941

J. W. Pauling—
c/o Mt. Plymouth Hotel
Mt. Plymouth, Fla.

Anchor Post Fence

Dear Chap:

Thank you for your memo of March 4th, and with the information contained therein I am able to reconcile some prices that I believe are about right and will cover the Perfex quotations to Anchor.

I think Perfex have dropped their prices to Anchor to their low price basis, and they were not carrying them on that basis last year. As near as I can figure, Perfex is quoting them $12.70 on the constant ignition set of controls as against our $13.00 in the fifth bracket. On the intermittent ignition set I think the Perfex price to Anchor would be $13.20 as against our price of $13.75.

It does seem to me that if these differences are correct we still ought to be able to make a deal with Anchor whereby they would make our controls optional at no price difference—so I am sending John a copy of this in the event he stops at Baltimore on his way north, and he will have the whole story.

Best regards.

AHL:NLA

John Pauling:

I assume you got Chap's memo on this, for my copy showed he had sent one to you, and it did not come into the office here.

I learned that Kingsland and Hansen were in Baltimore recently, and what I was fearful of actually did happen, for it's apparent they gave Anchor their lowest price.

I still think there is a chance for us to get a goodly share of this business if we want to go to fifth bracket.

Best regards, and I sure hope you are having a good time.

A.H.L.

223 COMMISSION'S EXHIBIT NO. 35-B.

Minneapolis-Honeywell Regulator Company

This Communication Receives Same Handling As A Telegram

Air-Mail-O-Gram

Date March 4, 1941

HEC:HL

To Home Office—A. H. Lockrae

From New York Office—H. E. Chapler

Subject: Anchor Post Fence

cc: J. W. Pauling
J. Dorsey—Phila.

Dear Lock:

When we arrived home last night we got your Air Mail letter of March 1st concerning the above.

Ardis and I got back to Baltimore on Sunday and we spent the evening with Joe Hauf and his wife. On Monday we met John Dorsey in Baltimore and went out to Anchor Post and showed Bill Brannon and Donahue our Advertising Campaign. After going through this we talked to Brannon about controls for 1941 and he told us that they intended to go along about the same as they did last year. He pointed out to us that last year the difference between our Price and Perfex's was about 40¢ while this

year the difference had increased to about $1.00. This is applying Perfex's price against our Bracket 4-A. We asked Brannon if Perfex's price had changed from last year and he said they had been quoted this new price recently. We assume that this was done when Kingsland and Hansen were in Baltimore recently. Joe Hauf said they had been in to May a short time ago and we believe that these two gents have been all through the eastern territory with their new prices.

Brannon said their lowest price on their burner was $53.50 and that they sold a lot of them at $55.00 and on these jobs he said there was not enough margin to take care of $1.00 difference in controls. On the other hand, he said where they were getting $60.00 or $65.00 for a burner, the $1.00 difference was not too serious and that he had no doubt that they would supply quite a few Minneapolis-Honeywell controls on these jobs. He reported that the Fluid Heat dealers had had less trouble with Perfex than Minneapolis-Honeywell controls. He also said that he felt he would like to have two sources of supply for controls, as well as motors, transformers, pumps, etc. In view of all the above I do not believe that our fifth Bracket prices will get this business 100% because we will still have a 50¢ higher price than Perfex and I do not believe that on these lower priced burners they will spend the 50¢ extra unless their dealers put the heat on for Minneapolis-Honeywell controls.

Another thing Brannon brought up was that we were in competition with them on our own controls and brought up the subject of our having quoted a manufacturers price to the Morton Oil Co. of Malden, Mass. on an R157 Protectorelay. He got out a copy of Ted Smoot's letter to you and your reply regarding this transaction, and also had Hobb's letter explaining that we did not quote them any price. Brannon took exception to the statement that we had sold Morton Oil 47 units at 25% off, stating that Anchor Post gave Morton 25-15% and it would just not be logical for Morton to be paying us a higher price. Brannon said we might be selling Morton under some other firm name at a price better than 25%. We assured him that this was not the case and we are writing Charlie Hoyt, asking that he send us invoices made out to
224 Morton Oil for 1940 and will show them to Brannon at the first opportunity.

Brannon's reaction to our Advertising Campaign was that it should do us a lot of good. However, Donahue was very complimentary about it and felt that it would do the automatic heating industry a lot of good.

We are sending a copy of this memorandum to J. W. Pauling so he can have this information if he stops to see Brannon on his way north. Brannon is going to be at the Oil Burner Show on Thursday and we told him we surely wanted to have a little session with him there. Of course you know Anchor Post Fence is not exhibiting at this Show.

Ted Smoot, Frank Harbin and Bishop were all out of town and of course we could not see them.

We did not press Brannon for his signature of the Bracket 4-A contract which was there and believe this thing will have to wait until we see Brannon at the Oil Burner Show and get lined up on some basis.

225 COMMISSION'S EXHIBIT NO. 36.

Minneapolis-Honeywell Regulator Company
Branch

Inter-Office Memorandum

To Home Office * A. H. Lockrae

From New York Office * H. E. Chapler

Subject Anchor Post Fence

Date March 12, 1941

C. C. to: HEC:FK Dic: 3/10

Replying to your memorandum of March 7th concerning competitive, and our prices to the above concern, we believe that you have got about the right dope because in the 4A price, we were about $1.00 out of line according to Brannan and our fifth bracket price would be about 50c on intermittent controls.

Regarding your air mail letter of the 4th, we talked to John Dorsey on the phone this morning and suggest that he put in a call for Ted Smoot to find out about the 100 burners for the Government order on which we believe,

they are going to use Perfex. John told us that Ted Smoot is not expected back until the latter part of this week and then we told him we thought it might be a good idea to get hold of Brannon on the 'phone and see what could be done or what he could find out about this particular order and report directly back to you. In other words, we thought we had better get after this thing right away even though Ted Smoot was not back because we felt that the order might go out between now and that time. You should hear from John very shortly on this proposition.

Brannon told us that he would be in Philadelphia on Thursday of the Show and we certainly should make it a point to get together with him if we are able to give them fifth Bracket prices. They are having a Meeting of their dealers and representatives on Monday, Tuesday and Wednesday of the Show week, and most of them will attend the Show in Philadelphia after that.

233 COMMISSION'S EXHIBIT NO. 54.

Mr. Gene Galdabini — Frederick D. Hansen/es

Price on 475 Series Controls — April 18, 1939

Effective within thirty days from date, the prices on the 475 Series Controls are increased as shown below. You will note that an increase is effective in each bracket, except Bracket 25.

	575D-D4		475D2-D6	
	Net Less Than 12	Net 12 or More	Net Less Than 12	Net 12 or More
Bracket 25	5.80	5.55	6.20	5.95
Bracket 26	5.65	5.40	6.05	5.80
Bracket 27	5.55	5.30	5.95	5.70
Bracket 28	5.50	5.25	5.90	5.65
	Net Less Than 24	Net 24 or More	Net Less Than 24	Net 12 or More
Bracket 28A	5.50	5.25	5.90	5.65
Bracket 29	5.50	5.25	5.90	5.65

The reason for this price change is because we have entered into a license agreement with the Minneapolis-Honeywell Regulator Co., who own some patents on com-

bination fan and warm air controls. Under this agreement they have the right to set up a minimum price and we have to adhere to it.

Will you please advise all of your customers with whom you have contracts, in writing, of this price change, and that the provision in the Purchase Agreement, headed "Price Changes" will apply to this change.

In the event that for some reason you want us to write letters direct to your customers from here, please advise and we will do so.

Please correct your price book in accordance with the prices listed above.

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252 COMMISSION'S EXHIBIT NO. 66-A.

Minneapolis-Honeywell Regulator Company

Manufacturers' Control Contract

Purchaser: Submitted December 2, 1935

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Timken Silent Automatic Co., of Detroit, Michigan, hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract 10,000 or more sets of the Company's automatic temperature controls, each set con-

sisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 90% (but at the prices named not more than 125%) as many Limit Controls as Primary Controls. $.50 net will be added to all Limit Control prices on orders calling for shipment of less than 10 of the same type at one time.

Prices on Material Shipped From Factory.

T10 or T11 Aeratherm	3.35
T105 Heat Accelerated Chronotherm, less than 25	19.00
T105 Heat Accelerated Chronotherm, less than 24	19.00
T12 or T22 Electric Clock Thermostat, lots 24 or more	18.00
T12 or T22 Electric Clock Thermostat, less than 24	19.00
7710 8-day Clock Thermostat	19.50
T45 Thermostat (used with DC or 400 Series Locksw.)	3.85
T42 Thermostat	4.25
T100 Time-O-Stat	4.95
R105-1 Protectorelay	18.85
R117-3 Protectorelay	11.50
R417-3 Lockswitch	10.20
R121 Protectorelay, stack type, low volt, intermittent	9.00
R421 Lockswitch, stack type, line volt, intermittent	8.45
R125-2 Protectorelay	12.95
R15-5 Relay	4.95
D Motor, CS 9-014 or M26-1 Motor	16.00
V46 Gas Valve	3.05
C57-1 Protectostat	6.45
C56-1 Pyrostat	6.45
C40-3 Pyrostat	5.15
L620 Low Pressure or L622 High Pressure L.W. Cutoff	13.25
L646 Duplexswitch	16.75
L416-4 Aquastat, CS 362-611, CS 362-614, CS 362-615 Lots 100 or more	5.00
Lots less than 100	5.25

Company's Copy

253 #Limit Controls

L404 Pressuretrol	3.50
L408 Vaporstat	4.50
L409 Surface Aquastat	3.50
L411 Vacuumstat	5.25
L415 Airstat	4.50
L419 Airstat	3.50
B6510 Aquastat	4.75
L416 Aquastat	4.75

It is understood that until the R121 Protectorelay and R421 Lockswitch are available for shipment that the R117 Protectorelay will be invoiced at $9.00 net and the R417 Lockswitch will be invoiced at $8.45 net.

In view of the special prices listed in this agreement, it understood that the Purchaser will standardize on and use Company's products exclusively, except for field test or when other makes are specified by dealer.

Miscellaneous Control Prices

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-....., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15-10% unless otherwise shown on the price sheets.

254 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f.o.b. Minneapolis, Minnesota; Wabash, Indiana.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R-153, $2.00 net each. Motor operated devices (excepting Type D and special

industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Prices from Branch Stocks.

Emergency shipments of equipment to the Purchaser from a Branch Office of the Company shall be billed with discounts in effect at such Branch Office.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will
255 pay such award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the

sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Sales Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company. In consideration of the special prices listed in this contract, the Purchaser agrees to use the controls listed herein in conjunction with his products only and that such controls will not be sold separately to other manufacturers or vendors.

Deliveries.

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Manufacturer's field men.

Period of Contract.

This contract shall become effective at the accepted date, and expire on Dec. 31, 1936 unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Michigan.

Accepted at Detroit, Michigan.

Timken Silent Automatic Division
Timken Detroit Axle Co.,
By H. C. Shafer, *Pur. Agt.*,
Purchaser.

Dated Feb. 19-1936.

Minneapolis-Honeywell Regulator
Company,
By Geo. D. Kingsland,
Its V. P.

Dated at Minneapolis, Minn., 2/24/36.

256 COMMISSION'S EXHIBIT NO. 67.

(Letterhead of The Timken Silent Automatic Company, Detroit, Michigan.)

June 11, 1935.

Minneapolis Honeywell Regulator Company
Minneapolis, Minn.

Attention John Pauling.

Dear John:

In discussing prices on burner controls yesterday with Mr. Roberts, the question arose as to what you could or would do if we were to give you a firm order for 5000 sets to be produced at your convenience. By this I mean that if you have a few slow weeks, it might be very nice to have such an order to work on, and the material shipped as produced. The entire question in placing such an order of course is the price, and we shall be interested in your reaction.

Of course, we would not want the material rushed thru the plant so as to cause extremely large expenditures on our part—we are merely referring to regular steady production.

Yours very truly,

H. C. Shafer,
Purchasing Agent.

TJS.

257 COMMISSION'S EXHIBIT NO. 68.

June 18, 1935.

Timken Silent Automatic Co.,
Detroit, Michigan.

Att.: H. C. Shafer, P. A.

Dear Mr. Shafer:

Replying to your letter of June 11th regarding prices on a firm order for 5000 sets of controls.

The present prices you are enjoying on our equipment are the very lowest that we are in a position to give you at this time. This price setup, as you understand, is based on your purchasing from us this year 40,000 units. You will recall at the end of last year we also permitted you to take advantage of this price on shipments made after we announced the 1935 price setup. Frankly, in view of your recent decision to divide your control requirements with another manufacturer the writer wonders, even in view of your increased sales, if your requirements from us will reach the total of 40,000 units on which your present price is based.

As explained to you on my recent visit in your office, we are very anxious to build controls and have them ready for you before the fall rush. Judging from indications and the hesitancy on the part of most manufacturers to stock in advance at this time, it looks to us as tho this is going to be one of those years when we will be working night and day during the fall months. As I stated to you, we are particularly anxious to have your controls ready and if possible in your hands before this rush as we know we can build you a much better product when we are not working our factory under pressure.

You say that the entire question in placing a quantity order is price. I cannot help but believe that you agree with us that another good consideration is the advisability of having controls produced under normal conditions, so as to avoid delays and possible imperfections that creep in when controls are manufactured with extra help working overtime.

Considering the last paragraph of your letter, it certainly is not our desire to rush thru large shipments of con-

trols that would cause you unduly large expenditures before the controls are actually needed. On the other
258 hand, however, if we could ship you an order of 5000 sets this would make a carload and the saving in freight to you, as you can appreciate, would be quite a factor. Therefore, permit me to suggest this proposition which I think is a profitable one for you and us.

Give us an order for 5000 sets of controls to be produced during the early part of July. We will ship these to you in one car shipment and accept our trade acceptance for the shipment subject to 2% discount Oct. 10, 1935.

If such an arrangement meets with your approval, we would like to have you wire on or before the 21st of this month as the writer is leaving the office on that date for about ten days and would like to personally see that this order is properly executed.

Yours very truly,
Minneapolis-Honeywell Regulator Co.,
J. W. Pauling,
Vice President.

JWP:DR

In checking with the Traffic Department I find that on a carload of 5000 sets of controls you would effect a saving in freight over less than carload of approximately $175.00. You also would save the labor of uncrating as we do not crate carload shipments.

I have just checked with the Production Department also and find that we are so far back-ordered that on a normal production basis it would be the latter part of July before we could make shipment of 5000 R117 Protectorelays.

259 COMMISSION'S EXHIBIT NO. 69.

Minneapolis, Minn.
Sept. 27, 1935.

Mr. M. J. Powers,
c/o Timken Silent Automatic Co.,
100—400 Clark,
Detroit, Mich.

Dear Milt:

I want to thank you very much for the information you gave me over the phone the other day regarding the Pressuretrol picture. This matter has been discussed with our various executives and we are taking steps to develop a cheaper Pressuretrol. This confidential and for your information only.

I of course would be very much interested to know who the two companies are you mentioned coming into the market with a $2.50 unit. As I told you over the phone, the cost of our present Pressuretrol does not permit us selling it much below our present $3.50 price.

I would like to have you give me the following information. Can we sell a Pressuretrol with a fixed differential and if so what should the differential be? We, of course, feel that in any event it would be necessary, even with a fixed differential, to have an adjustable scale for the setting, both up and down.

I would certainly appreciate your writing me, outlining the minimum refinements in a Pressuretrol that could be sold at a low price.

Any information you can give me I shall consider a personal favor.

Sincerely,

260 COMMISSION'S EXHIBIT NO. 70.

(Letterhead of The Timken Silent Automatic Company, Detroit, Michigan.)

September 30, 1935.

Mr. John Pauling
Minneapolis-Honeywell Regulator Company
Minneapolis, Minnesota

Dear John:

This will acknowledge your letter of September 27 regarding the redesign of your Pressuretrol to enable you to supply it to us at a much reduced price. Lock was in to see me on Wednesday and we discussed this same matter at considerable length. From our point of view the Pressuretrol is merely a safety device as applied on the great majority of domestic installations and consequently does not need the wide range of adjustments now provided.

As I have discussed with you previously, I feel that a steam pressure control arranged to cut off at pressures up to 10 pounds and with the fixed differential of approximately 2 pounds adjustable over the 10 pound range is all that is ordinarily required. In fact if there would be any material advantage in reduced cost, the pressure range might be reduced from 10 pounds to 5 pounds.

I regret that I am unable to tell you the names of the companies who are proposing to supply us pressure controls at reduced prices. I might mention that, counting our own unit, there are now four reputable sources who expect to be able to supply us a suitable pressure control, the price in any case being not to exceed $2.50 and ranging down to as low as $2.00. I am giving you this information because I know it will be of value to you and at the same time I am certain in my own mind that the price on Pressuretrols and other instruments, even including furnace switches, will be well under the $2.50 price before another season passes.

Kindest regards,

Very truly yours,

Milton A. Powers,
Vice President & Chief Engineer.

MAP.G

261 COMMISSION'S EXHIBIT NO. 71.

Oct. 3, 1935.

Mr. M. A. Powers,
Timken Silent Automatic Co.,
Detroit, Michigan.

Dear Milton:

Thanks very much for your letter of Sept. 30th, and the information you have given me.

I have had a meeting with our Engineering Department and we have started work to design a Pressuretrol to meet the specifications you set forth.

I will keep you advised of our progress.

Sincerely yours,

J. W. Pauling
DR.

262 COMMISSION'S EXHIBIT NO. 72.

(Letterhead of The Timken Silent Automatic Company, Detroit, Michigan.)

November 26, 1935.

Mr. J. W. Pauling
Minneapolis-Honeywell Regulator Company
Minneapolis, Minnesota

Dear John:

Am sorry I missed you the last time you were here but had expected to see you before this as I met Lockrae for a few minutes at the airport and he said he thought you would be back last week.

Incidentally, we have completed the campaign for chronotherm clock sales in the various branches, and the total amount of prizes given out was $290.58. The total sales of chronotherm clocks amounted to 101. This was a little disappointing, but I believe it was largely due to the fact that we had a slump in sales in October, on account of the warm weather continuing. Sales seem to have picked up since we have had this cold spell, but I believe in turn that

you will find there will be an increase in chronotherm orders as the salesmen now find it very good business for their pocket books, to go after that type of sale. A little stimulation like that once in a while reminds them that they actually do have chronotherms in their list of appliances to sell. At least you have definitely made a sale of 101 chronotherms, and I trust you will have a check for this amount sent to Mr. Soyster, who has been handling the matter, in order that he may clean up same.

Mr. Powers gave me the price set-up which you have submitted as a tentative proposition and I wish you would check this over and see if you haven't made an error—possibly a misplaced decimal point—as I can tell you now that on those prices you are kissing yourself out of a lot of nice business, for we are getting a good volume on boiler business, which is sold largely on price. We have taken a substantial reduction ourselves, and other vendors of different parts have come along with us. Naturally, we expect the same from you.

Kindly advise me as soon as you know when you will be in Detroit again, in order that I may make arrangements to be here. We expect to have a sales meeting in the East in about ten days or two weeks, for our various sales managers, and would like to have definite price schedules before this meeting.

Best personal regards.

Very truly yours,
M. J. Roberts,
Vice President & General Mgr.

MJR:ML

(P.1823

COMMISSION'S EXHIBIT NO. 73.

FEDERAL TRADE COMMISSION

MANUFACTURERS CONTACT REPORT

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

USE THIS FORM TO REPORT CALLS ON MANUFACTURERS FOR BOTH O. E. AND MODUTROL DIVISIONS

FOR BOTH O. E. AND MODUTROL DIVISIONS

DATE OF INT. 1/28/40

INTERVIEWED BY [illegible], Official Reporter

Timken-Detroit Axle Company
Timken Sound Automatic Division
1141-400 Clark Ave.

CITY Detroit

STATE Mich.

		TITLE	MAILING LIST	SPECIFY LIST
	Walter F. Rockwell	V. Pres.	ADD TO / TAKE OFF	
	R.J. Smith	V. Pres.	ADD TO / TAKE OFF	
	J. J. Crawford	Gen. Sales Mgr.	ADD TO / TAKE OFF	
	Walter Myers	Chief Engr.	ADD TO / TAKE OFF	
	W. J. Shafer	Pur. Ag.	ADD TO / TAKE OFF	

CHECK IN WHICH ONE	OIL BURNER	COAL BURNER	GAS BURNER	WARM AIR	HTG., VENT., & A. C. EQUIPT.	REFRIGERATION	MISC.
	X						

DETAILS OF INTERVIEW

IF SERVICE CALL CHECK X

WHAT DID HE SAY?

WHAT WAS THEIR OBJECTION?

CHECK IN WHAT YOU STRESSED DURING INTERVIEW		CHECK IN WHAT YOU STRESSED DURING INTERVIEW	
ACRATHERM	X	SUMMER - WINTER	
AIR CONDITIONING CONT'L (A) Compensated Control (B) Economizer Control (C) Automatic Changeover (D) Heating & Cool Controlled		TIME O STAT	
BIG BUILDING STORY		WAT IN PACKAGES	
BROWN INSTRUMENTS		ZONE CONTROL	
CHRONOTHERM			
CIRCULATOR			
CONDENSATION REGULATION			
HUMIDITY CONTROLS			
LIMIT CONTROLS	X		
L. W. CUTOFF			
MODUSTAT			
PRIMARY CONTROLS			
REFRIGERATION CONTROLS			
REPLACEMENT SALES			
SERIES 90 CONTROLS			

Other people contacted -

Mr. Chappel
Mr. Soyster
Mr. Bilcom - Eng.
Mr. Satterfield
Mr. Myron Ellis - Assistant to Mr. Crawford

John Pauling and I contacted this organization with the idea of getting their 1939 contract lined up. They wish to have their contract changed to a unit contract rather than sets and this was agreed upon. Timkin is planning to use Perfex limit controls and have already started sending these out to their dealers without asking the dealers' consent and I have checked with Jack Sloan, the Timken dealer in Wilmette, and the last five burners have had three Perfex limit controls and two Minneapolis-Honeywell limit controls. The Minneapolis-Honeywell L404 pressuretrol was $7.50 net to Jack Sloan and the Perfex was $6.25 net to him, making a difference of $1.25 advantage for Perfex limit controls to the dealer.

When we were in Detroit Mr. Crawford stated that they were going to use our list prices and give the dealers a 33⅓ discount off our list which will bring our pressure controls down to $6.00. We did not get any indication of what they were going to charge for the Perfex limit controls, but the dealer Jack Sloan stated that he would rather have all Minneapolis-Honeywell equipment even though the price of $1.25 existed.

It is very evident that the Timken crowd expected to get a $1.00 credit on seven or eight thousand gun-type burners when they all ganged up at lunch time, but John Pauling was able to satisfactorily kill this idea in Walter Rockwell's mind, during the return ride from lunch in the car

SPECIAL COPY FOR

SALESMAN'S SIGNATURE W. J. Shafer

SALESMEN DO NOT WRITE BELOW THIS LINE

ADVERTISING AND SALES PROMOTION	L		
FIELD ORGANIZATION	J		
MISCELLANEOUS	X		

LOCKHART	LYNCH	BRANNEN	BRANCH RECEIVED	H. O. RECEIVED	
PAINTON	PENNOCK	BOGGON	CHECKED BY BRANCH SUPERVISOR		
BOYSON	MAHONEY	GRADY			GRADY FOR H. O. FILE
HINCHLIFF	MOORHEAD		ENTERED ON CARD IN H. O. S. D. CLERK	ENTERED ON CARD IN H. O. S. D. CLERK	321

(P. 1824)

and it was not mentioned in the discussion on the contract.

Timken is very definite in wanting to have their name on the controls this year and they wish to change the looks of our T31 thermostat to a point where it will give them an individual thermostat. Bill Powers is planning on leaving Detroit Thursday on the 4:25 and I am meeting him in Chicago and we will come on up to Minneapolis together.

265 COMMISSION'S EXHIBIT NO. 74-A.

February 3, 1936.

Cleveland Steel Products Corp.,
Cleveland, Ohio.

Att.: Mr. J. L. O'Brien—Toridheet Division.

Dear J. L.:

With reference to our phone conversation this morning, I am enclosing contract covering your requirements and you will find therein the prices we discussed.

In analyzing the estimated quantity of the contract, you will remember our last discussion wherein we pointed out that insofar as quantity was concerned your sale to Fox, Westinghouse, Kelvinator or other manufacturers we might be selling direct would be credited against your contract.

The net price being extended you on the R117 Protectorelay set, including the T11 Acratherm and Limit Control in lots of 10 is 18.35. The price on the R116 set is $17.00. Providing your purchases and our sales to your associated manufacturers total 7500 sets of controls before the expiration of the contract, the purchases of Cleveland Steel Products Corp. would become retroactive and a credit memo equivalent to 3% of your total net purchases would be issued. Then, your subsequent purchases would be invoiced at the new bracket price, which is $17.25 on the R117 set and $16.05 on the constant ignition set.

Just what the balance of the year will bring forth neither you nor we can clearly predict, but I did want to place the above information in your hands for I feel if you could arrange to give us a larger portion of your constant ignition control business there would be little doubt but what you could earn the retroactive credit and the lower price.

If you could standardize on our constant ignition controls it would go a long way toward obtaining the lower prices—but failing that, then if you can see your way to place as nominal a price difference as possible between your burner equipped with our controls and our competitors, it would be extremely beneficial.

I wanted to discuss all the above with you—as a matter of fact phoned you from Syracuse only to learn that you

would be out of town yesterday so I did not stop. Present indications are that I will be in Cleveland week after next and I am looking forward with a lot of pleasure to seeing you. Sorry we didn't make connections in New York.

266 Kindest regards from the writer, we are

Yours very truly,

Minneapolis-Honeywell Regulator Co.,
A. H. Lockrae,
Asst. Mgr. of Sales, Original Equipment Division.

AHL:DR
Enc.

267 COMMISSION'S EXHIBIT NO. 74-B.

(Western Union Telegram.)

MAM22 23 NL-WUX Cleveland Ohio Feb 2, 1938
Minneapolis Honeywell Regulator Co, A. H. Lockrae—

Westinghouse Very Impatient Because We Cannot Give Them Definite Control Prices For Thirty Eight. Holding Up Their Sheets. Are Your Prices Established Definitely—

J L OBrien Cleveland Steel Products Corpn.
.841AM Feb 3.

268 COMMISSION'S EXHIBIT NO. 75-A.

February 15, 1938

cc: Bill Brown—New York
A. H. Lockrae
J. W. Pauling

Fairfield Oil Heating Co., Inc.,
Greenwich, Connecticut.

Attention: Mr. J. R. Johnson, President.

Dear Mr. Johnson:

I have your letter of February 10th and regret the devil of a time you are having with our New York Office. I cannot, however, censure them as they are simply following our standard company policies which, briefly, are that we are willing to extend to any manufacturer a contract for the

quantity of controls he has purchased in the previous year. If, however, a customer due to developments, circumstances, etc., desires to contract for a larger quantity of controls than his previous performance has indicated, then in such case we require a bona-fide order for one-third of the minimum specified in the contract to be shipped within a period of sixty days from the acceptance of the contract. If the manufacturer does not wish to do this, he always has the benefit of our retro-active policy so that if he reaches his estimated greater quantity, he receives a retro-active discount in the form of a merchandise credit which gives him exactly the same results as if he had signed the larger contract and taken out the sixty-day requirements.

This being our general policy, it must be applied to all alike. As you realize, we cannot discriminate among our many good friends and customers. From the above you will see, Mr. Johnson, that under our system a manufacturer always receives the price which his quantity entitles him to.

In reference to your remark about your tour of Maryland and Delaware and oil burner dealers there enjoying a price of $18.50 per set, I wonder, Mr. Johnson, if you have really obtained the exact facts and if these dealers have not made a statement which you interpret one way, but in reality is not exactly the truth.

The majority of burner manufacturers price their burners complete with a set of controls. Some control manufacturers have not pursued the policy of protecting the manufacturer, but have gone directly to dealers offering the dealer prices on controls only slightly in excess of their manufactured prices, endeavoring to persuade the dealer to purchase his burner without controls and purchase their controls direct from the manufacturer in question. To eliminate such a practice, the majority of manufacturers pursue the policy of allowing the dealer a deduction from the price of the burner complete with controls if the dealer does not take the controls. Some manufacturers make this deduction approximately the price that they pay for controls; others quote a far smaller allowance to discourage the dealer from buying his burners without controls. This sometimes unfortunately creates the impression in the dealer's mind that he is buying his controls at such and such a figure; whereas this is not actually the price he is paying, but purely the allowance he receives if he

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does not buy. If the dealer desires to purchase, for example, an extra set of controls from the manufacturer, he does not receive this allowance price. Hence you will generally find, if the dealer is actually pinned down, he will acknowledge that he cannot buy controls at the price he has mentioned, but that price is actually is deduction if he does not take controls.

This practice of soliciting dealer business direct by the control manufacturer has also resulted in the following happening. A dealer, for example, receives an allowance from a manufacturer of $18.50 if he does not purchase the control with the burner. A control manufacturer will offer him a set of controls for say $17.00. (the figures used are purely hypothetical). The dealer will sell his burner with the $17.00 set of controls and have on his hands a set of standard controls which he figures cost him $18.50. He will add a couple of dollars to this and go out and offer to sell this set of standard controls for $20.00 or $21.00 and think he is making money, when, as a matter of fact, he is operating on a dead loss because the controls have probably been figured in his complete burner price at $25.00 or $26.00 and he is just out this difference.

I enjoyed very much the very courteous interview which you gave me at the recent show. I realize what an imposition it was to talk to you at that time when you were so very busy, and I trust that you expectations for 1938 will be more than fulfilled and that we will have the pleasure of doing business with you.

Very sincerely yours,

Minneapolis-Honeywell Regulator Co.,

C. B. Sweatt,

Vice-President.

CBS/s

270 COMMISSION'S EXHIBIT NO. 75-B.

(Letterhead of Fairfield Oil Heating Co., Inc.,
Greenwich, Conn.)

February 10, 1938.

Mr. C. B. Sweatt
Minneapolis-Honeywell Reg. Co.
Minneapolis, Minnesota

Dear Mr. Sweatt:

I am having one "devil" of a time with your New York office in regard to your contract which is enclosed. After signing up for seven hundred fifty sets of controls, they informed me that it will be necessary to take two hundred fifty sets within a period of sixty days in order to make the contract valid.

Now, we cannot possibly do this at this time of year as it is our slow period and would involve approximately $5000.00 and we do not desire to tie up this amount at this time in controls.

I have just returned from a tour of Maryland and Delaware and find there that oil burner dealers are enjoying a price of $18.50 per set and it does not seem fair that we, as manufacturers, should have to pay more than they do.

It is utterly impossible to sell controls at the $21.50 bracket and unless we can enjoy the $19.85 price, without taking the two hundred fifty sets, we will have to forget Minneapolis Controls, but if you do allow us this price, we will go one hundred percent with you, and eliminate the other two makes of controls that we have been selling.

We expect to sell between two and three thousand burners this year.

Please let me hear from you.

Yours very truly,
Fairfield Oil Heating Co., Inc.,
J. R. Johnson,
Pres.

JRJ:M

271 COMMISSION'S EXHIBIT NO. 76.

C L Peterson:

John is out of town and won't return until the fore part of February, so I have answered as follows. Of course, there are some other accounts on the West Coast buying at the same price as Hayward, but their quantities entitle them to that price. I hope Nelson earns his retroactive credit.

A. H. Lockrae.

Ray Oil Burner Co.,
401 Bernal,
San Francisco, Cal.

Att: Nelson Hayward, Vice-President

Dear Nelson:

Just received a letter from Mr. Peterson of our San Francisco office advising that our 1938 contract had been accepted—and we wish to extend our sincere thanks for your cooperation in this matter.

As Pete pointed out to you, a retroactive credit of 3% will be extended providing you purchase 3000 sets of controls prior to the expiration of the contract, the amount of the credit to be 3% of your net purchases. Our standard retroactive policy is outlined below:

"In the event that the purchaser accepts and pays for 2999 control sets during the life of this contract, a material credit to be absorbed by future purchases, will be issued amounting to 3% of the net sales to the Purchaser, and future shipments during the life of the contract will be invoiced at the prices then in effect for 3000 control sets."

For example, after the retroactive credit is earned a set of controls consisting of the Thermostat, standard Limit Control and R117 Relay would be invoiced you at $18.35 net instead of $19.35 net as outlined in your contract.

In considering the relay parts which you purchase from us, we construe two of the relay units and the safety switch as constituting a primary control and I wanted you to know this so that you would understand we are giving you credit against your contract quantity for the parts you are purchasing.

The splendid progress your company has made under

your able management in the past two or three years makes me feel personally confident that your purchases this year will earn you the retroactive credit. As you know, we have no alternative except to extend prices commensurate with the quantity of controls the customer purchases, and you, of course, are buying at prices commensurate with the volume of business given us last year.

I am just wondering if you are going to be at the
272 Heating & Ventilating Show in New York next week.

For some reason or other I doubt it, but I hope I am wrong for I certainly would enjoy spending some time with you.

I don't know what John's plans will be later in the season, or mine, but I am in hopes one or the other of us will be able to spend some time with you.

Kindest regards, and please remember me to Mrs. Hayward.

Yours most truly,
Minneapolis-Honeywell Regulator Co.,
A. H. Lockrae,
Asst. Mgr. of Sales, Original Equipment Division.

AHL:DR

273 COMMISSION'S EXHIBIT NO. 77.

January 21, 1937.

Century Engineering Inc.,
Cedar Rapids, Ia.

Att: B. J. Lattner, Pres.

Dear Jack:

We have had our Branch Managers at the office all week and I have just had an opportunity of discussing your requirements as per our phone conversation a couple of days ago with the management.

1. We will be glad to extend you our 5th bracket contract reading for 7500 sets of controls but in order to do so it would necessitate an order for 3750 sets to be delivered prior to July 1st; shipments to be in approximately equal monthly lots.

It would be impossible to accept your order for 2000 sets of controls because if we did this it would be necessary to revise our pre-season commitment orders that we now

have on our books and unfortunately that is out of the question.

2. In analyzing prices, it would seem to me that your best bet would be to accept our 5th bracket contract calling for 7500 sets on the above basis and standardize on the R110-4 low voltage constant ignition controls. Your price would be as follows: R116-4 Relay, $9.40; T11 Acratherm $3.00, Standard Limit Control $2.65—total $15.25.

It would mean that this set of controls would cost you approximately $1.25 more than the figure you mentioned at which you could obtain low voltage competitive controls and if this amount of dealer difference in price could be set we know that we would get our share of the business, for all our efforts with your dealers thus far have been on the line voltage controls.

3. When I visited you, you asked if it would not be possible to use the T44 Thermostat without the heating element. Since my return I have investigated this device and find it tests just as good as similar devices of competitive makes but is no where near as accurate as the T11 Acratherm, and this is another point that should be considered in making your decision on low voltage vs. high voltage controls because the T11 Acratherm is used with the R116-4 Protectorelay.

4. Another point that you brought up was to determine if it would be possible for us to title the re-designed R116 relay so that we could call it the Type R422—(something or other). This would be possible.

274 5. I hope you will consider the suggestion to use the low voltage control seriously, Jack, for if you make a price difference to your dealers that approximates your difference in cost between our controls and those of competitive makes, I am quite confident that we will get our share of the business. We would plan to make a concerted drive on your dealers immediately and with the selling features we have in our low volt control system I think we could go to town in a big way.

I am leaving on my vacation Wednesday of next week, so I will be awfully glad to hear from you regarding the above by mail—or better yet will appreciate a phone call when you have arrived at a decision.

Yours very truly,
Minneapolis-Honeywell Regulator Co.
A. H. Lockrae,
Asst. Mgr. of Sales Original Equipment Division.

AHL:DR

275 COMMISSION'S EXHIBIT NO. 78.

(Letterhead of Century Engineering Corporation,
Cedar Rapids, Iowa.)

January 29, 1937.

Minneapolis-Honeywell Regulator Company,
4th Avenue, South and 28th St.,
Minneapolis, Minn.

Gentlemen:

We are enclosing herewith manufacturer's control contract submitted December 2, 1936.

This contract has been signed and we are forwarding it to you at this time so that your records will show this contract to be in effect on all orders shipped after this date.

In accordance with the terms of the contract, we are now making up an order for 3750 complete sets of controls which are to be shipped to us prior to July 1st. We expect to have this order ready for mailing the early part of next week and trust that this will be satisfactory to you.

Yours very truly,
Century Engineering Corporation
E. D. Holvenstat,
Product Manager.

E. D. Holvenstot:FD
Encl.

276 COMMISSION'S EXHIBIT NO. 79.

Copy to H. C. Carlsen, Jr.—Chicago
Copy to A. H. Lockrae

February 2, 1937

Century Engineering Corp.,
Cedar Rapids, Iowa.

Attention Mr. E. D. Holvenstot.

Gentlemen:

Thank you for your letter of January 29th, to which you attached the accepted 1937 price agreement. This has now been executed by our Mr. Buckland and we are returning your copy to you.

Thank you for your advice concerning the order for 3750 sets of controls to be shipped prior to July 1st in accordance with the contract. We shall be pleased to receive this so that we can make plans to schedule our production to meet the shipping dates you specify.

Thank you for acceptance of our 1937 contract, and trust that we can continue to merit your confidence.

Very truly yours,
Minneapolis-Honeywell Regulator Co.,
C. E. Swanson—Original Equipment Div.

CES:AH

H. C. Carlsen:

Henry, at the request of Ken, I am sending down a copy of the Century contract for your information. You will undoubtedly receive this within a day or two.

277 COMMISSION'S EXHIBIT NO. 80.

January 5, 1939.

Mr. E. J. Lattner, Pres.,
Century Engineering Corp.,
Cedar Rapids, Iowa.

Dear Jack:

The way things are shaping up, I expect to be in Cedar Rapids about Thursday of the coming week. We have our plans all worked out for 1939, and I hope I will be able to give you all the answers.

Incidentally, the Order Department tells me that they received an order for 200 or 300 devices from you today—for which we thank you—and I am requesting that these be invoiced in accordance with our new 1939 prices. I will give you the rest of the story when I see you.

Kindest regards.

Yours very truly,

Minneapolis-Honeywell Regulator Co.
A. H. Lockrae
Asst. Mgr. of Sales, Original Equipment Division.

AHL:NLA

278 COMMISSION'S EXHIBIT NO. 81.

CC to C. M. Swanson—with executed blue copy of contract Minneapolis

Miss M. McNutt—This is Class IV Oil contract, signed January 23d, 1940

Chicago File
Kansas City Office
Omaha Office.

Century Engineering Corporation,
213—4th Avenue S.
Cedar Rapids, Iowa.

Attention—Mr. E. J. Lattner, President.

Gentlemen:

Mr. C. M. Swanson has asked me to execute the attached copy of your contract covering temperature controls for the current year.

We sincerely appreciate your confidence in signing this contract, and look forward with pleasure to cooperating with you in your merchandising plans.

Your business during the past year has been very much appreciated, and may we take this opportunity to wish you a most successful and profitable operation during 1940.

Yours very truly,

Minneapolis-Honeywell Regulator Company,
Chas. L. Saunders,
Vice President.

1/31/40

279 COMMISSION'S EXHIBIT, NO. 82.

September 22, 1941

Mr. E. J. Lattner, President
Century Engineering Corporation
Cedar Rapids, Iowa

Dear Jack:

Have we made some enemies in your organization, or gotten our foot off base in some manner? I ask this because of reports we have received pretty generally to the effect that your organization is pushing our competitors' controls wherever possible—and as an instance of this, I quote a report from one of our men:

"Century want him to use Penn controls. Told him they have had a lot trouble with M-H and had to return over 200 sets to us. Mr. Swanson has had no trouble with M-H and refuses to accept Penn, so Century shipped him five burners without controls, and told him he would have to wait for the M-H controls.

"He needs these controls and asked me if we had controls in stock at New York. I explained that manufacturers' prices were f. o. b. factory and that there was an extra charge for branch pick up. He said he would call Century in New York and demand M-H controls and said he would pay the extra cost."

I would certainly appreciate your comments—and with best regards, we are

Yours very truly,
Minneapolis-Honeywell Regulator Company,
A. H. Lockrae,
Manager of Sales Heating Controls Division.

AHL aco
cc Henry Carlson, Jr.

280 COMMISSION'S EXHIBIT NO. 83.

(Letterhead of Century Engineering Corporation of Cedar Rapids, Iowa.)

Minneapolis Honeywell Regulator Co.
Minneapolis, Minnesota

Attention Mr. Lockrae

Gentlemen:

The writer did not answer your letter of September 20 until I had an opportunity to investigate and determine just what was taking place.

I am unable to find that this actually happened, and the information you received must have been somewhat inflated.

In any event, I explained this to Mr. Carlson when he was here, and he will probably tell you the story.

Very truly yours,

Century Engineering Corporation,
E. J. Lattner (G. L.)
President.

E. J. Lattner:CL

281 COMMISSION'S EXHIBIT NO. 84-A.

Name	1937	1938	1939
Automatic Burner Corp.			
Therm.	5465	2071	3526
Limit	6449	2105	4345
Primary	5466	2214	3568
Misc.	276	179	100
Century Engineering			
Therm.	4516	1921	3301
Limit	5171	2460	3590
Primary	4307	2109	3389
Misc.	625	182	204
Cleveland Steel Products			
Therm.	1164	1031	3111
Limit	1718	573	2752
Primary	1292	951	2985
Misc.	8	19	4
De Soto			
Therm.		79	560
Limit		111	686
Primary		76	537
Misc.			8
Electrol, Inc.			
Therm.	126	79	783
Limit	2776	133	936
Primary	15	216	477
Misc.	123	34	86
Gar Wood Industries			
Therm.	2340	1475	1661
Limit	2415	747	1972
Primary	2619	1236	1620
Misc.	191	104	198

282 COMMISSION'S EXHIBIT NO. 84-B.

Name	1937	1938	1939
General Oil Burner			
Therm.	881	747	774
Limit	1002	783	786
Primary	714	605	616
Misc.	91	109	89
General Oil Heating			
Therm.	417	205	412
Limit	609	245	729
Primary	406	231	350
Misc.	37	6	48
Gould Oil Burner Corp.			
Therm.	1440	626	885
Limit	2088	910	1431
Primary	1293	687	867
Misc.	208	33	63
Hall-Neal Furnace Co.			
Therm.			
Limit			
Primary			
Misc.			
Hart Oil			
Therm.	3664	1686	1525
Limit	4183	1202	1494
Primary	3835	1850	1611
Misc.	11	16	26
Herco Oil Burner			
Therm.	698	281	1421
Limit	942	315	1686
Primary	580	286	1084
Misc.	53	50	78

283 COMMISSION'S EXHIBIT NO. 84-C.

Name	1937	1938	1939
Malleable Iron Fittings			
Therm.	1258	555	926
Limit	1711	744	1235
Primary	1086	730	791
Misc.	57	45	230
Micro-Wesco Inc.			
Therm.	2136	115	838
Limit	2259	400	1011
Primary	2061	230	1184
Misc.	27	8	56
Penn Boiler & Burner Co. (Formerly Burner Parts & Service)			
Therm.	194	55	11
Limit	267	57	4
Primary	138	55	10
Misc.	59	6	12
Petroleum Heat & Power			
Therm.	8965	5226	6316
Limit	11942	6273	9351
Primary	10456	5357	8905
Misc.	1336	1092	1548
Quiet Heat Mfg. Corp.			
Therm.	7975	10744	15994
Limit	12369	18039	21979
Primary	7141	9670	15090
Misc.	99	382	527

284 COMMISSION'S EXHIBIT NO. 84-D.

Name	1937	1938	1939
Timken			
Therm.	11034	6979	7484
Limit	9172	1944	850
Primary	9894	6136	8323
Misc.	505	255	–1
Volcano			
Therm.	597	1106	1018
Limit	1062	1580	2147
Primary	454	985	1003
Misc.	67	123	139
Wayne Oil Burner			
Therm.	1440	562	639
Limit	1711	651	517
Primary	1656	646	547
Misc.	13	18	23
Williams Oil-O-Matic			
Therm.	946	368	2347
Limit	483	219	1135
Primary	1533	497	2695
Misc.	296	52	188
Wisconsin O. B. Co.			
Therm.	241	345	357
Limit	146	422	458
Primary	229	321	330
Misc.	20	47	44

285 COMMISSION'S EXHIBIT NO. 85.

(Letterhead of Timken Silent Automatic Division of Detroit, Michigan.)

May 19, 1936

Minneapolis-Honeywell Regulator Company
Minneapolis, Minnesota

Attention—Mr. J. W. Pauling

Dear John:

We have a deal on to supply burners to L. J. Mueller Furnace Company and are up against a proposition on which you can give us some help.

They are anxious to supply their own controls—first, because they feel they will not be penalized on price, and, second, because their direct purchase of controls will probably put them in a lower price bracket for the year and favorably affect costs on all of the controls they buy from you.

They wish to use your R-126 primary control, and if it is not inconsistent with your policy I would appreciate advice as to the prices you are charging them, the price you would recommend we charge them, and whether you would be willing to give them credit on their quantity purchase arrangements for controls bought through us.

Appreciating your cooperation, I am

Cordially yours,
T. A. Crawford,
General Sales Manager.

TAC:ML

(Pencil notation: T11. Thermostats 4.50. 4th 12.00. 3rd Bracket 12.30. Timken price 9.15.)

286 COMMISSION'S EXHIBIT NO. 86.

May 22, 1936.

Timken Silent Automatic Division,
Timken-Detroit Axle Company,
Detroit, Michigan.

Att. T. A. Crawford, General Sales Mgr.

Dear Al:

Replying to yours of the 19th. We see no reason why you cannot sell L. J. Mueller Furnace Co. their controls if the difference between your prices and the prices we charge them justifies.

Our contract with Mueller is somewhat unusual. As you know, Mueller have been buying gas equipment from us for a number of years and we have been selling them in what we call our 4th bracket, which entitles them to a price of $4.50 on Thermostats. On oil burner controls we have given them prices in our 3rd bracket, exclusive of the Thermostat, as that is a unit they use with the gas equipment and it would be rather difficult for us to discriminate and charge them a higher price for Thermostats on their oil burners. Our price to them on the R124 primary control in 3rd bracket is $12.30. As you know we have not been able as yet to make delivery of this unit and until such time as we can make delivery are giving the manufacturers the benefit of the R124 price on the R126 unit.

Mueller feel that they will be able to reach the 4th bracket prices on primary controls this year in the oil burner line and have approached us on the basis of giving them a retroactive contract. In view of our past very satisfactory business relations with Mueller we may be obliged to do this. In that case the price on the R126 would be $12.00. Your price on the R126 is $9.15. The boiler controls and other accessories to Mueller are in the same bracket as for Timken providing they order in carton lots.

I shall be very glad to cooperate with you in swinging

this business thru your company. However, we want to be very careful and not get Mueller too conscious of a large price differential between your company and theirs as we fear a lot of pressure from this end.

Sincerely,

Minneapolis-Honeywell Regulator Co.
J. W. Pauling,
Vice President.

JWP:DR

287 ° COMMISSION'S EXHIBIT NO. 87.

(Letterhead of Timken Silent Automatic Division of Detroit, Michigan.)

January 15, 1937

Minneapolis Honeywell Regulator Company
Minneapolis, Minn.

Gentlemen:

In accordance with conversation held in our office to-day, you have agreed to extend to us the prices of the controls sold in your contract dated Dec. 2, 1936, if we comply with the following provisions:

(1) Place an order with you for 51% of our approximate annual requirements estimated at 45,000 units or, in other words, 23,000 units. Shipments of the 23,000 units to be in approximate equal monthly lots, prior to July 1, 1937.

(2) Terms: invoices 1 to 15th subject to 2% cash discount on 25th, due net and payable on 10th of following month. Invoices 16-31st, subject to 2% cash discount on 10th of following month, due net and payable on 25th next month. All shipments f. o. b. Minneapolis, Minn.

(3) Prices on the 23,000 units ordered to be shipped before July 1 to be guaranteed by you and you further agree that if during the year 1937 you reduce the prices on the units on this order to any other customers, you will credit us with this reduction on the undelivered balance.

Your Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writ-

ing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

(4) It will not be necessary to order the controls in sets.

This agreement to expire December 31, 1937.

Yours very truly,

H. C. Shafer,
Purchasing Agent.

Accepted:
J. W. Pauling.

COMMISSION'S EXHIBIT NO. 91-A.

1938 PURCHASES BY THE TIMKEN-DETROIT AXLE CO.

Minneapolis-Honey Well

Comparable Purchases from Perfex

MH No.	Name	TSA No.	Qty.	Price Each	Perfex No.	Timken No.	Qty.	Price Each
T11-A	Acratherm	A1-2598-U21	989	2.70	151-A	A2598-S19	375	2.65
T11-A	Acratherm	A1-2598-U21	5025	2.95	151-A	A2598-S19	400	2.95
T44A	Thermostats	A2598-X24	167	2.70	101-D	A2598-W23	675	2.75
					101-D	A2598-W23	100	2.80
T109-A	Da-Nite Acratherms	A1-2598-V22	811	6.35		None		
R117-A	Relays	A3550-P68	5476	9.45	5520-D	A3550-Q69	175	7.90
R117-3	Relays	A3-3550-R18	500	9.45	5520-D	A-3550-Q69	55	8.90
					5520-D	A-3550-Q69	100	9.10
R116A	Relays	A3550-F58	152	8.45	5200-D3	A-3550-M65	700	7.90
R19A	Relays	A3550-E57	166	4.30	5010-D	A3550-N66	128	2.80
L-415A	Air Control	A1615-Y25	400	3.75	400-D6	A2-1615-F58	1800	3.05
L-409A	Water Control	A1615-X24	286	2.75	500-D	A1615-E57	1955	2.50
					500-D	A1615-E57	250	2.40
L-404A	Steam Control	A1615-T46	175	2.75	700-D	A1615-D56	1900	2.50
					700-D	A1615-D56	250	2.40
L-165A	Immersion Water Control	A1615-F32	860	3.50		None		
L-416A	Immersion Water Control	A1615-V48	175	3.50	650-D	A3616-C3	730	2.50
					650-D	A3616-C3	75	2.40
L-408A	Vapor Control	A1615-S45	10	4.75	700-D10	A1-1615-G59	60	3.75
R417-3	D. C. Relay	A3550-K37	2	11.45		None		

MPG

Commission's Exhibit No. 91-A.

1847

COMMISSION'S EXHIBIT NO. 91-B.

1939 PURCHASES BY THE TIMKEN-DETROIT AXLE CO.

From Minneapolis-Honey Well					Comparable Purchases from Perfex			
MH No.	Name	TSA No.	Qty.	Price Each	Perfex No.	TSA No.	Qty.	Price
T11A	Acratherm	A1-2598-U21	6405	2.70	151-A	A2598-S19	2270	2.45
T44A	Acratherm	A2598-X24	377	2.70	101-D	A2598-W23	1400	2.60
T109A	Da-Nite Acratherm	A1-2598-V22	750	6.35		None		
T105-A	Chronotherm	A-18-1597-Q43	280	17.40	126-D	A1-2598-Y25	50	14.45
T105-A	Chronotherm (Lock Type)	A20-1597-Q43	15	18.40		None		
R117-A	Relay	A3550-P68	6800	9.45	5520-D1	A3550-S71	2042	8.55
R116-A	Relay	A2-3550-P68	300	8.45		None		
R116-A	Relay (25 Cycle)	A1-3550-R70	6	10.45		None		
R19-A	Relay	A3550-E57	10	4.30	5010-D	A3550-N66	500	3.20
					5010-D	A3550-N66	50	2.78
L415-A	Air Control	A1615-Y-25	85	3.75	400-D1	A2-1615-F-58	2550	2.80
L165-A	Imm. Water Control	A1615-F-32	200	3.25	650-A	A2-3616-C3	600	2.50
L412-A	Fan Control	A1615-U47	12	3.75	450-D7	A1-1615-J62	*325	*3.25
L416-A	Imm. Water Control	A1615-V48	50	3.25	650-D	A3616-C3	1275	2.50
L444-A	Imm. Water Control	A3616-G7	150	3.25	650-D	A3616-C3		
L170-A	Imm. Water Control	A3616-H8	250	3.25	650-A	A2-3616-C3	*	*

MPG

COMMISSION'S EXHIBIT NO. 91-C.

1940 PURCHASES BY THE TIMKEN-DETROIT AXLE CO.

From Minneapolis-Honeywell					Comparable Purchases from Perfex			
MH No.	Name	TSA No.	Qty.	Price Each	Perfex No.	TSA No.	Qty.	Price
T11	Acratherms	A1-2598-U21	470	2.70	151-A	A-2598-S-19	10517	2.45
T109A	Da-Nite Acratherm	A1-2598-V22	1025	6.35		None		
T44A	Acratherm	A-2598-X24	125	2.70	101-D	A-2598-W-23	2550	2.60
T111A	Chronotherm	A10-2598-A27	650	11.75	126-D2	A1-2598-Y-25	10	14.20
RA117A	Relay	A-3550-W75	1895	8.55	5520-D1	A-3550-S-71	10450	8.10
R116A	Relay	A2-3550-P68	45	8.45	5200-D4	A-3550-V-74	575	7.60
R116A	Relay	A1-3550-R70	6	10.45		None		
P404A	Steam Control	A-3616-M13	350	2.50	700-D	A-1615-D-56	4391	2.50
LA419B	Air Control	A-3616-K11	200	3.25	400-D6	A2-1615-F-58	2900	2.50
LA409A	Water Control	A-3616-J10	500	2.50	500-D	A-1615-E-57	5318	2.50
L170A	Imm. Water Control	A-3616-H8	400	3.25	650-A	A2-3616-C-3	350	2.50
					650-A2	A2-3616-P-16	900	2.50
L444A	Imm. Water Control	A-3616-G7	50	3.25	650-D	A-3616-C-3	825	2.50
					650-D	A-3616-P-16	1000	2.50

Commission's Exhibit No. 91-C.

COMMISSION'S EXHIBIT NO. 91-D.

1941 PURCHASES BY THE TIMKEN-DETROIT AXLE CO.

From Minneapolis-Honey Well					Comparable Purchases from Perfex			
MH No.	Name	TSA No.	Qty.	Price Each	Perfex No.	TSA No.	Qty.	Price
T11A	Acratherm	A1-2598-U21	1025	2.70	151-A	A2598-S19	17113	2.45
T109A	Da-Nite Acratherm	A1-2598-V22	1765	6.35		None		
T111A	Chromotherm	A10-2598-A27	1351	11.75	125-D	A1-2598-B28	25	9.50
RA117-A	Relay	A3550-W75	3766	8.55	5520-D1	A-3550-571	17290	8.10
RA117-A	Relay (25 cycle)	A3550-Y77	12	10.55	None			
RA116-A	Relay	A2-3550-W75	158	7.80	5200-D4	A3550-V74	822	7.60
P404-A	Steam Control	A3616-M13	1100	2.50	700-D	A1615-D56	7191	2.50
LA409-A	Water Control	A3616-J10	1100	2.50	500-D10	A3616-519	10466	2.50
LA401-A	Comb. Fan & Air Control	A3616-U21	500	5.25	475-D	A3616-E5	3375	5.25
L170-A	Imm. Water Control	A3616-H8	150	3.25	650-A	A2-3616P16	2502	2.50
L444A	Imm. Water Control	A3616-G7	700	3.25	650-D2	A3616-P16	2136	2.50

327 COMMISSION'S EXHIBIT NO. 105.

(Letterhead of Minneapolis-Honeywell Regulator Co., Minneapolis, Minn., U. S. A.)

January 20, 1937.

Cleveland Steel Products Corp.,
Cleveland, Ohio.

Att: Mr. J. L. O'Brien

Dear J. L.:

As per our phone conversation today, I am returning herewith the contract which you executed, and this has been signed by Mr. Rodgers of our Cleveland office, so everything is in order.

As I told you over the phone, the correct quantity in our 3rd bracket is 1000 sets of controls and in view of the fact you are sending us your order for this quantity I have made out the contract on that basis—and I'm sure this will meet your approval.

Now that the proper credit for the controls can be given you, I hope you can see your way clear to accepting our 4000 set proposition, and—if so please advise us and we'll be glad to get in touch with you promptly.

With kindest regards from the writer, we are

Yours most truly,
Minneapolis-Honeywell Regulator Co.,
A. H. Lockrae,
Asst. Mgr. of Sales, Original Equipment Division.

AHL:DR
Enc.

Jan 22 A.M.

328 COMMISSION'S EXHIBIT NO. 106.

(Letterhead of Minneapolis-Honeywell Regulator Co., Minneapolis, Minn.)

April 13, 1939

Cleveland Steel Products Corporation
Madison at West 74th Street
Cleveland, Ohio

Attention: Mr. W. J. Smith, Vice-President,
General Manager

Dear Bill:

I am mailing you herewith a contract as per our agreement in your office April 5th.

McGoldrick is writing you regarding delivery on the special relay which will be known as type R134A. Mac is also sending a relay to Underwriters made from temporary tools, and advises that he will leave nothing unturned to expedite production on this relay so we can start shipping them as soon as possible.

You surely know, Bill, how much I appreciate this opportunity to work with you again, and may I assure you that we here at Minneapolis are going to exert our utmost to serve you.

I thoroughly enjoyed my visit with you and J. L. last week, and left with anticipation of years of mutually pleasant and profitable business relations. The setup you have and the completeness of your line, along with your present sales policy, impresses one most favorably as to your future position in the automatic heating industry.

Again I want to thank you for your favorable decision in this matter, and assure you that I am looking forward to another visit with you in the near future.

Yours very truly,
Minneapolis-Honeywell Regulator Company,
J. W. Pauling,
Vice-President.

mko
Apr 17 A.M.

329 COMMISSION'S EXHIBT NO. 107-A.

(Notation on margin) File copy—C letter to Mr. Pauling 4/18/39 cc—submitted to J. T.—

April 18, 1939
Dict. April 17

Mr. W. J. McGoldrick, Chief Engineer
Minneapolis-Honewell Regulator Co.
Minneapolis, Minnesota

Dear Mac:

I know that John is out-of-town so I am sending the letter addressed to him to you so that you can give it to him immediately upon his return or, if that will be too long a time to wait, to the proper authority upon whom this decision rests.

Kindest personal regards.

Yours very truly,

W. J. Smith,
Vice-President and Gen. Mgr., Cleveland Steel Products Corp.

WJS:AS
enc.

330 COMMISSION'S EXHIBIT NO. 107-B.

April 18, 1939
Dict. April 17

Mr. J. W. Pauling, Vice-President
Minneapolis-Honeywell Regulator Co.
Minneapolis, Minnesota

Dear John:

I acknowledge your letter of April 13th along with copy of contract sent for our signature.

It is needless to say that we appreciate very much your very fine expressions of satisfaction because we have decided to place our business with your good company and we also appreciate your expressions of desire to co-operate to your fullest extent.

In checking the contract, however, I wish to call to your

attention some errors which have occurred, apparently due to the speed we were making in order to help you make your plane. We have a habit here of keeping an absolute record of all conferences when they start to deal with prices or contracts and Mr. O'Brien during our conversation made his usual record of our discussions of price. His record tallied exactly with mine and we, therefore, followed our usual custom and put it in typewritten form.

The price of the thermostats is correct, the prices on the various protectorelays are correct, including the new R134A relay, which is the constant ignition non-recycling special job built for us, however, on our limit switches we were to receive a price of $2.65 each with an order of 500 of them, which order was promptly given to Mr. McGoldrick as you were forced to leave on account of the departure time of your plane.

Your contract does not include the price of the special line voltage relay which is to be used on our hot water heater. The price you agreed on for that item was $6.70. We have that notation and both Mr. O'Brien and the writer very definitely remember you and Mr. McGoldrick discussing it and saying that you could very easily do it. This is the relay that we understand will be hurried along as soon as possible.

In order to further clarify the situation, you will probably remember that our price of the three pieces came out exactly $14.05 per set and when one of our clerks was writing up the order, you will remember, I was standing in the doorway of my office and suggested that perhaps we could make it an even $14.00 and you said, "no", it had to be $14.05. So, that proves our contention of the price of $8.45 for the protectorelay, $2.65 for the limit switch and $2.95 for the thermostat, the total of which is $14.05.

331

Will you, therefore, kindly have new contracts made up and include also the $6.70 line voltage constant ignition relay that we will use on our little rotary burner in our hot water heater? Then our understanding and contract will coincide and no further discussion about prices would be necessary in regards to your last visit.

You understand, of course, that we have gone with you paying a higher price, in fact, considerably higher, but with our eyes turned to the future because of your assurance that our prices beginning with 1940 will be the equal of the

lowest prices quoted in the Oil Burner Industry and, in return for this, we anticipate giving you our business 100% and doing all within our power to greatly increase our volume of business with you as a whole.

Yours very truly,
Cleveland Steel Products Corporation,
W. J. Smith,
Vice-President and General Manager.

WJS:AS

332 COMMISSION'S EXHIBIT NO. 108.

(Letterhead of Minneapolis-Honeywell Regulator Company, Minneapolis, Minn.)

April 24, 1939.

Mr. W. J. Smith, Vice-Pres. & Gen. Mgr.,
Cleveland Steel Products Corp.,
Madison at W. 74th St.,
Cleveland, Ohio.

Dear Bill:

Sorry a delay occurred in replying to your letter of April 18th—but John, Mac, and I were all at a New York meeting, and I was the first to return.

I have carefully read your letter of April 18th, and while we would be glad to type up another contract for you, under the circumstances I don't believe it will be necessary, for you can take this letter as authority for confirmation of the prices omitted from the contract.

The price on the set of controls including the R134A as shown on the contract is $14.15 per set—but as John told you, the standard L404 Pressuretrol, L409 Surface Aquastat, or L419 Airstat is reduced to $2.65 net when orders for each type are placed in lots of 500. Deliveries against the 500 orders for each type can be taken out to suit your convenience. The 10¢ reduction in limit control prices thus obtained brings the set price down to $14.05, as per your understanding.

The line voltage stack control for use with your hot water heater will be $6.75 net, as John quoted. This device was not shown on the contract because we had not assigned a type number—as a matter of fact, it will probably be a few days yet before the new type number is set up.

In other words, Bill, the above data confirms your understanding of the prices, and you may consider this letter as a part of your contract if you so desire. The information contained herein is being passed on to our Order Department so that their pricing records will be in accord.

We certainly do appreciate your decision with reference to our controls, and I can most certainly assure you that we will be glad to extend our cooperation in every possible way. I thought perhaps J.L. or you would be in New York so that I could express my appreciation in person—but I'll do it the next time I am in Cleveland, and I hope that will be soon.

Kindest personal regards,

Yours very truly,
Minneapolis-Honeywell Regulator Co.,
A. H. Lockrae,
Asst. Mgr. of Sales, Original Equipment Division.

AHL:NLA
Apr 26 A.M.

333 COMMISSION'S EXHIBIT NO. 109-A.

May 1, 1939
Dict. April 28

Harold W. Sweatt
Minneapolis-Honeywell Regulator Co.
Minneapolis, Minnesota

My dear Harold:

Thank you for your very kind letter of the 21st. We were pleased to receive your fine expressions.

We want to advise you, too, that we think the world of Bill McGoldrick. In my estimation, you were most fortunate when you took him in your organization and the longer he is with you, I am sure, the more important he will become to you.

We will be most happy to see you any time you are coming through our town.

Kindest personal regards.

Sincerely yours,
W. J. Smith,
Vice-President & Gen. Mgr., Cleveland Steel Products Corp.

WJS:AW

334 COMMISSION'S EXHIBIT NO. 109-B.

(Letterhead of Minneapolis-Honeywell Regulator Co., Minneapolis, Minn.)

April 21, 1939.

Personal
Mr. W. J. Smith,
Cleveland Steel Products Corporation,
Madison at W. 74th Street,
Cleveland, Ohio.

Dear Bill:—

When I returned to the office, after having been South and East for a couple of weeks, I was very happy indeed to hear that your good company was going to standardize on M-H controls during the coming year.

This was one of the best pieces of news that I have had in a long time, and I wanted to drop you this personal note to tell you how much I appreciate the consideration that you and your associates have given to John, Lock and Bill McGoldrick.

I sincerely hope that this year may be one of the best for you.

I had hoped that I might see you in New York this week at the time of the meetings there. I expect my path will be bringing me through Cleveland before long, and I am looking forward to a visit with you.

Sincerely yours,

Harold.

H.W.Sweatt
JT

Apr 24 A.M.

336 COMMISSION'S EXHIBIT NO. 110-B.

(Letterhead of Minneapolis-Honeywell Regulator Company, Minneapolis, Minn.)

April 11, 1939.

Cleveland Steel Products Corp.,
Madison at W. 74th Street,
Cleveland, Ohio

Att: Mr. W. J. Smith, Vice-Pres. & Gen. Mgr.

Dear W. J.:

Thanks very much for your communication of April 7th. I must apologize for not writing you before this to thank you for the very kind reception you gave us while at your plant last week.

Bill, I want you to know that everyone here in Minneapolis is extremely happy in having Cleveland Steel Products come so wholeheartedly with us, and you may be assured that we will do everything possible in our power to make and keep you happy in this connection, and now that we are together, it is my personal hope that you will get behind us and give us a little boost wherever you have the opportunity.

No doubt, it will take a little time for us to get squared around where we are meeting your requirements with the promptness that we hope to attain, and ask that you bear with us during this period.

Drawings were completed today and tooling started for your special relay, which will be known as the R134A, and we expect production parts to be available one week from today, which means that we should be able to start shipping within two weeks.

For your information, we are jumping the gun as far as Underwriters are concerned, and are sending them a relay made from temporary tools in the Model Shop for their examination and approval, so you see everything is being done to facilitate putting your program into effect with the least possible delay.

Enclosed are sample nameplates and prints, showing the dimensions of our standard aquastat nameplate, and the size nameplate that we will use on your special line voltage hot water stack control, which will serve as a guide for your design. You will note that our part #8962 has the lettering running the short way of the plate, but in your application it will be necessary for the lettering to run the long way on the 2" dimension.

337 COMMISSION'S EXHIBIT NO. 110-C.

April 13 P. M.

Referring now specifically to your communication of the 7th, I shall be very happy to receive the electric fence timer, and will let you have a report after it has been put into operation.

With reference to the transformer relay combination and monkey control, as you call it, with a cold contact, parts are now being prepared, and these will get to you with the least possible delay.

I am afraid that you misunderstood us on the new chronotherm clock thermostat, as sample models on this will not be ready until early fall, and we shall be very happy to see that you receive one as soon as they are ready. It is just possible that you confused this with the item of a new chronotherm to replace the defective one you now have in your office, and for your information, one is going forward to you tomorrow which has been check tested, together with two additional heaters which may, or may not, help you out on this particular installation. This chronotherm is being billed to you on a "will credit" basis, and full credit will be allowed when the one you now have has been returned to us.

I certainly shall not forget you on the mercury switches, and it is my opinion that we may have a few of these available by early fall.

So far I have been entirely faithful in the use of the razor, and shall continue to be so until either I lick it or it licks me. However, I shall give you a further report from time to time on my progress in this direction.

I again want to assure you that if at any time we here in Minneapolis can be of any service to you on any of your control problems, we shall welcome the opportunity of working with you.

Sincerely yours,

Minneapolis-Honeywell Regulator Co.,

W. J. McGoldrick,

Chief Engineer of Product.

WJM-AS
Ene.

Apr 13 P.M.

340 COMMISSION'S EXHIBIT NO. 111.

June 26, 1939.

Mr. A. H. Lockrae,
Asst. Mgr. of Sales
Original Equipment Division
Minneapolis-Honeywell Regulator Co.
Minneapolis, Minn.

Dear Mr. Lockrae:

Kindly pardon my delay in replying to yours of the 9th but I have been away and just recently returned.

I am terribly sorry to hear about Mac being in the hospital and I sincerely hope that you will be able to tell me that he is completely out of danger and that his trouble has been corrected. Give him my very best regards and if he is going to be confined to a hospital any length of time let me have his address.

In regards to the Domestic Hot Water Lockswitch, until we get worked out a better mounting than you have and some kind of a flange or other idea to fit it to our jacket we will have to continue using Perfex.

I dislike saying this because since we have gone to the controls 100% for the future we perhaps do not set so well with Perfex and, then again, we want to standardize on controls and prefer to use yours for that reason.

We are deciding on a color for a new stamped name plate for our water heaters and air conditioners so perhaps it would be better for us to wait for such a time as we have it developed and then we can make up separate plates for trial on your controls.

It was my understanding that you would supply the plates with our name on them, including a little decal, on the thermostat without any additional charge.

We will endeavor to settle this question as promptly as possible, but in bringing out two or three new burners and a line of new air conditioners in addition to our changes in the water heater we have been kept busy beyond the point of endurance and I hope you will bear with us until we are able to get to this name plate item.

Kindest personal regards.

Yours very truly,
Cleveland Steel Products Corporation,
W. J. Smith,
Vice-President & General Mgr.

WJS:AS

341 COMMISSION'S EXHIBIT NO. 112-A.

Aug. 9, 1939.

Mr. A. H. Lockrae
Minneapolis Honeywell Regulator Co.,
Minneapolis, Minn.

Dear Lock:

On July 20 you wrote me about your contact with Boulevard Oil Burner Company. Since then we have received an order from them for 25 burners which they accepted with your controls, but I would keep your man in touch with these people because he told Mercoid the same thing, namely, that all his burners would come with their controls. I would like to have you keep this confidential because I don't want to become involved, but there has been no order for a carload of burners from him, only the 25. I imagine he will split his control business unless you can keep your man contacting him regularly.

Yours very truly,
Cleveland Steel Products Corporation,
W. J. Smith,
Vice President and General Manager.

WJS:EP

342 COMMISSION'S EXHIBIT NO. 112-B.

(Letterhead of Minneapolis-Honeywell Regulator Company, Minneapolis, Minn.)

July 20, 1939.

Mr. W. J. Smith, Vice-Pres. & Gen. Mgr.,
Cleveland Steel Products Corp.,
Madison at W. 74th St.,
Cleveland, Ohio.

Dear Bill:

When I left your office the other day I immediately wrote a letter to our New York office with reference to Boulevard Oil Burner Co.—and if the information I have just received is correct, then your efforts and ours are bearing fruit.

I have just received a letter from Arnold Michelson in

New York wherein he states that he has been in contact with Mack Holden; during the visit he was advised that Mack had ordered out a carload of burners and boiler-burner-units and that M-H controls had been specified throughout.

I don't know whether Holden would order this carload direct from you, or through Westinghouse—but I assume that you do have some means whereby you could check on the carload and determine if our controls were specified as Holden stated, if you care to do so.

Michelson advised that Mack told him unequivocally, and said he would prove it if we wanted him to, that all the controls in the carload were ours.

Best regards.

Yours very truly,
Minneapolis-Honeywell Regulator Co.,
A. H. Lockrae,
Asst. Mgr. of Sales, Original Equipment Division.

AHL:NLA

July 24 A. M.

343 COMMISSION'S EXHIBIT NO. 113.

September 1, 1939.

Mr. W. J. McGoldrick
Minneapolis-Honeywell Regulator Co.
Minneapolis, Minn.

Dear Mac:

I am writing you because I am afraid Mr. Lockrae may be away and I have to have an answer here by Tuesday morning, September 5th.

When we decided to take on Minneapolis-Honeywell controls as standard equipment throughout our complete line we arrived at a price of $14.05, net, for a set of three controls. These are, of course, the constant ignition controls.

Previous to our price reduction there was not a tremendous difference between the intermittent and constant ignition relay prices and we have sold them to our jobbers and Westinghouse at very little difference in price.

We have a few dealers who demand intermittent ignition and Westinghouse are now closing a large account that demands it and they are asking us for this relay at the same price as the constant ignition.

We have endeavored to explain to them that it cannot be

done but in checking our prices we find that there is a difference of $1.80 between our cost of the constant ignition job as compared to the intermittent and this is entirely too much for us to try to get Westinghouse to pay. It might even hinder them getting this large account.

I am not trying to get you down on your prices, but perhaps we did not get a good enough deal on intermittent ignition.

I have to call Springfield, Mass., Tuesday so would you please wire me immediately if there can be any change made in that price, bearing in mind that they demand it from us at exactly the same price as the constant ignition? An immediate reply will be greatly appreciated.

Yours very truly,
W. J. Smith,
Vice-Pres. & Gen. Mgr.
Cleveland Steel Products Corporation.

WJS:AS

344 COMMISSION'S EXHIBIT NO. 114-A.

(Letterhead of Minneapolis-Honeywell Regulator Company, Minneapolis, Minn.)

September 5, 1939.

Mr. W. J. Smith, Vice-Pres. & Gen. Mgr.,
Cleveland Steel Products Corp.,
Cleveland, Ohio.

Dear Bill:

We are awfully sorry it was necessary to wire that we could not revise price on the intermittent ignition control.

We held session on this subject for at least an hour and a half this afternoon, and it all boiled down to the fact that if we made a concession to you we would have to make a comparable concession to others involving an amount that just isn't possible—especially in view of the condition we are already facing in the cost of raw materials and what may happen in the labor market.

Kindest regards—and again I regret we could not find a way out for you.

Yours very truly,
Minneapolis-Honeywell Regulator Co.,
A. H. Lockrae,
Asst. Mgr. of Sales, Original Equipment Division.

AHL:NLA

345 COMMISSION'S EXHIBIT NO. 114-B.

(Western Union Telegram.)

September 5, 1939.

Mr. W. J. Smith, Vice-Pres.,
Cleveland Steel Products Corp.
Cleveland, Ohio

Retel first. Regret extremely that we cannot change price on intermittent ignition control. Writing.

A. H. Lockrae
Minneapolis-Honeywell Regulator Co.

Outgoing
Confirmation Copy

Paid St.W.
Collect AHL:NLA
Time 3:10

346 COMMISSION'S EXHIBIT NO. 115.

(Western Union Telegram.)

HE 3 14 SER-WUX Minneapolis Minn Sep 5 325P

W J Smith, Vice Pres—Cleveland Steel Products Corp.

Retel First. Regret Extremely That We Cannot Change Price On Intermittent Ignition Control. Writing—

Minneapolis Honeywell Reg Co Lockre.

Sep 6 814 A.M.

347 COMMISSION'S EXHIBIT NO. 116-A.

Nov. 19, 1940.

Minneapolis Honeywell Regulator Co.,
Minneapolis
Minn.

Attention Mr. A. H. Lockrae

Dear Lock:

Answering your letter of Nov. 13th, regarding the matter of quoting control prices to Westinghouse. It is to be expected that Westinghouse will want you to quote them prices and we cannot expect you to jeopardize your position because of us and I, therefore, expect that you should quote them whatever prices they may be entitled to on the basis of their volume, company standing or whatever may be the basis upon which you would quote them, assuming that we were not in the picture at all.

For your private information I will tell you that their volume will run this year, approximately 1500 burners. A big percentage of which were equipped with M.H. controls. We have, up to the advent of the new RA series controls given them a price of ten percent over our costs and we believe that they have always agreed that was a very fair basis considering that we had the handling and that a very considerable part of their shipments are single units. We have not given them the benefit of the reduction on the new RA series because they have insisted upon our shipping the old R series to several of their customers and knowing their feeling toward a non-recycling control I thought it best not to give them the idea that this new control was a cheaper control until we got over the problems that have confronted us at the start with this control. However, I do expect to give them the same basis on this new control in our set-up for next year and I feel that is the best we can do. I would like to continue handling their controls and feel quite strongly that it is much more satisfactory to handle the controls right with the burners and that they will want to continue doing so as long as they are having their burners shipped direct from some outside manufacturer to their customers.

Again I want to say that we do not expect you to jeopard-

ize the use of your controls while trying to work with us so you go ahead and quote them whatever prices you feel they are entitled to and we will try to work out our problem with them so that every body will be happy.

Kindest regards.

Yours very truly,

J. L. O'Brien.

348 COMMISSION'S EXHIBIT NO. 116-B.

(Letterhead of Minneapolis-Honeywell Regulator Company, Minneapolis, Minn.)

Nov. 13, 1940.

Mr. J. L. O'Brien, Toridheet Div.,
Cleveland Steel Products Corp.,
Cleveland, Ohio.

Dear J. L.:

We have just had a letter from our Boston office, and they point out that it won't be long before we should be in a position to name Westinghouse Electric Manufacturing Co. prices on our controls. They state that our competitors have already quoted, and you undoubtedly know what all the "shooting" is about.

We do not want to do anything at all that would interfere with your interests or profit on controls you have been shipping Westinghouse, but from the information we have gotten, Westinghouse is going to insist that we name prices, and we would like to be as consistent as possible and yet not lose this business to competition. I know the prices you were extending Westinghouse a couple of years ago, but I don't know the prices you are giving them on our controls at the moment. This information would be extremely helpful—and many thanks.

Kindest personal regards.

Yours v y truly,

Minneapolis-Honeywell Regulator Co.,
A. H. Lockrae,
Asst. Mgr. of Sales, Originat Equipment Division.

AHL:NLA

Nov 15

349 COMMISSION'S EXHIBIT NO. 117.

(Letterhead of Minneapolis-Honeywell Regulator Company, Minneapolis, Minn.)

November 22, 1940.

Mr. J. L. O'Brien, Toridheet Div.,
Cleveland Steel Products Corp.,
Madison at W. 74th St.,
Cleveland, Ohio.

Dear J. L.:

Thank you very much for your letter of November 19th, and we will be very glad to let you know how the Westinghouse situation progresses.

With kindest personal regards, we are

Yours very truly,
Minneapolis-Honeywell Regulator Co.,
A. H. Lockrae,
Asst. Mgr. of Sales, Original Equipment Division.

AHL:NLA

Nov 25

350 COMMISSION'S EXHIBIT NO. 118-A.

March 5, 1942.

Mr. J. W. Pauling
Minneapolis-Honeywell Regulator Co.,
Minneapolis, Minn.

Dear John:

Bill has given me your letter of February 25, which has reference to a recent price reduction which your company has voluntarily put into effect at the suggestion of OPA. Also, in reference to the necessity of priorities on all future shipments.

We were not particularly disturbed by the price increase and felt that if the increase was justified and everybody had to pay it, we were quite willing to do so. However, we are very glad to get the controls at the lower price if your company feel that they are in position to furnish them on that basis.

Regarding the priority situation, I will say that this has put us in a rather tough spot. We do not have any appreciable amount of business carrying priorities because of the nature of the particular job or sale. The only priorities we have been able to get covering any appreciable volume of business were priorities which we got from OPM on the basis of inventory adjustment, and the priorities given us there were limited to the month of March. Because of the fact that we were badly pinched for controls, I will tell you that we have bought some controls and are buying some more of another make—not because we wanted to and I want to tell you that we still want to standardize on Minneapolis-Honeywell controls and will do so just as far as it is possible for us to do so. We will make every effort to get priorities and do what ever else may be indicated to get as many M-H controls as possible.

There is no suggestion of a criticism of your policy in this matter of requiring priorities from us as we understand your situation and realize that you have no other course to follow. We will be very glad to see you any time you are in this neighborhood.

My kindest regards.

Yours very truly,
Cleveland Steel Products Corporation,
J. L. O'Brien,
Toridheet Division.

JLO:EP

351 COMMISSION'S EXHIBIT NO. 118-B.

(Letterhead Minneapolis-Honeywell Regulator Company.)
(Minneapolis, Minn.)

February 25, 1942

Mr. W. J. Smith
c/o Cleveland Steel Products Corp.
Madison at W. 74th St.
Cleveland, Ohio

Dear Bill:

I am writing you personally as a general letter sent to our customers last week may not have come to your attention. The letter announced that on February 19, we were reducing our prices to those in effect last fall.

This price reduction was requested from the Office of Price Administration. It was not a formal order for ruling. We had no hesitancy in doing this on a voluntary basis though our increased cost of both labor and material did not justify this reduction. We were willing to cooperate with the Government in its efforts to avoid inflation and changed our prices within forty-eight hours after their request was received.

Some time ago when we were requested by the Priorities Division of OPM to limit our shipments of controls to orders carrying Preference Ratings of A-10 or better, we did so; and though it was apparent our company was being penalized, as in the case of this price reduction, our action was questioned by a few of our customers. Most of these, however, have now come to realize the soundness of our decision, and I am sure that in the long run, these policies will prove sound from your standpoint as well as ours.

More changes affecting you and us are likely to follow. Certain services which are normally expected of us are bound to be curtailed.

I shall continue to call on you frequently for a personal discussion of our mutual problems, and I am sure with your continued cooperation, we will be able to render our services in a better degree than you could expect from other sources.

Kind regards.

Sincerely yours,

Minneapolis-Honeywell Regulator Co.

John

J. W. Pauling—*Vice President*

JWP aeo

352 COMMISSION'S EXHIBIT NO. 119.

(Letterhead of The Mercoid Corporation.)
(Chicago, U. S. A.)

March 29, 1939

Mr. J. L. O'Brien
Cleveland Steel Products Corporation
Toridheet Division
Madison at W. 74th Street
Cleveland, Ohio

Dear J. L.:

Your favor of the 24th enclosing signed copies of contract is greatly appreciated, and we are returning herewith, the original with our acceptance signature.

We hope that you are right and that we may look forward to receiving a considerable portion of your control business during the present year.

Shall get in touch with Mr. Fisher and have him follow Mr. Hildreth with an idea of getting a definite commitment for 1,000 Sensatherms, so that we may go ahead and make these up with their name on cover.

I shall be in New York for the April 18 Oil Burner Meeting, at which time I understand the final discussion on the Bureau of Standards' Code will take place. Hope to see you at that time.

With kindest regards, remain,

Sincerely,

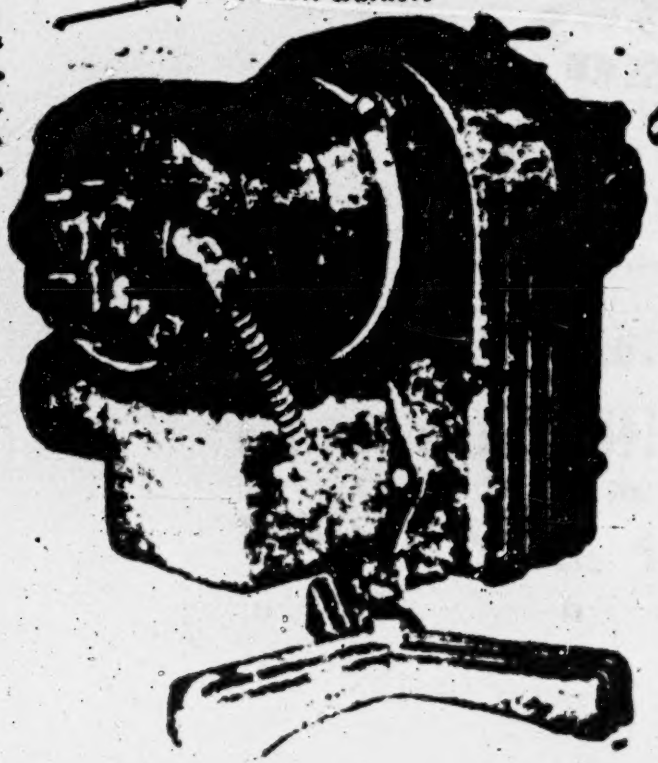
Jim

JWO:C
Encs.

P. S. Trust that we may look forward to receiving your blanket order covering at least 1,000 Sets of KMW's and Type H Sensatherms, so that we may put into effect the special net prices penned into this contract proposal.

J. W. O.

Product of the World's Largest Manufacturers of Oil Burners



Presenting

Our New 1941 Model

Gm Ex 124 9/16/43 WL

$45.00

COMPLETE WITH THREE
MINNEAPOLIS HONEYWELL CONTROLS

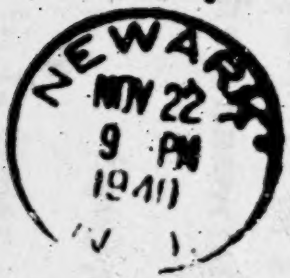
EQUIPPED WITH:
General Electric Motor, Webster Fuel Unit,
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Write for particulars immediately.
Be the sole leader in your community

QUIET-HEET MFG. CORP.
[illegible] N. J. RAILROAD AVE.
NEWARK N. J.

32

COMMISSION'S EXHIBIT NO. 124.





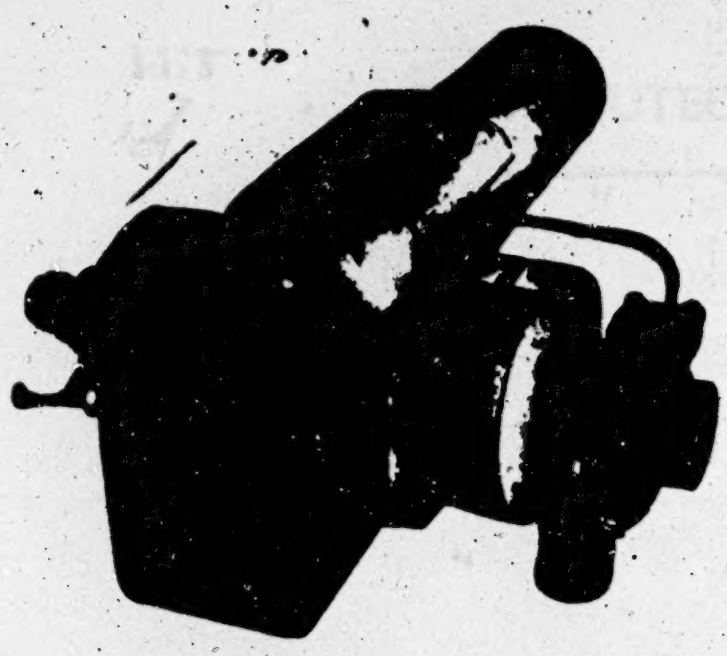
THIS SIDE OF CARD FOR ADDRESS

TOPEKA FUEL OIL CO.
528 W. RAILROAD ST.
TOPEKA, KANSAS

FEDERAL TRADE COMMISSION
DOCKET NO. 4420
EXHIBIT NO. 428
IN THE MATTER OF
DATE 9/12/45 WITNESS
HOWARD B SMITH

BY W6

428



Quiet-Heet

Model CX

A Quality Oil Burner

At

$65.00

With a Complete Set of 3 Minneapolis-Honeywell Controls

(R117—T11—L404)

(Write for our LIBERAL DISTRIBUTORS DISCOUNTS)

FEDERAL TRADE COMMISSION
DOCKET NO. 4920 EXHIBIT NO. 125
IN THE MATTER OF Minneapolis-Honeywell
DATE 7/15/53 WITNESS Peterson
BY WG

Streamlined

Balanced in design—carefully constructed—engineered for economy—built in a modern, properly equipped factory and backed by a financially responsible organization

Equipped with these quality parts:

G. E. Motor—1/6 H.P.—Precision Built

Webster Pump—Model "Q"

Webster Transformer—10,000 V.—Radio Filter

Guardian Flexible Coupling

Nichrome Steel Electrodes

Harsch Precision Nozzle

Send in your order now—Terms C.O.D.—F.O.B. Newark.

Satisfied customers have invested over $1,000,000.00 in Quiet-Heet Installations.

QUIET - HEET MFG CORP.

25 GREEN STREET NEWARK, N. J.

Mitchell 2-8430

DISTRIBUTED BY

SAVE

$40.00

Section 562 P. L. & R.

To _____

_____

_____

361 COMMISSION'S EXHIBIT NO. 132.

Minneapolis Honeywell Regulator Company.

Manufacturers' Control Contract.

Submitted December 2, 1936

Purchaser:

This agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Malleable Iron Fittings Company of Branford, Conn., hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract Season's Requirements sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

Prices on Material Shipped From Factory.

T10 or T11 Acratherm	3.80
T100 Time-O-Stat	5.45
7710 Clock Type Thermostat	19.95
T105 Heat Accelerated Chorontherm	19.50
T45 Thermostat	4.30
R121 Protectorelay (R117-3 until available)	13.30
R122 " (R116-4 " ")	11.90
R417 Lockswitch for DC	12.95
C402-1 Low Water Cutoff (L620-3 until available)	11.50
L622-1 " " " 150# pressure	13.00
L627-2 " " "	10.60

Limit Controls.

L401-3 Combination Control	6.60
P404A Pressuretrol (L404 until available)	3.35
L408 Vaporstat	5.00
L 409 Surface Aquastat	3.35
L411 Vacuumstat	5.00
L415 Airstat	4.30
L419 "	3.35
B6510 Immersion Aquastat	5.25
L416 " "	5.25

Deduct 50¢ net from the Limit Control prices for shipment of 10 or more of the same type at one time.

Purchaser's Copy.

362 The Purchaser agrees that at least ninety-five (95) percent of his control requirements consisting of Thermostats, Primary Controls and Limiting Devices will be purchased from the Company.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-...., which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15-5% unless otherwise shown on the price sheets.

363 Conditions

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f.o.b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (exception Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices from Branch Stocks

Prices shown do not include thermostat cable or fittings. Emergency shipments of equipment to the Purchaser from a Branch Office of the Company shall be billed with discounts in effect at such Branch Office.

Terms

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired

or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such
364 award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Sales Agreement

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with his products.

Prices contained in this agreement cover shipments made to the Purchaser, and the Company will add a handling charge of 10% to cover shipments that the Purchaser requests be made to his dealers. All shipments are F. O. B. factory.

Deliveries

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period.

If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Manufacturer's field men.

Period of Contract

This contract shall become effective at the accepted date, and expire on 12-31-37 unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Connecticut.

Accepted at Branford, Connecticut,
Malleable Iron Fittings Co.,
By Herbert Gillis,
Purchaser.

Dated Dec. 22, 1936.

Minneapolis-Honeywell Regulator Company,
By (Signature illegible),
Its Resident Vice President.

Dated at Boston, Mass., 12/28/36.

Salesman J. J. Feigenbaum.

COMMISSION'S EXHIBIT NO. 133.

June 8, 1937.

Minneapolis-Honeywell Reg. Co.,
801 Second Avenue,
New York.

Attention: Mr. Chapler.

Gentlemen:

As you know, there are a number of people assembling oil burners from standard parts and flooding the market at ridiculously low prices. This is detrimental to every industry connected with the oil burner industry, your own included. The ability of these firms to purchase equipment at minimum prices helps them to demoralize the oil burner industry and we believe your company should do something to curb one of their practices.

A salesman for the Quiet Heat Oil Burner Co. called on one of our dealers recently and when he could not interest him in the oil burner he wanted to know if he could not sell him the Minneapolis-Honeywell controls. He quoted $22.50 to this dealer on the Chronotherm and $5.50 on Immersion Aquastats. Undoubtedly they are offering these controls to dealers at their cost in order to get the volume and therefore the maximum discount on those they use themselves.

Allowing this practice does your company no good. It makes the legitimate manufacturer, who offers your controls to his dealer at the standard dealer price, look like a robber. If firms like this can offer controls at such prices, naturally the dealer thinks we purchase them for considerably less than that and are demanding an exorbitant profit, when as a matter of fact the prices quoted are almost if not quite at our cost.

The writer saw the memorandum of the prices quoted and if you are desirous of doing anything about it, we can give you the name and address of the dealer who has actu-
366 ally purchased some controls from the Quiet Heat Company at these prices.

We believe it is an obligation of your company to your many legitimate manufacturer customers to do everything possible to stop this practice and there is one way that this

can surely be stopped and that is—have trouble with deliveries to this type of person.

Yours very truly,
Oil Burner Division,
Malleable Iron Fittings Company,
Herbert Gillis,
Manager Sales Promotion.

HG/MJ

367 COMMISSION'S EXHIBIT NO. 134.

June 23, 1937.

Minneapolis-Honeywell Reg. Co.,
801 Second Ave.
New York.

Attention: Mr. Chapler.

Dear Mr. Chapler:

I saw the Philadelphia dealer to whom Quiet Heat Oil Burner Company had quoted prices on your controls about equal to our cost, but he informs me that he did not actually purchase any controls. He simply had the memorandum of the prices that were quoted.

I am sorry we cannot assist in getting more definite evidence but I understood your own representative in one of the larger cities actually purchased controls from this Company, which should be sufficient grounds for action.

Yours very truly,
Oil Burner Division,
Malleable Iron Fittings Co.,
Herbert Gillis,
Manager Sales Promotion.

HG/MJ

368 COMMISSION'S EXHIBIT NO. 135.

Dec. 22, 1937

Minneapolis-Honeywell Reg. Co.,
801 Second Ave.,
New York

Att: Mr. Chapler

Gentlemen:

Sometime ago, we informed you that we had heard of some oil burner manufacturers offering your controls to dealers at manufacturers' prices. Obviously, this practice would make it next to impossible for manufacturers to sell controls to their dealers at legitimate dealer prices.

You told us at the time that you had been endeavoring to get positive evidence of the practice, but had been unable to do so. The writer has just seen a postcard sent out by Westchester Home Equipment Company, offering to all and sundry, Minneapolis-Honeywell controls, specifying the various items by your model numbers, at prices which are approximately what we are paying. If you want evidence that the practice is being carried on, you should easily be able to get one of these postcards, which are printed with the prices they are offering.

We firmly believe that you owe it to your customers, who are endeavoring to do an ethical and legitimate business, to protect them from this kind of competition. Evidently, the purpose is to unload a quantity of controls at cost in order to reach a lower price bracket.

Does not your Company feel under any obligation to protect the largest proportion of your customers against this practice? If not, certainly they will not continue to feel so friendly toward you.

Yours very truly,
Oil Burner Division,
Malleable Iron Fittings Company,
Herbert Gillis,
Manager Sales Promotion.

HG/MJ

369 COMMISSION'S EXHIBIT NO. 136.

(Letterhead of
Minneapolis-Honeywell Regulator Company (Inc.)
New York City, N. Y.)

December 30, 1937.
(Dict. 12/23)

Malleable Iron Fittings Company,
Oil Burner Division,
Branford, Conn.
Attention: Mr. Herbert Gillis,

Manager Sales Promotion.

Dear Mr. Gillis:—

Thank you for your letter of December 22nd, and we do not blame you at all for being somewhat exercised due to the fact that an oil burner manufacturer sent out post cards advertising very low prices on Minneapolis-Honeywell Controls. We got ahold of this particular proposition shortly after the cards went into the field and called on the manufacturer in question, and told him that according to our contract we could not enter into a jobbing proposition with him and that if he wanted to job controls we would classify him under our jobber's discount. After going over this matter the manufacturer agreed to, and did send out cards to the same list to whom he had circularized the low prices and advised these people that there had been an error and that the prices that were sent out would not be available.

Replying to the third and fourth paragraphs of your letter, first we want to say that we are doing everything possible to maintain the agreements that are set up in our manufacturers' contract—one agreement being that the oil burner manufacturer agrees to supply our Controls only with or as a part of his burner, and that the oil burner manufacturer agrees not to do a jobbing business.

There is a great deal more to this story and we will be glad to discuss it further with you some time right after the 1st of the year, since we expect to be in Branford at that time. In the meantime, please be assured that we want to do everything possible to keep matters of this kind in line, and we believe that the above explanation as to how

we handled this particular matter that you brought up will show that it is our desire to maintain a policy which is beneficial to, as you say, the largest proportion of our customers.

Wishing you the Compliments of the Season, and looking forward to seeing you before long, we are

Very truly yours,
Minneapolis-Honeywell Regulator Company,
H. E. Chapler.

H.E.Chapler/MM

370 COMMISSION'S EXHIBIT NO. 137-A.

January 14, 1938

Mr. H. W. Sweat,
Minneapolis-Honeywell Reg. Co.,
Minneapolis, Minn.

Dear Mr. Sweat:

During the past year some very bad practices in the handling of your oil burner controls have sprung up and in order to protect the interests of your older and more dependable customers, whose patronage built up your business for you, you should take definite steps to stop these practices.

Each year we, and your other dependable manufacturer customers, sign a contract to purchase your controls. Where we resell to dealers, we agree to sell at the dealers' discounts, which you have established. We have been keeping that agreement to the letter. However, we have frequently run across cases where your controls have been offered to our dealers at exactly the price which we pay you, which indicates that the people offering those controls are selling them to dealers at their cost or are being given a concession in price, which permits them to make a profit at these prices.

This bootlegging, we might call it, is being done by a small group who have done more to demoralize the oil burner industry in the past two years than anything else that has ever occurred. The members of this group are well known to your representatives and we presume to you. We have repeatedly written to your branch offices, whose representatives contact us, and called this to their attention. The

first explanation was that they had tried in vain to procure tangible evidence that such practices were being followed. That was obviously an alibi, as your representatives in private conversation admitted knowledge of the practice and of the people following it.

We recently informed your New York office that if evidence was wanted, they had only to procure a copy of a printed postcard mailed broadcast by the Westchester Home Equipment Company, offering Minneapolis-Honeywell controls to all and sundry at exactly the same prices which appear on your contract before the writer now, awaiting signature, for 1938. This postcard had the prices printed on it, so there could be no claim for typographical error.

We believe that it is an obligation on your part to legiti-
mate oil burner manufacturers to protect their inter-
371 ests by stopping this practice, even to the extent of
refusing to sell to those who are doing it. We have always been loyal to Minneapolis-Honeywell controls, as have many other manufacturers, but your failure, or refusal to insist upon ethical business practices where you can enforce it, is causing the good will of your older patrons to rapidly dwindle, and makes them more receptive to the stories of your competitors.

From the conversations with other manufacturers, we believe that if you do nothing to remedy this condition, they will, and the resulting action will not be pleasant. It is a very live subject among manufacturers now whenever they get together and in their conversations, you can be sure that no laurels are placed on the brow of Minneapolis-Honeywell Company.

We feel that you have failed us, and will continue to feel that way unless you take some drastic action in place of the alibis that your field representatives have been giving us.

Yours very truly,

Oil Burner Division,
Malleable Iron Fittings Company,
Herbert Gillis,
Manager Sales Promotion.

BG/J

CC: Harvey-Whipple Inc., Springfield, Mass.
Hartford Office, 740 Capitol Ave.
Petroleum Heat & Power Company, Stamford, Conn.
Silent Glow Oil Burner Co., 1477 Park St., Hartford

372 COMMISSION'S EXHIBIT NO. 138.

(Letterhead of Minneapolis-Honeywell Regulator Company, Boston, Mass.)

February 24, 1938

Malleable Iron Fittings Co.
Branford, Conn.

Attention: Mr. Herbert Gillis

Gentlemen:

We are deeply appreciative of the acceptance of the 1938 control contract recently presented to you by our representative.

This has been signed by us and we are returning enclosed herewith your copy along with price list, Form SA573, covering miscellaneous controls not specifically mentioned in the contract itself.

Very truly yours,
Minneapolis-Honeywell Regulator Co.,
Per (Illegible)
M
Assistant to the Manager.

JHM:BM
Enc.

373 COMMISSION'S EXHIBIT NO. 139.

(Letterhead of
Minneapolis-Honeywell Regulator Company (Inc.)
New York City, N. Y.)

June 11, 1937.

Malleable Iron Fittings Co.,
Branford, Conn.

Attention: Mr. Herbert Gillis,
Manager Sales Promotion

Dear Mr. Gillis:—

This will acknowledge receipt of and thank you for your letter of June 8th, regarding the sale of Controls by oil burner manufacturers to dealers other than their own, and we are certainly glad to have the specific information which you have given us.

As you know, our contract with the manufacturer definitely states that the Controls which he purchases are to be used on or in conjunction with his own burners, and are not to be jobbed to dealers other than his own, at any price. We have done everything we possibly could to stop the practice which you speak of. We have limited the number of burner controls which the manufacturer can buy as regards to the number of primary controls which he buys, and in nearly every case we have been able to control this part of the proposition. We have had complaints from other good customers besides yourself but it has been terribly hard to get any real evidence that we could use to confront the manufacturer who has been accused of bootlegging. However, you state in your letter that one of your dealers has purchased Controls from the source which you speak of, and we are wondering if he would be willing to let us have the invoices on which these Controls were shipped. If you do not desire to try to get these invoices, if you will give us the name and address of your dealer we will be glad to see what we can do, because we are certainly interested in having the terms of our contract lived up to, and if you can furnish these invoices it will help us materially to do this.

We have been trying to get up to Branford to see you for some time and hope that we can make it within the next ten days. We hope that you are feeling good again and that everything is going along in good shape.

With kindest personal regards, and awaiting your reply to this letter with very much interest, we are

Very truly yours,
Minneapolis-Honeywell Regulator Co.,
H. E. Chapler,
M.M.
Eastern Factory Representative.

HEC:MM Dict.6/10

374 COMMISSION'S EXHIBIT NO. 140A.

Oct. 28, 1938.

Mr. H. W. Swett,
Minneapolis-Honeywell Regulator Co.,
Minneapolis, Minn.

Dear Sir:-

There are things happening in this control business about which you may be able to enlighten us. We think we know the answer, but may be wrong.

We understand that a 25% discount from your list is the standard trade price to a contractor or dealer. Do you stipulate that this must be the resale price?

Also, what discount is a plumbing supply jobber given beyond this?

We are no longer able to sell your controls to our dealers at the standard discount, because they can purchase them considerably cheaper than that at any number of plumbing supply jobbers. Also the plumbing supply jobber can purchase your controls at almost the price we pay you, ordering in any quantity, and not committing himself to purchase any given quantity during the year as we are required to do.

Our dealer in Waterbury, Conn., only recently purchased some of your controls (a stock order), paying $15.00 for R-117 Protectorelays and 50% off list on all other items. He was quoted 50% off on any quantity and on any standard controls.

This is not one of those rumors which reached us tenth handed, for our own representative saw the carbon copy of the order giving the prices, and we confirmed the fact that delivery was made. The order was solicited by a salesman, (not your representative), the order placed, and delivery made. We know the purchaser well, and know the name of the salesman; but do not know whom he represented. The buyer, however, believes that the controls came from Providence, Rhode Island.

In New York City area a similar condition exists. We quote from a letter just received from our New York distributor:

375 "Your letter of the 27th regarding the price of Chronotherms did not require a reply since you plainly

stated that unless we could sell these clocks at your price you prefer to have us buy them elsewhere. However, the facts are as follows: clocks are being sold by most of the plumbing supply houses at $24.00 flat, in which case they buy the burner from us without the thermostat, we allow them $4.05, and that amount deducted from $24.00 means that the clocks cost the dealers $19.95. Frankly, why should they pay $24.00 if they can buy them for $19.95?

Regarding the immersion aquastats, ... supply houses sell them for $5.50. I would like to have you tell me the answer to all this."

We cannot tell him the answer, but if anyone can you ought to be the one. Having your products kicked around bargain basement style means that competing oil burner manufacturers are able to sell to our dealers because we live up to the spirit and the letter of our contract agreement and they do not. We cannot escape the conviction that these things are happening with your knowledge.

Since anyone, even a stranger, can walk into a supply house and purchase a single control for 23% less than your standard trade price it is common knowledge that it is being done, despite the not very convincing denials of your representatives. The only way your controls can be sold at such prices at a profit is for the seller to get a preferential price.

We cannot believe that your products and your prestige are being used as darts to disable or destroy the ethical manufacturers by whom your business was built, unless you lack the desire or the ability to stop it. To attribute the condition to either will be a confession of moral or mental delinquency.

If you condone such practices then we believe you should place these manufacturers who are living up to their contract agreements with you in a position to protect the trade they have built up by placing them on an equal price basis. You owe your oldest patrons that consideration.

We believe that one or more of the fair trade practices acts passed in recent years are designed to prevent preferential buying, and consequent cut price selling, and there is a question in our mind as to whether or not one of these acts is not being violated either by your company, your bootlegging friends, or by the jobbers or dealers who take advantage of the opportunity.

If you will not or cannot do anything to protect the majority of your patrons, then we ourselves

will trace such specific cases as we hear of to their sources, submit the facts that we find to the Oil
376 Burner Institute, and endeavor to have them instruct their legal counsel to ascertain if any law is being violated. It is our belief that there is a violation of the very law behind which you hide in endeavoring to explain why you cannot do anything to correct the condition.

We are simply looking for information and advice so we can figure out some way to successfully build a business along ethical lines, and are first going to the logical place to get it. Can the contract respecting manufacturers depend upon your cooperation, and if so in just what way will it be manifested?

Do you know that your controls are being sold to jobbers and dealers at prices in some cases equal to those charged manufacturers?

Do you care whether they are or not, or would you rather have the bootleggers purchase your product and demoralize the market than to do it with someone else's?

Can you suggest any way in which a manufacturer who lives up to his agreement can protect his trade in your product against these bargain peddlers other than turning the merchandise over at cost and thus investing capital and labor for you without compensation?

Our distributors are asking us the answer and we are passing it along to you before seeking the answer elsewhere.

Any help you can give us will be appreciated.

Yours very truly,
Oil Burner Division
Malleable Iron Fittings Company
Herbert Gillis,
Manager Sales Promotion.

HG/MJ
CC: Mr. Chapler
Mr. Feigenbaum

377 COMMISSION'S EXHIBIT NO. 141.

(Letterhead Minneapolis-Honeywell Regulator Co., Minneapolis, Minn.)

November 3, 1938.

Mr. Herbert Gillis,
Manager Sales Promotion,
Malleable Iron Fittings Company,
Branford, Connecticut.

Dear Mr. Gillis:

In Mr. Sweatt's absence I am acknowledging receipt of your letter of October 28th. Upon his return to the office toward the end of next week, I am sure that Mr. Sweatt will want to reply fully to the points raised in your letter.

In the meantime, I should like to tell you that we are fully aware of these unsatisfactory conditions which you describe, and that we are planning on certain fundamental changes in our policies for next year which will go a long way, if not all the way, in clearing up these bad practices.

May I suggest that you bear with us just a little while longer as we are confident that the policy changes which we have in mind will meet with your approval when announced.

Yours very truly,
Minneapolis-Honeywell Regulator Co.,
W. L. Huff,
Vice-Pres. & Treasurer.

WLH/s

378 COMMISSION'S EXHIBIT NO. 142.

Nov. 4, 1938.

Mr. H. W. Swett,
Minneapolis-Honeywell Reg. Co.,
Minneapolis, Minn.

Dear Sir:—

With reference to our conversation of last night, the suggestions made were just new thoughts, but the more I think of them, the better I like them. I would like to amplify a little the principal suggestions made.

First, we believe it would be advantageous to make all controls which will sell to manufacturers as standard equipment for their oil burners, etc., with covers of a different design or a different color from those which you will sell through jobbers and dealers and over the counter sales.

Since you state you prefer to have the greater part of your distribution through manufacturers, and we believe this would be a great advantage to you, we suggest that you have all over the counter material of the same black color and design that you now have, and that each year some little change either in color shade or other wise be made in the original equipment sold to the manufacturers. The working parts of the controls would of course be the same, but this would encourage the purchase of controls from their manufacturers by dealers, because they could always tell from the color, or whatever other characteristics of design you decide upon, that they are getting the latest up-to-date instrument. Whereas, if the over the counter sales were always of the same design, they would never be quite sure that what they were getting was new stock. Manufacturers themselves could work out a way to capitalize on this system.

We believe that if this is adopted, that the holes in the instrument to attach the cover should be spotted a little differently also, so that the cover of one class of material could not be changed to another.

379 If this were adopted, one half of your detective work would be done as soon as you see a control, if a stray one is being traced to its source.

A second suggestion is that the price differential between the various brackets be reduced. This would take away the incentive for the bootleggers to buy more than they need,

as the profit would not be sufficient to make it attracti[illegible]. Secondly, it would reduce the temptation of the more [illegible] ethical manufacturers to sell burners to favorite customers at approximately cost in order to get sufficient volume to place them in the next lower price bracket.

Thirdly, if a test case were ever made, I do not believe that under the Robinson-Patman Act present differential would be allowed to stand.

We sincerely hope that your efforts to stop this precarious bootlegging of your controls are successful.

Yours very truly,
Oil Burner Division,
Malleable Iron Fittings Company,
Herbert Gillis,
Manager Sales Promotion.

HG/J
CC: Mr. Chapler

380 COMMISSION'S EXHIBIT NO. 143.

Minneapolis-Honeywell Regulator Company

Manufacturers' Control Contract

Purchaser: Submitted January 3, 1938.

This Agreement, entered [illegible]to between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Malleable Iron Fittings Co. of Branford, Conn., hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas, the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and of special prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract Est. at 1200 sets of the

Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

Prices on Material Shipped From Factory.

T11 Acrathem			$ 4.05
T105 Chronotherm			19.50
T109 DaNite Acratherm			8.55
R116 Protectorelay			10.90 x
R117 Protectorelay			12.25 x
R416 Lockswitch for DC only			12.90 x
R417 Lockswitch for DC only			14.25 x
	1-9	10-24	25-up
C402 Low Water Cutoff	10.30	9.80	9.25
C602 Low Water Cutoff	11.40	10.75	10.20
C622 High Press. Low Water Cutoff	12.10	11.60	10.95
C627 Low Water Cutoff	10.30	9.80	9.25

Limit Controls

L404 Pressuretrol	3.55
L408 Vaporstat	5.45
L409 Surface Aquastat	3.55
L411 Vacuumstat	5.45
L415 Airstat	4.35
L419 Airstat	3.55
L416 Immersion Aquastat	4.30
L165A Immersion Aquastat	4.30

Deduct 50¢ net from Limit Control prices for shipment of 10 or more of the same type at one time.

Purchaser's Copy

See Page 2 for Prices from Branch Stocks and C. O. D. Shipments.

x Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.

381 C. O. D. Shipments of Materials from Factory.

If the Purchaser requests C. O. D. shipment of standard devices or devices purchased at the odd model discount to his dealer from factory the Company will add a handling charge of 5%. There will be no charge for dealer shipments made on an open account basis from factory.

Prices from Branch Stocks.

All prices herein are predicated on delivery from factory, and are f. o. b. factory. The Company maintains limited stocks at its various branch offices and emergency shipments of standard equipment made the manufacturer therefrom will be invoiced at the prices shown herein, plus 5% to cover transportation, handling, warehousing, etc., but no handling charge will apply to instruments shipped at the odd model discount shown below.

C. O. D. Shipments of Materials from Branch Stocks.

If a Company branch makes a C. O. D. shipment of standard equipment to the Purchaser's dealer a charge of 10% will be made. Open account shipments will carry only the 5% charge mentioned above. Devices sold at odd model discount shipped the dealer on a C. O. D. basis will carry a 5% charge, but if shipped on an open account basis no added charge will be made.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-__, which are hereby made a part of this agreement, will be furnished at list prices stated less discount of 25-15-5% unless otherwise shown on the price sheets.

382 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f.o.b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for

110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153 and R83, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 3 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such
383 award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the

sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment of Contract and Resale Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of it, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except in conjunction with such products, and violation of this, or other conditions of this agreement gives the Company the right to immediately cancel same.

Deliveries.

It is agreed that this contract shall not be subject to cancellation except by the consent of the Company, and that serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filing orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designated in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings conducted by the Purchaser's field men.

Period of Contract.

This contract shall become effective at the accepted date, and expire on Dec. 31, 1938 unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Connecticut.

Accepted at Branford, Conn.
Malleable Iron Fittings Co.,
By Herbert Gillis,
Purchaser.

Dated Feby. 1, 1938.

Minneapolis-Honeywell Regulator Company,
By W. G. Jennings,
By C. S. Hoyt,
Its Resident Vice-President.

Dated at Boston, Mass. 2/17/38.
Salesman J. J. Feigenbaum.

384. COMMISSION'S EXHIBIT NO. 144.

(Cut)

Incorporated 1864

Malleable Iron Fittings Company
Branford, Conn.

Trade Price List

Branford Oil Burners

(Cut)

Branford Boiler Burner Units

For 74 years manufacturers of fine products for the heating trade.

385 Oil Burners and Boiler Burner Units

	Steam Capacity	Hot Water Capacity	Price
Model "F" Branford Oil Burner.....	750 sq. ft.	1200 sq. ft.	95.00
Model "A" Branford Oil Burner.....	1000 sq. ft.	1600 sq. ft.	125.00
Model "E" Branford Oil Burner.....	2500 sq. ft.	4000 sq. ft.	145.00
Model "D" Branford Oil Burner.....	7500 sq. ft.	12000 sq. ft.	225.00
No. 5 Branford Boiler Burner Unit.....	335 sq. ft.	535 sq. ft.	300.00
No. 7 Branford Boiler Burner Unit.....	500 sq. ft.	800 sq. ft.	350.00
No. 10 Branford Boiler Burner Unit.....	670 sq. ft.	1070 sq. ft.	450.00
No. 12 Branford Boiler Burner Unit.....	835 sq. ft.	1335 sq. ft.	485.00
No. 15 Branford Boiler Burner Unit.....	1000 sq. ft.	1600 sq. ft.	510.00
No. 17 Branford Boiler Burner Unit.....	1170 sq. ft.	1870 sq. ft.	535.00
All Prices F. O. B. Branford.		Prices Include 3 Controls.	

No Allowance for Piping or Pickup Is to Be Made for Boiler. Such Allowance Has Been Made in Boiler Ratings.

Boiler Burner Unit Prices Include Thermostat, Relay, Limit Control and Low Water Cut Off. Heater Coils and Aquastat for Hot Water Are Extra.

Prices on Heater Coils for Boiler Burner Units.

Tank Coils	Tankless Coils
66 Gal. — 10.00	185 Gal. (2 coils) 40.00
100 Gal. — 11.00	212 Gal. (2 coils) 45.00
120 Gal. — 15.00	240 Gal. (2 coils) 50.00
150 Gal. — 20.00	

ommission's Exhibit No. 144.

Branford Oil Burner Parts

lodel "F"	Model "A"	Model "E"	Model "D"
.00	13.00	15.00	30.00
.00	12.00	12.00	14.00
.50	9.50	9.50	9.50
.00	3.00	4.00	5.00.
8.00 (Comb.)	2.85	2.85	7.50 (Duplex)
	3.90	3.90	
	2.25	3.00	3.00
.70	.70	.90	.90
	1.00	1.00	1.00
	.60	.60	
.75	.75	.75	.75
.50	.50	.50	.50
3.85	3.85	4.15	4.50
	1.15	1.15	1.15 Ea.
	1.00	1.00	
1.00	1.00	1.00	1.00
.50	.50	.50	.50

Controls

t	T-11	6.00
	T-42-A	6.75
m	T-105	27.38
ay	R-117-4	17.25
	R-19-A	6.00
ol	L-404-A	4.50
	L-415-A	5.25
Surface)	L-409-A	4.50
	L-408-A	7.88
Immersion)	L-165-A	5.25
Cut Off (McD&M)	No. 66	12.75

Are Net F. O. B. Branford, Conn.

387 COMMISSION'S EXHIBIT NO. 145.

Minneapolis-Honeywell
Regulator Company

Manufacturers' Control Contract

Submitted December 15, 1938

Purchaser:

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Malleable Iron Fittings Co. of Branford, Conn. hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and the prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract 350 sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and to avoid any such difficulty and divided service responsibility, it is agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices.

Prices on Material Shipped From Factory

T11 Acratherm, T44 or T45 Thermostat	3.75
T109 DaNite Acratherm	7.90
T105 Chronotherm	18.00
R116 and R124 Protectorelays	9.45 x
R117 and R123 Protectorelays	10.65 x
R416 Lockswitch for DC	11.45 x
R417 Lockswitch for DC	12.65 x
z L404 Pressuretrol	2.85
z L409 Surface Aquastat	2.85
z L419 Airstat	2.85
z L415 Airstat	3.35
z L412 Furnacestat	3.85
z L165 Immersion Aquastat	3.35
z L416 Immersion Aquastat	3.35
L401A Combination Control	5.35
L408 Vaporstat	5.25
L411 Vacuumstat	5.25
C402 Low Water Cutoff	8.60
C622A High Pressure Low Water Cutoff	9.35

Purchaser's Copy

x Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.
z New models will be shipped against all orders as soon as available.

Caution! Important!

It is always unsatisfactory—often dangerous—to use mixed controls on the same installation, and it is of mutual interest to avoid this. The Company can give no assurance of satisfactory operation, or assume any service responsibility, if its controls are used with other makes.

388 Direct Dealer Shipments

If the Purchaser requests C. O. D. or open account shipment of standard devices from Branch stock to his dealer, the Company will add ten percent to the prices shown herein to cover transportation, warehousing, etc. Five percent will be added to devices purchased at the Odd Model discount and shipped from Branch stock on a C. O. D. or open account basis to the dealer.

There will be no added charge for dealer shipments made on an open account basis from factory, but C. O. D. shipments to the dealer from factory will carry a five percent charge.

Purchaser's Prices from Branch Stock

All prices herein are f. o. b. factory and are predicated on the fact that the Purchaser will buy in representative quantities and carry sufficient stock to serve his dealers. The Company maintains only limited stocks at its stocking Branch offices, and emergency shipments of standard equipment made to the Purchaser therefrom will be invoiced at the prices shown herein, f. o. b. Branch, plus five percent to cover transportation, handling, warehousing, etc. There will be no added charge for instruments shipped at the Odd Model discount.

Miscellaneous Control Prices

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573....., which are hereby made a part of this agreement, will be furnished at list prices stated less Odd Model discount of 25-20% unless otherwise shown on the price sheets.

389 Conditions

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f. o. b. point of manufacture.

Prices relating to relay of motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153, R154 and R183, $2.00 net each. Motor operated devices (excepting Type D and special industrial motors), Magnetic, and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100°, or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special construction which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms.

Shipments shall be made f. o. b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f. o. b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will

390 pay such award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment and
Cancellation of Contract

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein, as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except for use in conjunction with such products.

It is agreed that this contract shall be subject to can-

cellation by the Company without cause upon thirty (30) days written notice.

Deliveries

Serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designed in said orders.

Price Revisions

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings.

Period of Contract

This contract shall become effective at the accepted date, and expire on Dec. 31, 1939 unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Connecticut.

Accepted at Branford, Connecticut.

Malleable Iron Fittings Co.,
By Herbert Gillis,
Purchaser.

Dated January 5, 1939.

Minneapolis-Honeywell Regulator Company,
By W. G. Jennings,
Its Resident Vice-President.

Dated at Boston, Massachusetts, 1/9/39.
Salesman—J. J. Feigenbaum.

391 COMMISSION'S EXHIBIT NO. 146.

(Letterhead of Minneapolis-Honeywell Regulator Company, Boston, Mass.)

January 9, 1939

Malleable Iron Fittings Co.
Branford, Conn.
Attention: Mr. Herbert Gillis

Gentlemen:

Our contracts with oil burner manufacturers are automatically retroactive if the manufacturer qualifies for the next succeeding bracket price.

As this will affect your company, you will receive a retroactive credit to apply against future purchases as soon as you have reached 1000 sets of controls. The sets consist of three units, primarily being determined by the number of primary oil burner relays purchased.

Upon your reaching 1000 sets, the credit will be figured on the basis of the net difference in price between second bracket and third bracket prices and any succeeding invoices on our controls will be priced on the basis of the third bracket prices then in force.

I believe that this explains quite completely the working of our retroactive contract plan.

Very truly yours,

Minneapolis-Honeywell Regulator Co.,
Per C. S. Hoyt.

CSH:BM

392 COMMISSION'S EXHIBIT NO. 148.

Malleable Iron Fittings Company
Branford, Conn.

Trade Price List

Branford Oil Burners
Branford Boiler-Burner Units

Controls Parts

Effective Nov. 1, 1941

Member OBI Oil Burner Institute

393 Dealers Price Sheet

Branford Burner Model	Capacity. Gallons Per Hour	Capacity Standing Radiation @ 70% Boiler Efficiency		Price With Three Controls
		Steam	H. W.	
FU	1.35 – 2.50	765	1225	82.00
F	1.35 – 2.50	765	1225	88.50
HU	.75 – 2.00	765	1225	92.95
H	.75 – 2.00	765	1225	96.80
B	1.35 – 3.50	1040	1710	115.50
E	2.00 – 6.50	2000	3200	143.00
D	5.00 – 17.00	5200	8330	225.00*
O & OO	Prices on application			

Mercoid Intermittent Ignition Controls Standard Equipment.

For Mercoid Constant Ignition Controls — Deduct $2.50
For M-H Intermittent Controls — Add $2.00
For High Voltage Thermostat — Add $2.50

*M-H Controls Standard Equipment.

Boiler Burner Units

Type Branford

Unit	Gallons	Steam	H. W.	Steam	H. W.
Type B	.75 – 1.25	360	580	$185.00	$175.00
" P-4*			300		163.00
" P-5*			400		173.00
" P-6*			500		183.00

*For Hot Water Only.

Add $5.00 to all boiler prices for freight.

For High Voltage Thermostat Add $2.50.

For Extra Immersion Aquastat For Forced Circulation Add $4.63

All Prices Net — F. O. B. Branford.

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Branford Oil Burner Parts

Part	Models FU	F	HU	H	B	E	D
Motor	18.00	18.00	18.00	18.00	18.00	20.00	30.00
Pump	14.00	14.00	14.00	14.00	14.00	14.00	20.00
Motor & Pump Assembly							55.00
Transformer	9.50	9.50	9.50	9.50	9.50	9.50	9.50
Fan	4.00	4.00	4.00	4.00	4.00	5.00	7.00
Branford Fuel Unit		10.00		10.00	12.00		
Pressure Reg. Valve						4.00	9.50 (Duplex)
Cut Off Valve						5.00	
Filter Complete						3.50	3.50
Filter Basket &Gasket	.90	.90	.90	.90	.90	1.10	
Pressure Gauge					1.50	1.50	1.50
Belt					.75	.75	
Pulleys (Motor & Pump)	Per Pr.				1.25	1.25	
Nozzle	1.00	1.00	1.00	1.00	1.00	1.00	1.00
Nozzle Adaptor	.50	.50	.50	.50	.50	.50	.50
Electrodes (pr.)	1.00	1.00	1.00	1.00	1.00	1.00	1.00
Insulators (pr.)	.75	.75	.75	.75	.75	.75	.75
Jet Line Assembly	4.85	4.85	5.25	5.25	4.85	5.35	6.00
Bellows Only for Valve		2.00		2.00	2.00	2.00	2.00
Bellows With Seat		2.35		2.35	2.35	2.35	2.35
Valve Adjusting Screw		.25		.25	.25	.25	.25
Valve Plugs		.50		.50	.50	.50	.50
High Tension Ignition Leads (pr.)	.50	.50	.50	.50	.50	.50	.50

395 **Controls**

	Mercoid		M.-H.	
Thermostat—Low Voltage	Type H	4.28	T-11	6.00
Thermostat—High Voltage	#855	7.12	T-42A	6.75
Electric Clock Thermostat	HH-T 41	23.15	T-111A	19.50
Stack Relay Int. Ignition	JMI	14.25	RA-117	17.25
Stack Relay Const. Ignition.	JM	12.80	RA-116	14.25
Pressure Control	DA-31	5.50	P404-A	4.50
Relay	V2-3A	6.06	R-19-A	6.00
Airstat	M-51	4.99	LA419A	4.50
Aquastat (Surface)	Fig. 35	4.99	LA409A	4.50
Vaporstat	DA-37	7.48	L-408A	8.25
Aquastat (Immersion) Low Voltage	115-W	4.63	L-170A	5.25
Aquastat (Immersion) High Voltage	DA-37	7.48	L-444A	5.25
Summer Winter Controller			L-147A	10.88
Low Water Cut Off Gauge Glass Type	DA-131Q (Comb.)	16.39	C402A	12.75
Low Water Cut Off Thread Connection Type	DA-130T (Comb.)	14.97	C401A	9.00
Warm Air Fan Control	M-53 SW	5.34	LA412A	4.88
Visaflame	L-41	14.60		
Visaflame Bulb	L-41	4.88		
Panel (relay)	K-2	9.62		
Low Water Cut Off McDonnell-Miller #67	13.88			
Do—Built-in Type	10.72			
Fram Filters — #F1103	3.33			

396 **COMMISSION'S EXHIBIT NO. 149.**

Minneapolis-Honeywell Regulator Company.

Manufacturers' Control Contract.

Submitted December 15, 1939

Purchaser:

Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Malleable Iron Fittings of Branford, Connecticut, hereinafter called the Purchaser,

Wherein it is mutually agreed as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named,

during the life of this contract 350 sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of satisfactory operation nor assume any service responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices.

Prices on Material Shipped From Factory.

T11A Acratherm, T44A or T45A Thermostat	3.75
T109A Da-Nite Acratherm	7.90
T105A Chronotherm	18.00
R116A or R124A Protectorelay	9.45*
R117A or R123A "	10.65*
R416A Lockswitch for D. C.	11.45*
R417A Lockswitch for D. C.	12.65*
P404A Pressuretrol 0-10 lb.	2.85
LA409A Surface Aquastat	2.85
LA419A Airstat	2.85
L404A Pressuretrol 2-50 lb., 5-150 lb.	4.50
LA419B Airstat, adj. diff.	3.35
LA412A Furnacestat	3.35
L170A Immersion Aquastat	3.35
L444A Immersion Aquastat	3.35
L401A Combination Control	5.35
C402A Lo-Water Cutoff	8.60
C622A High Pressure Lo-Water Cutoff	10.85

* Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.

Purchaser's Copy.

398 Waiver of Special Terms.

It is contemplated that during the life of this contract the Purchaser may submit orders under this contract on its own purchase order forms and that such forms may contain statements, clauses, or conditions modifying, add-

ing to, repugnant to, or inconsistent with the terms and provisions of this contract. It is the intention of the parties, however, and it is expressly agreed that notwithstanding any such statements, clauses or conditions contained in any of the order forms of the Purchaser the liabilities of the Company shall be determined solely by this contract, and in accepting and consummating any such order the Company shall be deemed not to have in any way changed, enlarged, or modified its liabilities or obligations as fixed by this contract.

Purchaser's Price from Branch Stock.

All prices herein are f.o.b. point of manufacture and are predicated on the fact that the Purchaser will carry sufficient stocks to serve his dealers, and that emergency pick-ups only will be made from the Company's stocking Branch offices or warehouses. Standard equipment from Branch or warehouse stocks will carry a 5% charge to cover transporation, handling, warehousing, etc., but there will be no added charge for devices sold at the Odd Model Discount.

Direct Dealer Shipments.

Direct dealer shipments of standard devices from Branch or warehouse stocks, C. O. D. or open account, will add 10% to the prices shown herein or 5% if pick-up is made at the Branch. Direct dealer shipments of devices sold at the Odd Model Discount, C. O. D., or open account, and shipped, or picked up, from Branch stock will carry a 5% charge. Shipments made to dealers from Factory on open account will carry no added charges, but C. O. D. shipments will carry a 5% charge

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4 Form SA 573 Oil, which are hereby made a part of this agreement, will be furnished at list prices stated less Odd Model discount of 25-20% unless otherwise shown on the price sheets.

Conditions.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any

particular may not be returned by the Purchaser. Prices on devices shown herein employing relay, motor or magnetic principle of operation are for 110 Volt, 60 Cycle specifications, unless otherwise specified. Chronotherm prices cover 110 Volt, 60 Cycle only. An extra charge will be made for other voltages and frequencies not shown above, and also for special scales, extensions and other deviations from standard.

Prices do not include thermostat cable or fittings.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the

loyees or others. A defect in the mean-
ty in any part of said equipment shall
t is capable of being renewed, repaired
ate to condemn such equipment. This
sly in lieu of all other warranties, guar-
or liabilities, expressed or implied by
s representatives. All statutory or im-
other than title, are hereby expressly
uded.

/

grees that it will at its own expense de-
may be instituted by any party against
lleged infringement of patents relating
or apparatus of its own manufacture
haser under this contract provided such
nt shall consist only in the use of such
pparatus itself and not as a part of any
er apparatus, devices, and/or parts and
aser shall have made all payments then
including such device or apparatus and
immediate notice in writing of any such
nt and of the institution of any such suit
ompany, through its counsel, to defend
ovided the Purchaser gives all needed
ssistance and authority to enable the
o so, and thereupon in case of a final
ages in any such suit the Company will
nt shall not be responsible for any com-
nout its written consent, nor shall the
to defend any suit or to pay any dam-
may arise directly or indirectly by rea-
parts, devices and/or apparatus not
ompany.
said devices and/or apparatus are, in
onstitute infringement and their use is
any, if unable within a reasonable time
rchaser the right to continue using such
either by suspension of the injunction,
purchaser a license, or otherwise, will,
either replace said device or apparatus
place of business with non-infringing
us, or modify said device or apparatus
non-infringing, or accept the return of

the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment and Cancellation of Contract.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except for use in conjunction with such products.

It is agreed that this contract shall be subject to cancellation by the Company without cause upon thirty (30) days' written notice.

Deliveries.

Serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designed in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period.

If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order, or that the Company will not be obligated to fill any orders including blanket orders outstanding, calling for a total of more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings.

Period of Contract.

This contract shall become effective at the accepted date, and expire on 12-31-40 unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Massachusetts.

Accepted at Branford, Connecticut.

Malleable Iron Fittings.

Minneapolis-Honeywell Regulator Company.

400 Waiver of Special Terms

It is contemplated that during the life of this contract the Purchaser may submit orders under this contract on its own purchase order forms and that such forms may contain statements, clauses, or conditions modifying, adding to, repugnant to, or inconsistent with the terms and provisions of this contract. It is the intention of the parties, however, and it is expressly agreed that notwithstanding any such statements, clauses or conditions contained in any of the order forms of the Purchaser the liabilities of the Company shall be determined solely by this contract, and in accepting and consummating any such order the Company shall be deemed not to have in any way changed, enlarged, or modified its liabilities or obligations as fixed by this contract.

Purchaser's Price from Branch Stock

All prices herein are f.o.b. point of manufacture and are predicated on the fact that the Purchaser will carry sufficient stocks to serve his dealers, and that emergency pick-ups only will be made from the Company's stocking Branch offices or warehouses. Standard equipment from Branch or warehouse stocks will carry a 5% charge to cover transportation, handling, warehousing, etc., but there will be no added charge for devices sold at the Odd Model Discount.

Direct Dealer Shipments

Direct dealer shipments of standard devices from Branch or warehouse stocks, C.O.D. or open account, will add 10% to the prices shown herein or 5% if pick-up is made at the Branch. Direct dealer shipments of devices sold at the Odd Model Discount, C.O.D., or open account, and shipped, or picked up, from Branch stock will carry a 5% charge. Shipments made to dealers from Factory on open account will carry no added charges, but C.O.D. shipments will carry a 5% charge.

Miscellaneous Control Prices

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4 Form SA 573 Oil, which are hereby made a part of this agreement, will be furnished at list prices stated less Odd Model discount of 25-20% unless otherwise shown on the price sheets.

Conditions

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser. Prices on devices shown herein employing relay, motor or magnetic principle of operation are for 110 Volt, 60 Cycle specifications, unless otherwise specified. Chronotherm prices cover 110 Volt, 60 Cycle only. An extra charge will be made for other voltages and frequencies not shown above, and also for special scales, extensions and other deviations from standard.

Prices do not include thermostat cable or fittings.

Terms

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no lia-

bility for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired, or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices; and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the
401 Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchaser's place of business with non-infringing

devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment and Cancellation of Contract

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except for use in conjunction with such products.

It is agreed that this contract shall be subject to cancellation by the Company without cause upon thirty (30) days' written notice.

Deliveries.

Serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designed in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser

reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order, or that the Company will not be obligated to fill any orders including blanket orders outstanding, calling for a total of more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings.

Period of Contract.

This contract shall become effective at the accepted date, and expire on 12-31-40 unless sooner cancelled as herein-above provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Massachusetts.

Accepted at (City) Branford, (State) Connecticut.
Malleable Iron Fittings,
By .....
Purchaser.

Dated .....

Minneapolis-Honeywell Regulator Company,
By .....
Its .....

Dated at (City) ..... (State) ..... (Date) .....
Salesman .....

402 COMMISSION'S EXHIBIT NO. 150.

Minneapolis-Honeywell Regulator Company.

Manufacturers' Control Contract.

Submitted January 2, 1940.

Purchaser:

Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Malleable Iron Fittings Company of Branford, Connecticut, hereinafter called the Purchaser, Wherein it is mutually agreed as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract 1,000 sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of satisfactory operation nor assume any service responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices.

Prices on Material Shipped From Factory.

	Approx. 55% off
T11A Acratherm, T44A or T45A Thermostat	3.30
T109A Da-Nite Acratherm	6.65
T105A Chronotherm	17.80
R116A or R124A Protectorelay	9.35*
R117A or R123A Protectorelay	10.50*
R416A Lockswitch for D.C.	11.35*
R417A Lockswitch for D.C.	12.50*

* Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.

	Approx. 55% off
P404 Pressuretrol, 0-10 lb.	2.85
LA409A Surface Aquastat	2.85
LA419A Airstat	2.85
L404A Pressuretrol, 2-50, 5-150 lb.	4.50
LA419B Airstat, adj. diff.	3.25
LA412A Furnacestat	3.25
L170A Immersion Aquastat	3.35
L444A Immersion Aquastat	3.35
L401A Combination Control	5.25
C402A Lo-Water Cutoff	8.60
C622A High Pressure Lo-Water Cutoff	10.85

Purchaser's Copy.

403 Waiver of Special Terms.

It is contemplated that during the life of this contract the Purchaser may submit orders under this contract on its own purchase order forms and that such forms may contain statements, clauses, or conditions modifying, adding to, repugnant to, or inconsistent with the terms and provisions of this contract. It is the intention of the parties, however, and it is expressly agreed that notwithstanding any such statements, clauses or conditions contained in any of the order forms of the Purchaser the liabilities of the Company shall be determined solely by this contract, and in accepting and consummating any such order the Company shall be deemed not to have in any way changed, enlarged, or modified its liabilities or obligations as fixed by this contract.

Purchaser's Price from Branch Stock.

All prices herein are f.o.b. point of manufacture and are predicated on the fact that the Purchaser will carry sufficient stocks to serve his dealers, and that emergency pick-ups only will be made from the Company's stocking Branch offices or warehouses. Standard equipment from Branch or warehouse stocks will carry a 5% charge to cover transportation, handling, warehousing, etc., but there will be no added charge for devices sold at the Odd Model Discount.

Direct Dealer Shipments.

Direct dealer shipments of standard devices from Branch or warehouse stocks, C.O.D. or open account, will add 10% to the prices shown herein or 5% if pick-up is made at the Branch. Direct dealer shipments of devices sold at the Odd Model Discount, C.O.D., or open account, and shipped, or picked up, from Branch stock will carry a 5% charge. Shipments made to dealers from Factory on open account will carry no added charges, but C.O.D. shipments will carry a 5% charge.

Conditions.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser. Prices on devices shown herein employing relay, motor or magnetic principle of operation are for 110 Volt, 60 Cycle specifications, unless otherwise specified. Chronotherm prices cover 110 Volt, 60 Cycle only. An extra charge will be made for other voltages and frequencies not shown above, and also for special scales, extensions and other deviations from standard.

Prices do not include thermostat cable or fittings.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind, and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired, or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices, and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such award, but shall not be

responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

404 In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchaser's place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment and Cancellation of Contract.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except for use in conjunction with such products.

It is agreed that this contract shall be subject to cancellation by the Company without cause upon thirty (30) days' written notice.

Deliveries.

Serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designed in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order, or that the Company will not be obligated to fill any orders including blanket orders outstanding, calling for a total of more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, Form SA 573 Oil, which are hereby made a part of this agreement, will be furnished at list prices stated less Odd Model discount of 25-25% unless otherwise shown on the price sheets.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company

will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings.

Period of Contract.

This contract shall become effective at the accepted date, and expire on 12-31-40 unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Massachusetts.

Accepted at Branford, Connecticut.
Malleable Iron Fittings Company,
By Herbert J. Ellis,
Purchaser.

Dated January 28, 1940.

Minneapolis-Honeywell Regulator Company,
By W. G. Jennings,
Its Resident Vice-President.

Dated at Boston, Massachusetts 2/1/40.
Salesman J. J. Feigenbaum.

405 COMMISSION'S EXHIBIT NO. 151.

Minneapolis-Honeywell Regulator Company.

Manufacturers' Sales Agreement

Submitted December 9, 1940.

Purchaser.

Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Malleable Iron Fittings Company of Branford, Connecticut, hereinafter called the Purchaser,

Wherein It Is Mutually Agreed As Follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named,

during the life of this agreement 1,000 sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of satisfactory operation nor assume any service responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices.

Prices on Material Shipped From Factory.

	New List Nov. 15, 1941		As of Nov. 15, 1941
T11A Acratherm	8.75	3.30	3.65
T109A Da-Nite Acratherm	18.75	6.65	7.30
T105A Chronotherm	43.00	18.80	20.70
T111A Chronotherm	28.50	12.75	14.00
RA116 Protectorelay	21.00	8.70	9.55
RA117 Protectorelay	24.25	9.75	10.70
P404A Pressuretrol O-10#	6.50	2.85	3.15
LA409A Surface Aquastat	6.50	2.85	3.15
LA419A Airstat	6.50	2.85	3.15
LA419B Airstat, Adjustable Differential	7.00	3.00	3.30
L404A Pressuretrol, 2#-50# or 5#-150#	11.50	4.50	5.50
LA412A Furnacestat	6.50	3.00	3.00
LA401A Combination Control	11.00	5.25	5.25
L147A Summer Winter Controller	16.00	6.95	7.65
L170A Immersion Aquastat	7.75	3.35	3.70
L444A Immersion Aquastat	7.75	3.35	3.70
L157A or L454A Vertical Type Immersion Aquastat	11.00	4.80	5.30
C402A Lo-Water Cutoff	18.75	8.60	9.45
C612A High Pressure Lo-Water Cutoff	33.00	15.20	16.70

Dealer Prices 25% off List.

Purchaser's Copy.

Special Terms.

ated that during the life of this agreement ay submit orders under this agreement on e order forms and that such forms may its, clauses, or conditions modifying, add- it to, or inconsistent with the terms and s agreement. It is the intention of the par- d it is expressly agreed that notwithstand- atements, clauses or conditions contained er forms of the Purchaser the liabilities of ll be determined solely by this agreement, g and consummating any such order the e deemed not to have in any way changed, dified its liabilities or obligations as fixed nt.

e from Warehouse Stock.

ein are f. o. b. point of manufacture and are ne fact that the Purchaser will carry suf- serve his dealers, and that emergency pick- made from the Company's New York or use door or other stocking points. Stand- urchased from these stocks will carry a 5% ransportation, handling, warehousing, etc., e no added charge for devices sold at the ount.

hipments.

). dealer emergency shipments of standard v York or Chicago warehouse door or other will add 10% to the prices shown herein, nt dealer shipments will add 5%. Direct s of devices from warehouse, factory, or points sold at the Odd Model discount C. a 5% charge. Shipments made to dealers open account will carry no added charge.

the Company must be secured by the Pur- the return of any equipment for credit. equipment which are specially made in any not be returned by the Purchaser. Prices n herein employing relay, motor or mag- of operation are for 110 Volt, 60 Cycle nless otherwise specified. Chronotherm

prices cover 110 Volt, 60 Cycle only. An extra charge will be made for other voltages and frequencies not shown above, and also for special scales, extensions and other deviations from standard. Pilotstats and Metaphrams are not to be considered as units toward the fulfillment of this agreement.

Prices do not include thermostat cable or fittings.

Terms.

Shipments shall be made f. o. b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f. o. b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equip-

ment shall not, when such part is capable of being renewed, repaired, or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this agreement provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any combination of other apparatus, devices, and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such award, but shall not be responsible for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

407 In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchaser's place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined devices or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment and Cancellation of Agreement.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except for use in conjunction with such products.

It is agreed that this agreement shall be subject to cancellation by the Company without cause upon thirty (30) days' written notice.

Deliveries.

Serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filing orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designed in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the agreement providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order, or that the Company will not be obligated to fill any orders including blanket orders outstanding, calling for a total of

more than one-twelfth of the amount of this agreement during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this agreement.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4 Form SA 573 Oil, which are hereby made a part of this agreement, will be furnished at list prices stated less Odd Model discount of 25 and 25% unless otherwise shown on the price sheets.

Service Responsibility.

The prices shown in this agreement do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and proper installation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings.

Period of Agreement.

This agreement shall become effective at the accepted date, and expire on 12-31-41 unless sooner cancelled as hereinabove provided. The validity, enforceability and interpretation of all of the provisions of this agreement shall be determined and governed by the laws of the State of Massachusetts.

Accepted at Branford, Connecticut.
Date Jany. 13, 1941.

Malleable Iron Fittings Company,
Purchaser,
By Herbert Gillis,
Mgr. Sales Promotion.

Minneapolis-Honeywell Regulator Company,
By W. E. Reddings,
Its Vice President.

Dated at Boston, Massachusetts 2/8/41.
Salesman J. J. Feigenbaum.

408 COMMISSION'S EXHIBIT NO. 152.

August 24, 1937.

Automatic Home Appliance Company
109-11 Jamaica Avenue
Jamaica, New York
Attention: Mr. Hart

Dear Mr. Hart:

I believe that you appreciate that it is impossible for any manufacturer to build you this burner and to deliver it to you in small quantities at the price you have specified.

You will also recall that I advised you we had, at that time, between 75 and 80 of these burners on hand. Now the price quoted you of $42.50 each without controls, f.o.b. Lancaster, Penna., is a very low price and as you stated you had use for them we gave you an opportunity to purchase the whole lot at a low price. Today, we have between 50 and 60 of these units. If you desire to purchase them at a price of $42.50 each without controls or at a price of $59.00 with three Mercoid controls, we must have your order for the whole 50 at once, otherwise, we will not have them to ship, as they are starting to move out very rapidly.

Yours very truly,
Herco Oil Burner Corporation,
F. E. Herr,
President.

FEH*J

453 COMMISSION'S EXHIBIT NO. 200.

Manufacturers
Control
Contract
Automatic Controls
MH

Minneapolis-Honeywell Regulator Company

Factories at
Minneapolis and Wabash

Minneapolis-Honeywell Regulator Company

Manufacturers' Control Contract

Submitted December 15, 1938.

Purchaser:

This Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Burner Parts & Service Corporation of Lancaster, Pa., 328 N. Arch Street, hereinafter called the Purchaser, Witnesseth:

That whereas the Company manufactures and sells a complete line of automatic temperature controls; and, whereas the purchaser has use for such devices in conjunction with products of his manufacture, and for the sale of such devices to his dealers;

Now, therefore, in consideration of the premises, of the mutual covenants herein contained and the prices extended the Purchaser by the Company, the parties hereto agree as follows:

Quantity.

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract 50 sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and to avoid any such difficulty and divided service responsibility, it is agreed

that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices.

Prices on Material Shipped From Factory.

T11 Acratherm, T44 or T45 Thermostat	3.95
T109 DaNite Acratherm	8.55
T105 Chronotherm	18.50
R116 and R124 Protectorelays	9.85 x
R117 and R123 Protectorelays	11.10 x
R416 Lockswitch for DC	11.85 x
R417 Lockswitch for DC	13.10 x
L404 Pressuretrol	3.05 z
L409 Surface Aquastat	3.05 z
L419 Airstat	3.05 z
L415 Airstat	3.50 z
L412 Furnacestat	4.00 z
L465 Immersion Aquastat	3.50 z
L416 Immersion Aquastat	3.50 z
L401A Combination Control	5.50
L408 Vaporstat	5.25
L411 Vacuumstat	5.25
C402 Low Water Cutoff	8.60
C622A High Pressure low Water Cutoff	9.85

x Royalty fee of 50¢ net will be added if Purchaser is not licensed under the Zoro Estate group of patents.

z New models will be shipped against all orders as soon as available.

Purchaser's Copy.

Caution! Important.

It is always unsatisfactory—often dangerous—to use mixed controls on the same installation, and it is of mutual interest to avoid this. The Company can give no assurance of satisfactory operation, or assume any service responsibility, if its controls are used with other makes.

455 Direct Dealer Shipments.

If the Purchaser requests C. O. D. or open account shipment of standard devices from Branch stock to his dealer, the Company will add ten percent to the prices

shown herein to cover transportation, warehousing, etc. Five percent will be added to devices purchased at the Odd Model discount and shipped from Branch stock on a C. O. D. or open account basis to the dealer.

There will be no added charge for dealer shipments made on an open account basis from factory, but C. O. D. shipments to the dealer from factory will carry a five percent charge.

Purchaser's Prices from Branch Stock.

All prices herein are f. o. b. factory and are predicated on the fact that the Purchaser will buy in representative quantities and carry sufficient stock to serve his dealers. The Company maintains only limited stocks at its stocking Branch offices, and emergency shipments of standard equipment made to the Purchaser therefrom will be invoiced at the prices shown herein, f.o.b. Branch, plus five percent to cover transportation, handling, warehousing, etc. There will be no added charge for instruments shipped at the Odd Model discount.

Miscellaneous Control Prices.

Control equipment of the Company's manufacture not previously shown, but listed on sheets 1, 2, 3, 4, 5, Form SA 573-_____, which are hereby made a part of this agreement, will be furnished at list prices stated less Odd Model discount of 25-15% unless otherwise shown on the price sheets.

456 Conditions.

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the company, f. o. b. point of manufacture.

Prices relating to relay or motor operated devices and/or to magnetic valves are for 110 volt, 50 or 60 cycle specifications only, unless otherwise specified. Prices pertaining to Chronotherms and Electric Clock Thermostats are for 110 volt, 60 cycle specifications only. When ordered in lots of less than fifty units, the Company will add net extra charge for other voltages and frequency combination shown below, according to following schedule: Relay operated devices, excepting Type R153, R154 and R183, $2.00 net each. Motor operated devices (excepting Type D and special in-

dustrial motors), Magnetic and Diaphragm valves, and Electric Clock Thermostats $1.00 net each. For current specification not shown, charges will be governed by the development work required.

110 volt, 40 cycle	220 volt, 30 cycle
110 volt, 30 cycle	220 volt, 25 cycle
110 volt, 25 cycle	110 volt, D. C.
220 volt, 60 cycle	220 volt, D. C.
220 volt, 50 cycle	32 volt, D. C.
220 volt, 40 cycle	

The extra charges outlined above will not be made for special alternating-current voltage and frequency specifications when units are ordered in quantities of 50 or more of one device all of the same voltage and frequency and all to be shipped at one time. The extra charges outlined above will, however, apply to direct current devices in all quantities.

Net extra charges will be made for the following special requirements: Special range pressuretrols 2 to 50 lbs., or 5 to 150 lbs., $1.25 net each; special scales open contact thermostat 100° or less $2.00 net each, over 100°, $5.00 net each; special scales Airstats and Furnacestats $2.00 net each; special scales to 440° F. Immersion Aquastat $3.00 net each; special scales over 440° F. Immersion Aquastats $5.00 net each. Net extra charges on other special requirements quoted on request.

The Company is not obligated under the terms of this contract to supply instruments for current specifications or special constructions which in its opinion are impractical.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms.

Shipments shall be made f.o.b. Factory Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from the date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Depart-

ment of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alteration of terms of payment and of determining Purchaser's limit of credit.

Guarantee.

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, f.o.b. Company's factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Patent.

The Company agrees that it will at its own expense defend any suits that may be instituted by any party against the Purchaser for alleged infringement of patents relating to specific devices or apparatus of its own manufacture furnished the Purchaser under this contract provided such alleged infringement shall consist only in the use of such specific device or apparatus itself and not as a part of any

combination of other apparatus, devices and/or parts and provided the Purchaser shall have made all payments then due upon any order including such device or apparatus and gives the Company immediate notice in writing of any such alleged infringement and of the institution of any such suit and permits the Company, through its counsel, to defend such suits, and provided the Purchaser gives all needed information, assistance and authority to enable the Company to do so, and thereupon in case of a final award of damages in any such suit the Company will pay such
457 award, but shall not be responsible, for any compromise made without its written consent, nor shall the Company be bound to defend any suit or to pay any damages therein which may arise directly or indirectly by reason of the use of parts, devices and/or apparatus not furnished by the Company.

In the event that said devices and/or apparatus are, in any suit, held to constitute infringement and their use is enjoined, the Company, if unable within a reasonable time to secure for the Purchaser the right to continue using such device or apparatus, either by suspension of the injunction, by securing for the Purchaser a license, or otherwise, will, at its own expense, either replace said device or apparatus at the Purchasers' place of business with non-infringing devices or apparatus, or modify said device or apparatus so that it becomes non-infringing, or accept the return of the enjoined device or apparatus and refund the sums paid therefor.

Conduct of Business.

Whenever the Company deems it necessary or expedient for the protection of the Company's patent rights for the prevention of patent litigation, infringement or accounting suits, or for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such product, and the Purchaser agrees upon receipt of such notice to make no further sales or installations of any such product unless or until authorized so to do in writing by the Company.

Assignment and Cancellation of Contract.

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except for use in conjunction with such products.

It is agreed that this contract shall be subject to cancellation by the Company without cause upon thirty (30) days written notice.

Deliveries.

Serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designed in said orders.

Price Revisions.

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change. It is further agreed that the Purchaser will not order more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Service Responsibility.

The prices shown in this contract do not provide a margin for free field service to the Purchaser's customers, dealers or distributors by the Company, the Company's Branch offices, or distributors. However, the Company will welcome the opportunity of co-operating with the Purchaser in educating his factory personnel in the servicing and

proper insfallation of the Company's controls and in educating the dealers at the request of the Purchaser through group meetings.

Period of Contract.

This contract shall become effective at the accepted date, and expire on 12-31-39 unless sooner cancelled as herein-above provided. The validity, enforceability and interpretation of all of the provisions of this contract shall be determined and governed by the laws of the State of Pennsylvania.

Accepted at Lancaster, Pennsylvania.
Burner Parts & Service Corporation,
By E. C. Stumffers,
Dated 1-4-39. *Purchaser.*

Minneapolis-Honeywell Regulator Company,
By Henry F. Dwer,
Dated at Phila., Pa., 1-4-39. *Its Branch Manager.*

Salesman J. C. Dorsey.

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SA 573

January 3, 1939

Minneapolis-Honeywell Regulator Company.

Automatic Controls MH

Manufacturers Confidential Price List.

Manufacturers are often called upon to furnish miscellaneous controls of our manufacture, and the devices shown on the following pages cover those most commonly used, together with list prices now in effect but subject to change without notice.

Controls of our manufacture will be furnished at prices in effect covering the kind and quantities involved. To avoid misunderstandings, we urge the manufacturer to re-

ll special items, and if this course is
greed that our invoice prices will be
y is necessary due to the hundreds of
ntrols we are manufacturing.
lized controls such as those used for
ntrol and those comprising our Modu-
Conditioning and large building tem-
nally require engineering service and
on not contemplated in this contract.
at such problems be referred to the
ll representative or office nearest the
for direct handling.

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pecialty Wholesalers' Prices.

nufacturers will have a clear under-
s to the trade, we are outlining our
applying to standard heating con-

under this section, SA-573, may be
er or specialty wholesaler, but orders
r the M-H controls that are supplied
t by the manufacturer. This stipula-
l in all specialty wholesaler contracts.

r Gas Company engaged in trade as-
ng, air conditioning, or refrigeration
for resale to users.
than $50.00 list for delivery at one

.00 list or more for delivery at one
n discount.

cialty Wholesaler.

aler is a firm who resells to the dealer
who is associated with the heating, air
igeration industries.

Wholesaler.

$750.00 net annual contract, 25-25%
d heating controls.

Operating without contract, 25-15% discount on standard heating controls, but on Circulators, Flow Valves, Low Water Cut-offs, and Metaphram Regulators they will receive 25-25% discount.

Class B Specialty Wholesaler.

This classification covers a wholesaler or manufacturer's agent who purchases controls from his manufacturer, but occasionally buys from us.

Operating under annual contract, 25-15% discount on heating controls.

459 Minneapolis-Honeywell Regulator Company.

Automatic Controls MH.

Manufacturers Confidential Price List.

Thermostats

Type No.	Description	List Price
T11A, T21A	Acratherms	$ 8.00
T19A, T29A	Twin Acratherms	14.50
T42A, T62A	Thermostats	9.00
T43A	Thermostats	10.00
T44A, T45A	Thermostats	8.00
T105A, T205A	Chronotherms	36.50
T109A, T209A	Da-Nite Acratherms	17.00
T178A, T278A	Eight-Day Clock Thermostats	37.50
T491B	Air Switch	12.00

Note: The above controls are priced net and will be invoiced according to the price bracket being extended the purchaser.

Limit and Fan Controls

Type No.	Description	List Price	Mfg. Net
L101A, L201A, L401A	Combination Controls	$11.00	
L101B, L201B, L401B	Combination Controls (with overrun)	12.50	
L104A*, L204A*, L404A*	Pressuretrols, 0-10#	6.00	
L108A, L208A, L408A	Vaporstat, 0-16 oz., 0-4#	10.50	$ 5.25
L109A*, L209A*, L409A*	Surface Aquastats	6.00	
L115A*, L215A*, L415A*	Airstats. Diff. Adj.	7.00	
L116A*, L216A*, L416A*	Immersion Aquastats	7.00	
L119A*, L219A*, L419A*	Airstats	6.00	
L121A, L221A, L421A	Combination Multispeed Fan Controller	12.50	
L134A, L234A, L434A	Combination Controls (open contact)	11.00	
L145A, L245A, L445A	Combination Limit and 2-Speed Fan Control	16.00	
L165A*, L265A*	Immersion Aquastats (open contact)	7.00	
L411A	Vacuumstat	10.50	5.25
L412A*	Furnacestat	8.00	
L420A*, L431A	Furnacestat	7.00	
L428A	Immersion Aquastat	11.50	5.85
L628A	Immersion Aquastat	10.00	5.10

* The items so indicated are those which will shortly be replaced by new models.

Note: The above controls are priced net and will be invoiced according to the price bracket being extended the purchaser.

Humidity Controls

Type No.	Description	List Price
H17A, H27A	Temperature and Humidity	
H47A	Controller	$22.00
H41A	Humidity Controller	25.00
H63A	Humidity Controller	15.00

Note: In limited quantities the above controls will be invoiced at the list prices shown, less old model discount. Manufacturers using these devices as standard equipment in quantities will be quoted net prices upon application.

Magnetic Water Valves

Type No.	Description	List Price
V43A	Series 40	$ 7.00
V83A	Low Voltage, two-wire	9.00

Note: In limited quantities the above controls will be invoiced at the list prices shown, less odd model discount. Manufacturers using these devices as standard equipment in quantities will be quoted net prices upon application.

Lo-Water Cutoffs

Type No.	Description	List Price	Mfg. Net
C402A	Gauge Glass Series 40, SPST	$17.00	$ 8.60
C602A	Gauge Glass Series 60, SPDT	18.50	9.35
C622A	150# per sq. inch	19.50	9.85
C622B	Double Circuit, 150# per sq. inch	23.50	11.90
C627A	1-inch Pipe Size, 25# per sq. inch, SPDT	17.00	8.60
C401A	Boiler mounted, screwed type, SPST	11.00	5.55
C401B	Boiler mounted, flanged type, SPST	11.00	5.55
C601A	Boiler mounted, screwed type, SPDT	12.00	6.10
C601B	Boiler mounted, flanged type, SPDT	12.00	6.10

Note: The above Lo-Water Cutoffs will be priced Net as shown above.

Relays

Type No.	Description	List Price	Mfg. Net
R12A	Series 10, DPDT Switching	$14.00	
R14A	Series 10, SPDT Switching	10.00	
R14B (D.C.)	Series 10, SPDT Switching	14.00	
R15A (D.C.)	Series 40, SPST Switching	12.00	6.30
R19A	Series 10, SPST Switching	8.00	4.30
R32A	Series 30, SPDT Switching	15.00	
R33A	Series 30, DPDT Switching	19.00	
R39A	Series 30, SPST Switching	10.00	
R41A	Series 40, 3PST Switching	16.00	
R48A	Series 40, SPST Switching	6.50	
R48B	Series 40, SPDT Switching	7.50	
R48C	Series 40, DPDT Switching	8.00	
R132A	Summer-Winter Relay	9.00	4.55
R155A	Warm Air Program Relay	16.50	
R155B	Same as R155A, except with extra contact for cooling	18.00	
R156A	Warm Air Program Relay for 2-Speed Fan	26.00	

Note: The above controls (excluding the R19A and R132 which will be invoiced at net price according to price bracket being extended the purchaser) will be invoiced at list prices shown, less odd model discount shown on page 2 of the attached contract.

Thermostat Guards

Type No.	Description	List Price
W50A	Thermostat Guard	$15.00
W51A	Cast Aluminum Guard for plain thermostat	4.50

Note: The above Controls will be invoiced at list prices, less the odd model discount shown on page 2 of the attached contract.

Prices subject to change without notice.

See reverse side for extra charge schedule.

Type No.	Description	List Price	Mfgrs. Net
M403A&B	Circulator, 1", Screwed	$34.00	$18.20
	Circulator, 1½", Flanged	39.50	21.15
	Circulator, 2", Flanged	44.00	23.60
M401A	Circulator, 3", Flanged	64.50	34.55
M401B	Circulator, 3", w/4" Impeller, Flanged	79.00	42.35
V563A	1" Flow Valve, Angle, Screwed	4.50	2.40
	1¼" Flow Valve, Angle, Flanged	6.00	3.20
	1½" Flow Valve, Angle, Flanged	7.00	3.75
	2" Flow Valve, Angle, Flanged	8.50	4.55
V561A	1" Flow Valve, Straight Thru, Screwed	7.50	4.00
	1½" Flow Valve, Straight Thru, Screwed	10.50	5.60
	2" Flow Valve, Straight Thru, Screwed	12.00	6.40
	3" Flow Valve, Straight Thru, Flanged	18.00	9.65
	4" Flow Valve, Straight Thru, Flanged	24.00	12.85

For odd voltages and frequencies write for special quotation.

Note: The above Circulators and Flow Valves will be priced Net as shown above.

Damper Motors

Type No.	Description	List Price
M26A	Electric Janitor Motor	$15.00
M26C	Zone Control Motor, Series 20	20.00
M87A	Spring Return Elec. Jan. Motor, Series 80	19.00

Note: The above controls will be invoiced at the list prices shown, less the odd model discount shown on page 2 of the attached contract.

Warm Air Zone Control Packages

Type No.	Description	List Price
Y12A	Zone Package for First Zone	$40.00
Y13A	Zone Package for Additional Zones	28.00
Y14A	Relief Zone Package	34.00
W1A	Power Box	12.00
W2A	Power Box (for Da-Nite operation)	25.00

Note: The above controls will be invoiced at the list prices shown, less the odd model discount shown on page 2 of the attached contract.

K204A Motorized Flow Valves

K204 Motorized Flow Valve consists of M204A Modutrol Motor, Z101 Linkage, and B561 Flow Valve (straight through type)

M204A	Modutrol Motor	$36.00 list less 25-15%
Z101A	Linkage	5.00 list less 25-15%
V561A	Flow Valves (straight through type) see tabulation in first column for list and net prices	

Modutrol Equipment

This type of equipment requires engineering service if satisfactory results are to be obtained. The general classifications of Modutrol Equipment are as follows: Remote Bulb Temperature Controllers, Motorized Valves, Modutrol Motors, and Series 90 Modulating Thermostats, Limit Controls and Relays.

Note: In limited quantities the above controls will be invoiced at the list prices shown, less 25-15% discount. Manufacturers using these devices as standard equipment in quantities will be quoted net prices upon application.

Extra Charges for Special Features

Thermostat Extra Charges	List	Net
Special scale, open or mercury switch type thermostats, add	$ 4.00	$ 2.00
Centigrade scale equivalent to Fahrenheit scale—T11, T19, T21, T29, T44, T45, T109, T209, T42, T43, T62	N.C.	N.C.
All other types, add	4.00	2.00
Standard special finishes, add	4.00	2.00
Locking Devices, T11, T21, T42, T43, T62, T44, T45	N.C.	N.C.
T19, T29 (locks on day and night dial), add.	1.00	.50
T105, T109, T205, T209, add	2.00	1.00
T105, T205 Chronotherms Special Voltages—220/25, 50, 60 110/25, 50, add	2.00	1.00
Week-end shutoff, week-end and holiday shut-off, add	4.00	2.00
Six tripping hands (where available), add	4.00	2.00
T42, T62, T43, less thermometer, deduct	.50	.25
Positive Nite shutoff (where available)	N.C.	N.C.
Reverse action—		
Open contact types, add	4.00	2.00
Mercury switch types	N.C.	N.C.
Special mercury switch, add	2.00	1.00

(Plus any extra charges for special building required.)

Water Valve Extra Charges	List	Net
For voltages and frequencies other than 110 volt, 50 or 60 cycles, add	$ 2.00	$ 1.00

Limit Control Extra Charges	List	Net
Special Ranges:		
L116, L216, L416, L165, L265, L428, L628 To 440° F. or 227° C., add	$ 6.00	$ 3.00
Over 440° F. or 227° C., add	10.00	5.00
L101, L201, L401, L109, L209, L409, L115, L215, L415, L134, L234, L434, L431, L412A, add	4.00	2.00
Standard Ranges in Centigrade, add	1.00	.50

L134, L234, L434		
Standard Ranges in Centigrade on both dials, add	2.00	1.00
L104, L204, L404, Special Ranges		
2 to 50#, 5 to 150#, add	2.50	1.25
10 to 300#, add	6.00	3.00
Special Lengths:		
L116, L216, L416, L165, L265		
Extra length up to and including 6" over standard, add	2.00	1.00
Over 6" and to 12" over standard, add	4.00	2.00
12", 18", and 24" over standard, add	6.00	3.00
36" over standard, add	8.00	4.00
Reverse Action:		
Open contact type devices, add	4.00	2.00
Mercury switch type devices	N.C.	N.C.
Special mercury switch, add	2.00	1.00

(Plus any extra charge for special building required.)

Low Water Cutoff Extra Charges	List	Net
C402, C602, for gauge glasses longer than 12", add	$ 1.00	$ .50
For manual reset except on C622B and C627A, add	1.00	.50
Manual reset C622B and C627A	N.C.	N.C.

Relays Extra Charges	List	Net
For voltages other than 110 or 220 volt, 50 or 60 cycles (and for D.C., where available), add	$ 4.00	$ 2.00

Damper Motor Extra Charges	List	Net
For voltages and frequencies other than 110 volts, 50 or 60 cycles, add	$ 2.00	$ 1.00

Prices subject to change without notice.

461 Minneapolis Honeywell Regulator Company

Automatic Controls MH

Manufacturers Confidential Price List

Protectorelays and Combustion Safety Controls

New Type No.	Description	List Price
R101A	Protectorelay — Intermittent type — recycling. D. C. only. Requires line voltage thermostat	$35.00
R114A	Protectorelay—Intermittent ignition—non-recycling	29.00
R116A	Protectorelay—Stack mounting—Constant ignition—recycling	20.00
R117A	Protectorelay—Stack mounting—Intermittent ignition—recycling	23.00
R118A	Protectorelay—Stack mounting—Intermittent ignition—delayed oil valve timing—recycling	31.00
R123A	Protectorelay—Burner mounting—Intermittent ignition—recycling—New design	23.00
R124A	Protectorelay—Burner mounting—Constant ignition—recycling—New design	20.00
R157A	Industrial Protectorelay. Intermittent ignition, delayed oil valve, timed ignition, timed recycling. Supersedes R105, R109, R113	35.00
R161A	Industrial Protectorelay—Intermittent ignition, delayed oil valve. Timed ignition, timed recycling. Used 2-wire combustion contact (available for D. C.)	43.00
R416A	D. C. Lockswitch—Stack mounting—Constant ignition—recycling—2-wire line voltage. Available for direct current only	24.00
R417A	D. C. Lockswitch—Stack mounting—Intermittent ignition—recycling—2-wire line voltage. Available for direct current only	27.00

Extra Charge Schedule

(Use Net Extra charges for controls having net prices. For controls priced at list subject to discount, use extra charges subject to same discount)

Feature	List	Net
Protectorelays and Lockswitches		
Standard 110-115 V. 50 or 60 Cy.	N. C.	N. C.
Other A. C. voltages and frequencies and D. C. (when available) add	$4.00	$2.00

Feature	List	Net
Alarm circuit in safety switch, add	$2.00	$1.00

Quantities of 50 or more specials of one type, at one time, are subject to special quotations except no extra charge is made for standard odd voltage and frequencies (other than D. C.)

Combustion Safety Controls

New Type No.	Description	List Price
C40A	Pyrostat—single contact	$13.50
C56A	Pyrostat—double contact—overlapping on heating	16.00
C57A	Protectostat—single contact	16.00
48H	Stackswitch—3-wire—overlapping	16.00
48R	Stackswitch—2-wire—make on temperature rise	16.00
48MR	Stackswitch—same as 48R except with manual rest	17.50

Extra Charge Schedule

(Use Net Extra charges for controls having net prices. For controls priced at list subject to discount, use list extra charge subject to same discount)

Feature	List	Net
Double length Pyrostat elements and shaft, add	$4.00	$2.00

Magnetic Oil Valves and Gas Pilot Valves

New Type No.	Description	List Price
V446A	Series 40 Magnetic Gas Valve with by-pass. $\frac{3}{8}$" pipe size	$ 7.00
V474A	Series 40 Magnetic Shut-off Oil Valve. $\frac{3}{8}$" size	11.50

Extra Charge Schedule

(Use Net Extra charges for controls having net prices. For controls priced at list subject to discount, use list extra charges subject to same discount)

Feature	List	Net
Standard voltages 110 V./50 or 60 Cy.	N. C.	N. C.
For other voltages and frequencies, add	$2.00	$1.00

Note: The above controls are priced net and will be invoiced according to price bracket being extended purchaser. Prices subject to change without notice.

462 COMMISSION'S EXHIBIT NO. 201.

Manufacturers Control Contract

Automatic Controls MH

Minneapolis-Honeywell Regulator Company

463 Minneapolis, Minn., Wabash, Ind., Chicago, Ill.

Minneapolis-Honeywell Regulator Company
Manufacturers' Control Contract

Submitted January 2, 1940.

Purchaser

Agreement, entered into between Minneapolis-Honeywell Regulator Company, a Delaware corporation, hereinafter called the Company, and Penn Boiler and Burner Manufacturing Corp. (Burner Parts and Service) of 359 N. Market St., Lancaster, Pennsylvania, hereinafter called the Purchaser.

Wherein It Is Mutually Agreed As Follows:

Quantity and Discounts

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract 50 or more of the Company's automatic temperature controls.

The Company's thermostats and primary controls are specifically designed to operate one with the other and because it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, the Company does not give any assurance of satisfactory operation or assume any service responsibility if its controls are used with other makes.

A discount of 25-25% from the list prices as shown in the attached price list form SA818-Pgs. 1, 2, 3, 4 Oil dated January 2, 1940 will be extended F. O. B. Company's Stocking Branch, Warehouse or Factory making shipment, or at the equivalent net prices shown below. The Odd Model discount will be 25-15%.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Retroactive Credit

A retroactive credit, to be absorbed by future purchases, will be issued to the Purchaser if during the period of this contract one hundred and fifty (150) units of the Company's manufacture are shipped to the Purchaser and paid for. The amount of credit will be determined by the difference between the price paid and the price the purchaser would have paid, had he purchased under the Company's No. 1 manufacturers bracket contract.

Direct Dealer Shipments

If the Purchaser requests C. O. D. or open account shipment of standard devices from Branch stock to his dealer, the Company will add 10% to the prices shown herein, or 5% if pick-up is made at the Branch to cover transportation, warehousing, etc. 5% will be added to devices purchased at the Odd Model discount and shipped from Branch stock on a C. O. D. or open account basis to the dealer. There will be no added charge for dealer shipments made on an open account basis from factory, but C. O. D. shipments to the dealer from factory will carry a 5% charge.

464 Waiver of Special Terms

It is contemplated that during the life of this contract the Purchaser may submit orders under this contract on its own purchase order forms and that such forms may contain statements, clauses, or conditions modifying, adding to, repugnant to, or inconsistent with the terms and provisions of this contract. It is the intention of the parties, however, and it is expressly agreed that notwithstanding any such statements, clauses or conditions contained in any of the order forms of the Purchaser the liabilities of the Company shall be determined solely by this contract, and in accepting and consummating any such order the Company shall be deemed not to have in any way changed, enlarged, or modified its liabilities or obligations as fixed by this contract.

Conditions

The Company agrees to render invoices to the Purchaser in accordance with the prices listed in the schedule above for the actual number of units shipped to the Purchaser by the Company, f. o. b. the Company's stocking Branch or Factory making shipment. Prices relating to relay or motor operated devices, magnetic valves or Electric Clock Thermostats and Chronotherms are for 110 volt 60 cycle specifications only.

For devices for other standard commercial A. C. voltages and frequencies, or for D. C. where available, and for other than standard specifications, list extra charges will be in accordance with attached price list. For other special requirements not listed, list extra charges will be quoted on request.

Approval of the Company must be secured by the Purchaser prior to the return of any equipment for credit. Instruments or equipment which are specially made in any particular may not be returned by the Purchaser.

Prices shown do not include thermostat cable or fittings.

Terms

Shipments shall be made f. o. b. the Company's stocking Branch, Warehouse or Factory making shipment Sight Draft attached to Bill of Lading, the Company to have the option as to point of shipment. If the Draft is paid within ten days from date of the invoice a special cash discount of two per cent will be allowed. Open account terms may be arranged by the Purchaser with the Treasury Department of the Company. If such terms are arranged, invoices 1st to 15th are subject to 2% cash discount on 25th, due net and payable on 10th of following month; invoices 16th to 31st are subject to 2% cash discount on 10th following month, due net and payable on 25th next. Remittances must be mailed on the 10th and 25th and cover entire purchases for period designated. All bills are payable to the Company. Credit and delivery of all equipment are subject to the approval of the Company which reserves the right of alterations of term of payment and of determining Purchaser's limit of credit.

Guarantee

The Company warrants all equipment manufactured by it and bearing its name plate to be free from defects in workmanship or material under normal use and service. If any part of the equipment herein described, and sold by the Company proves to be defective in workmanship or material, and if such part is within eighteen months from date of shipment from the Company's factory returned to such factory, transportation charges prepaid, and if the same is found by the Company to be defective in workmanship or material, it will be replaced or repaired, free of charge, F. O. B. Company's Factory. The Company assumes no liability for consequential damages of any kind and the Purchaser by acceptance of this equipment will assume all liability for the consequences of its use or misuse by the purchaser, his employees or others. A defect in the meaning of this warranty in any part of said equipment shall not, when such part is capable of being renewed, repaired or replaced, operate to condemn such equipment. This warranty is expressly in lieu of all other warranties, guaranties, obligations or liabilities, expressed or implied by the Company or its representatives. All statutory or implied warranties, other than title, are hereby expressly negatived and excluded.

Deliveries

Serious fires, strikes, differences with workmen, accidents to machinery, or other unavoidable cause or causes beyond the control of the Company, will excuse the Company from any delay in filling orders, provided, however, that the Company shall, in every case, use its best efforts to manufacture, ship and supply the equipment designed in said orders.

Price Revisions

The Company reserves the right to revise the prices contained herein provided thirty (30) days' notice in writing is given the Purchaser. Revised prices will apply to all unfilled orders, including blanket orders, in the Company's possession at the expiration of the thirty day notice period. If the revised prices are not agreeable, the Purchaser reserves the right to cancel the remainder of the contract providing the Company is notified in writing within thirty (30) days of the date of said price change.

It is farther agreed that the Purchaser will not order, or that the Company will not be obligated to fill any orders including blanket orders outstanding, calling for a total of more than one-twelfth of the amount of this contract during the thirty day price change notification period, or at the Company's option, the equivalent number of controls shipped during the same period of the previous year.

It is agreed that any sales, excise, or other Government taxes or assessments will be added to the prices contained in this contract.

Assignment of Contract and Resale Agreement

The Purchaser shall have no right to assign this agreement or any interest therein without the written consent of the Company.

The Purchaser agrees to use the controls listed herein as a part of, or in conjunction with, his products only and that such controls will not be sold or quoted separately to other manufacturers or vendors except for use in conjunction with such products. It is agreed that this contract shall be subject to cancellation by the Company without cause upon thirty (30) days' written notice.

Period of Contract

This contract shall become effective at the accepted date, and expire on December 31, 1940.

Accepted at Lancaster, Pennsylvania.
Penn Boiler and Burner Mfg. Corp.,
By E. C. Griffin,
Purchaser.

Dated Dec. 28, 1939.

Minneapolis-Honeywell Regulator Company,
J. C. Dorsey,
Its Dist. Mgr.,

Dated at Phila, Pa., 1/2 40,
J. C. Dorsey,
Salesman.

January 2, 1940

Minneapolis Honeywell Regulator Company.

Automatic Controls MH

Manufacturers' Confidential Price List

Manufacturers are often called upon to furnish miscellaneous controls of our manufacture, and the devices shown on the following pages cover those most commonly used, together with list prices now in effect but subject to change without notice.

Controls of our manufacture will be furnished at prices in effect covering the kind and quantities involved. To avoid misunderstandings, we urge the manufacturer to request quotations on all special items, and if this course is not followed it is agreed that our invoice prices will be accepted. This policy is necessary due to the hundreds of different types of controls we are manufacturing.

Other more specialized controls such as those used for Industrial Process control and those comprising our Modutrol System for Air Conditioning and large building temperature control normally require engineering service and installation supervision and are not contemplated in this contract. It is recommended that such problems be referred to the Minneapolis-Honeywell representative or office nearest the proposed installation for direct handling.

Dealer and Specialty Wholesalers' Prices

In order that manufacturers will have a clear understanding of our prices to the trade, we are outlining our schedule of discounts applying to standard heating controls.

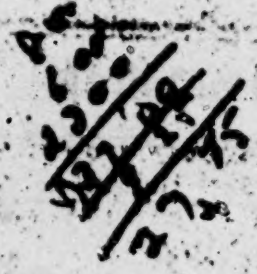
All controls listed under this section, SA-818, may be purchased by the dealer or specialty wholesaler, but orders will not be solicited for the M-H controls that are supplied as standard equipment by the manufacturer. This stipulation is definitely stated in all specialty wholesaler contracts.

Dealer Classification

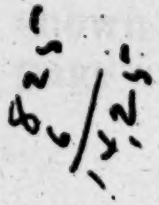
A dealer is a firm engaged in trade associated with the heating, air conditioning, or refrigeration industries purchasing for resale to users.

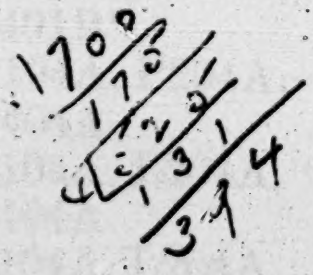
Discount in all quantities, 25%.

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467 Minneapolis Honeywell Regulator Company

Automatic Controls MH

Manufacturers Confidential Price List

Thermostats

Type No.	Description	List Price
T11A, T21A	Acratherms	$8.00
T19A, T29A	Twin Acratherms	16.00
T42A, T62A	Thermostats	9.00
T43A	Thermostat	10.00
T44A, T45A	Thermostats	8.00
T105A, T205A	Chronotherms	36.50
T109A, T209A	Da-Nite Acratherms	17.00
T178A, T278A	Eight-Day Clock Termostats	37.50
T491B	Air Switch	12.50
T802A	Two Stage Thermostat	12.00

Note: The above controls will be invoiced at the list prices shown subject to the contract discount indicated on page one of attached contract.

Limit and Fan Controls

Type No.	Description	List Price
L101A*, L201A*, L401A*	Combination Controls	$11.00
L101B*, L201B*, L401B*	Combination Controls (with overrun)	12.50
P104A, P204A, P404A	Pressuretrols, O-10#	6.00
L104A, L204A, L404A	Pressuretrols, 2-50# or 5-150#	9.50
L104A, L204A, L404A	Pressuretrols, 10-300#	13.50
L108A, L208A, L408A	Vaporstat, 0-16 oz., 0-4#	11.00
LA109A, LA209A, LA409A	Surface Aquastats	6.00
LA119A, LA219A, LA419A	Airstats	6.00

Type No.	Description	List Price
LA119B, LA219B, LA419B	Airstats with Adj. Diff.	7.00
L121A*, L221A*, L421A*	Combination Multispeed Fan Controller	12.50
L134A, L434A	Combination Controls (open contact)	11.00
L144A, L244A, L444A	Immersion Aquastats	7.00
L145A*, L245A*, L445A*	Combination Limit and 2-Speed Fan Control	16.00
L445B*	2-Speed Fan Control	11.50
L147A	Summer-Winter Controller	14.50

(For special voltage see extra charge schedule for relays on reverse side.)

L157A, L454A	Vertical Type Immersion Aquastat	10.00
L170A, L270A	Immersion Aquastats (open contact)	7.00
L411A	Vacuumstat	11.00
LA412A, L431A	Furnacestat	7.00
L417A	2-Speed Fan Control	24.50
L428A, L428B	Immersion Aquastat	11.50
L628A	Immersion Aquastat	10.00

* The items so indicated are those which will shortly be replaced by new models.

Note: The above controls will be invoiced at the list prices shown subject to the contract discount indicated on page one of attached contract.

Humidity Controls

Type No.	Description	List Price
H41A	Humidity Controller	$25.00
H63A	Humidity Controller	15.00

Note: In limited quantities the above controls will be invoiced at the list prices shown, less odd model discount.

Magnetic Water Valves

Type No.	Description	List Price
V437A	Series 40	$7.00
V837A	Low Voltage, two-wire	9.00

Note: In limited quantities the above controls will be invoiced at the list prices shown, less odd model discount.

Lo-Water Cutoffs

Type No.	Description	List Price
C402A	Gauge Glass Series 40, SPST	$17.00
C602A	Gauge Glass Series 60, SPDT	18.50
C622A	150# per sq. inch	21.50
C622B	Double Circuit, 150# per sq. inch	25.50
C627A	1-inch Pipe Size, 25# per sq. inch., SPDT	18.00
C401A	Boiler mounted, screwed type, SPST	12.00
C601A	Boiler mounted, screwed type, SPDT	13.00

Note: The above controls will be invoiced at the list prices shown subject to the contract discount indicated on page one of attached contract.

Relays

Type No.	Description	List Price
R12A	Series 10, DPDT Switching	$14.00
R14A	Series 10, SPDT Switching	10.00
R14B (D.C.)	Series 10, SPDT Switching	14.00
R15A (D.C.)	Series 40, SPST Switching	12.00
R19A	Series 10, SPST Switching	8.00
R32A	Series 30, SPDT Switching	15.00
R33A	Series 30, DPDT Switching	19.00
R39A	Series 30, SPST Switching	10.00
R41A	Series 40, 3PST Switching	16.00
R48A	Series 40, SPST Switching	6.50
R48B	Series 40, SPDT Switching	7.50
R48C	Series 40, DPDT Switching	8.00
R132A	Summer-Winter Relay	9.00
R155A	Warm Air Program Relay	16.50
R155B	Same as R155A, except with extra contact for cooling	18.00
R156A	Warm Air Program Relay for 2-Speed Fan	26.00

Note: The above controls (excluding the R19A, R132, R155 and R156A which will be invoiced at list prices less contract discount) will be invoiced at list prices shown, less odd model discount shown on page 1 of the attached contract.

Thermostat Guards

Type No.	Description	List Price
W50A	Thermostat Guard	$16.00
W51A	Cast Aluminum Guard for plain thermostat.	5.50

Note: The above Controls will be invoiced at list prices, less the odd model discount shown on the attached contract.

Prices subject to change without notice.

See reverse side for extra charge schedule.

Type No.	Description	List Price
M403A&B	Circulator, 1″, Screwed	$34.00
	Circulator, 1½″, Flanged	39.50
	Circulator, 2″, Flanged	44.00
M401A	Circulator, 3″, Flanged	64.50
M401B	Circulator, 3″, w/4″ Impeller, Flanged	79.00
V563A	1″ Flow Valve, Angle, Screwed	4.50
	1½″ Flow Valve, Angle, Flanged	7.00
	2″ Flow Valve, Angle, Flanged	8.50
V561A	1″ Flow Valve, Straight Thru, Screwed	7.50
	1½″ Flow Valve, Straight Thru, Screwed	10.50
	2″ Flow Valve, Straight Thru, Screwed	12.00
	3″ Flow Valve, Straight Thru, Flanged	18.00
	4″ Flow Valve, Straight Thru, Flanged	24.00

For odd voltages and frequencies write for special quotation.

Note: The above controls will be invoiced at the list prices shown subject to the contract discount indicated on page one of attached contract.

Damper Motors

Type No.	Description	List Price
M26A	Electric Janitor Motor, Series 20	$15.00
M26C	Zone Control Motor, Series 20	20.00
M87A	Spring Return Elec. Jan. Motor, Series 80	19.00

Note: The above controls will be invoiced at the list prices shown, less the odd model discount shown on page 1 of the attached contract.

Warm Air Zone Control Packages

Type No.	Description	List Price
Y12A	Zone Package for First Zone	$40.00
Y13A	Zone Package for Additional Zones	28.00
Y14A	Relief Zone Package	34.00
W1A	Power Box	12.00
W2A	Power Box (for Da-Nite operation)	25.00

Note: The above controls will be invoiced at the list prices shown, less the odd model discount shown on page 1 of the attached contract.

K204A Motorized Flow Valves

K204 Motorized Flow Valve consists of M204A Modutrol Motor, Z101 Linkage, and V561 Flow Valve (straight through type)

M204A Modutrol Motor...$37.00 list less 25—15%
Z101A Linkage ..... 6.00 list less 25—15%
V561A Flow Valves (straight through type) see tabulation in first column for list and net prices.

Modutrol Equipment

This type of equipment requires engineering service if satisfactory results are to be obtained. The general classifications of Modutrol Equipment are as follows: Remote Bulb Temperature Controllers, Motorized Valves, Modutrol Motors, and Series 90 Modulating Thermostats, Limit Controls and Relays. Refrigeration Equipment is also included in this classification.

Note: In limited quantities the above controls will be invoiced at the list prices shown, less 25-15% discount. Manufacturers using these devices as standard equipment in quantities will be quoted net prices upon application.

Metaphram Equipment

In limited quantities, controls in this classification will be invoiced at list prices less the odd model discount shown on page 1 of attached contract.

Extra Charges for Special Features

Use same discount on extra charges as on controls to which special features apply.

Thermostat Extra Charges	List
Special scale, open or mercury switch type thermostats, add	$4.00
Centigrade scale equivalent to Fahrenheit scale—T11, T19, T21, T29, T44, T45, T109, T209, T42, T43, T62	N.C.
All other types, add	4.00
Standard special finishes, add	4.00
Locking Devices, T11, T21, T42, T43, T62, T44, T45	N.C.
T105, T109, T205, T209, add	2.00
T105, T205 Chronotherms	
Special Voltages—220/25, 50, 60	
110/25, 50, add	2.00
Week-end shutoff, week-end and holiday shutoff, add	4.00
Six tripping hands (where available), add	4.00
T42, T62, T43, less thermometer, deduct	.50
Positive Nite shutoff, T11, T21, T44, T45	N.C.
Reverse action—	
Open contact types, add	4.00
Mercury switch types	N.C.
Special mercury switch, add	2.00

(Plus any extra charges for special building required.)

Low Water Cutoff Extra Charges	List
C402, C602, for gauge glasses longer than 12", add	$1.00
For manual reset except on C622B and C627A, add	1.00
Manual reset C622A and C627A	N.C.

Water Valve Extra Charges	List
For voltages and frequencies other than 110 volt, 50 or 60 cycles add	$2.00

Limit Control Extra Charges	List	Net
Special Ranges:		
L144, L244, L444, L170, L270		
To 400° F. or 204° C., add	$6.00	
Standard Ranges in Centigrade, add	1.00	
L157, L454, L428, L628, Special Ranges	6.00	
Standard Ranges to Centigrade	1.00	

	List	Net
LA109, LA209, LA409		
Special Range, 140—240	2.00	
Standard Ranges in Centigrade	1.00	
L101, L201, L401, LA119, LA219, LA419A, LA412A, L431, Special Ranges, add	6.00	
Standard Ranges in Centigrade, add	1.00	
L134, L434		
Standard Ranges in Centigrade on both dials add	2.00	
Special Lengths:		
L144, L244, L444, L170, L270		
Special lengths well 4½" and 6" or special nut 2¼" on L170, L270, add	2.00	
Other special extension up to 12"	6.00	
Over 12" extension	Special quotation	
L628, L428, L157, L454, special length well	Special quotation	
LA119, LA219, LA419, LA412A, LA222		
Special length insertion, 8" surface mounting or 18" ball mounting	2.00	
Other special lengths, 24" max.	6.00	
L101, L201, L401, L121, L221, L421, L145, L445		
8" insertion	N.C.	
Other special lengths	6.00	
Reverse Action:		
Open contact type devices, add	4.00	
Mercury switch type devices	N.C.	
Special mercury switch, add	2.00	

(Plus any extra charge for special building required.)

Relays Extra Charges	List
For voltages other than 110 or 220 volt, 50 or 60 cycles (and for D.C., where available), add	$4.00

Damper Motor Extra Charges	List
For voltages and frequencies other than 110 volts, 50 or 60 cycles, add	$2.00

Prices subject to change without notice.

469 Minneapolis Honeywell Regulator Company

Automatic Controls MH

Manufacturers Confidential Price List

Protectorelays and Combustion Safety Controls

New Type No.	Description	List Price
R101A	Protectorelay — Intermittent type—recycling. D.C. only. Requires line voltage thermostat	$35.00
R114A	Protectorelay — Intermittent ignition—non-recycling	29.00
R116A	Protectorelay — Stack mounting—Constant ignition—recycling	20.00
R117A	Protectorelay—Stack mounting—Intermittent ignition—recycling	23.00
R118A	Protectorelay—Stack mounting—Intermittent ignition—delayed oil valve timing—recycling	31.00
R123A	Protectorelay — Burner mounting—Intermittent ignition — recycling—New design	23.00
R124A	Protectorelay—Burner mounting—Constant ignition—recycling—New design	20.00
R157A	Industrial Protectorelay. Intermittent ignition, delayed oil valve, timed ignition, timed recycling	35.00
R161A	Industrial Protectorelay—Intermittent ignition, delayed oil valve. Timed ignition, timed recycling. Uses 2-wire combustion contact (available for D.C.)	43.00
R161B	Industrial Protectorelay—Intermittent ignition, delayed oil valve and ignition timing, non-recycling. Uses 2-wire combination control (available for D.C.)	43.00
R161C	Industrial Protectorelay—Same specifications as R161B except constant ignition	43.00

New Type No.	Description	List Price
R416A	D.C. Lockswitch — Stack mounting — Constant ignition—recycling—2-wire line voltage. Available for direct current only	24.00
R417A	D.C. Lockswitch—Stock mounting—Intermittent ignition—recycling—2-wire line voltage. Available for direct current only	27.00
R416A, B, C	Same as R161A, B, C, except for D.C. only	47.00

Extra Charge Schedule

Use same discount on extra charges as on controls to which special features apply.

Feature	List
Protectorelays and Lockswitches	
Standard 110-115 V. 50 or 60 Cy.	N.C.
Other A.C. voltages and frequencies and D.C. (when available) add	$4.00
Alarm circuit in safety switch, add	2.00

Quantities of 50 or more specials of one type, at one time, are subject to special quotations except no extra charge is made for standard odd voltage and frequencies (other than D.C.)

Combustion Safety Controls

New Type No.	Description	List Price
C40A	Pyrostat—single contact	$18.50
C56A	Pyrostat — double contact — overlapping on heating	16.00
C57A	Protectostat—single contact	16.00
C503A (48H)	Stackswitch—3-wire—overlapping	16.00
C403A (48R)	Stackswitch—2-wire—make on temperature rise	16.00
C403C (48)	Stackswitch—2-wire—break on temperature rise	16.00
C403B (48MR)	Stackswitch—same as 48R except with manual reset	17.50

Extra Charge Schedule

Use same discount on extra charges as on controls to which special features apply.

Feature	List
Double length Pyrostat elements and shaft, add....	$4.00

Magnetic Oil Valves and Gas Pilot Valves

New Type No.	Description	List Price
V446A	Series 40 Magnetic Gas Valve with by-pass. ⅜" pipe size	$7.00
V474A	Series 40 Magnetic Shut-off Oil Valve. ⅜" size	11.50

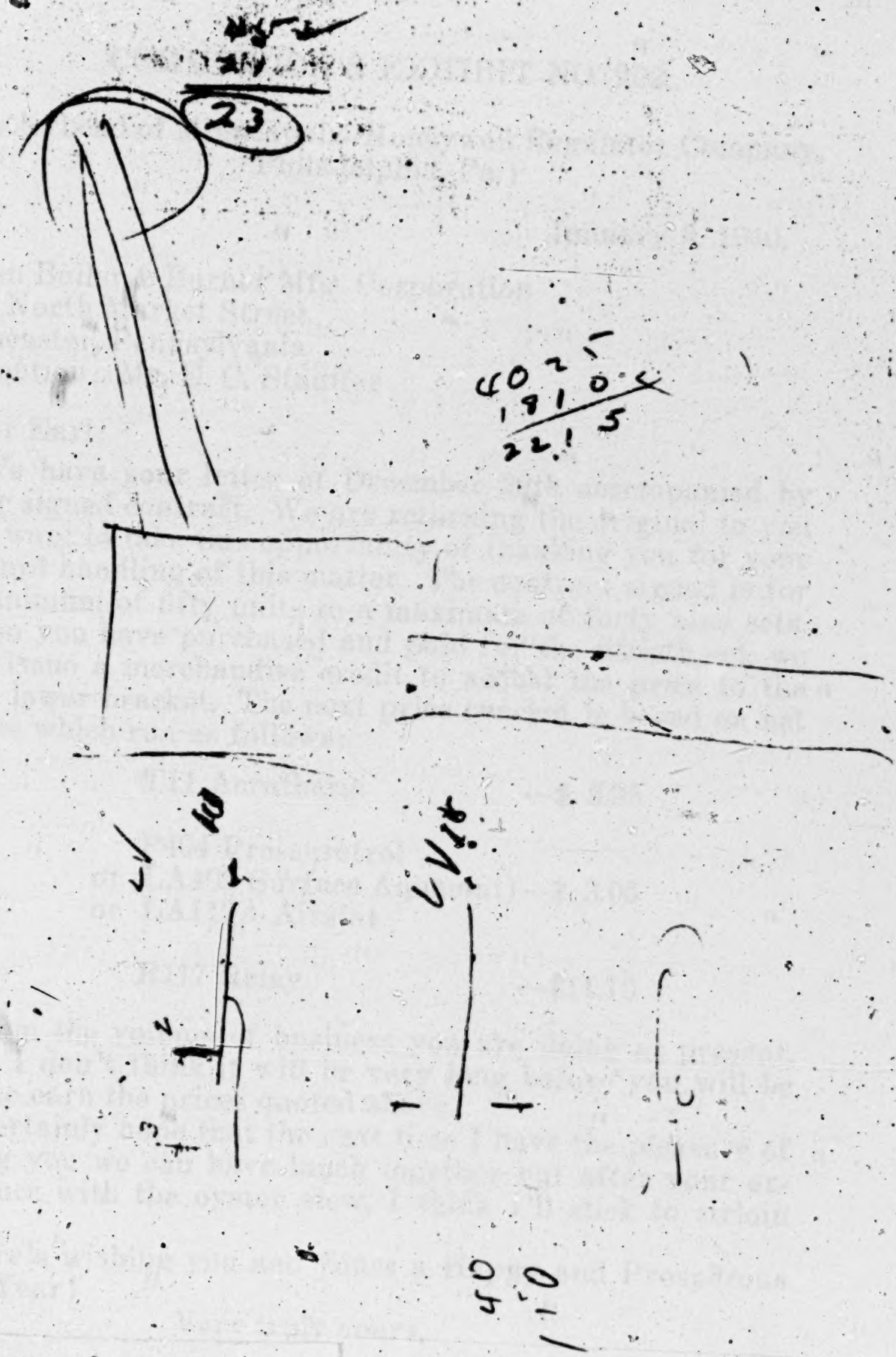
Extra Charge Schedule

Use same discount on extra charges as on controls to which special features apply.

Feature	List
Standard voltages 110 V./50 or 60 Cy.....	N.C.
For other voltages and frequencies, add.....	$2.00

Note: The above controls will be invoiced at the list prices shown subject to the contract discount indicated on page one of attached contract.

Prices subject to change without notice.



Cameraman's Note:

This is poor copy, but

471 COMMISSION'S EXHIBIT NO. 202.

(Letterhead of Minneapolis-Honeywell Regulator Company, Philadelphia, Pa.)

January 3, 1940.

Penn Boiler & Burner Mfg. Corporation
359 North Market Street
Lancaster, Pennsylvania
Attention: Mr. E. C. Stauffer

Dear Earl:

We have your letter of December 29th accompanied by your signed contract. We are returning the original to you and want to take this opportunity of thanking you for your prompt handling of this matter. The contract signed is for a minimum of fifty units to a maximum of forty nine sets. When you have purchased and paid for the fiftieth set, we will issue a merchandise credit to adjust the price to the next lower bracket. The next price bracket is based on net prices which run as follows:

T11 Acratherm —$ 3.95

P404 Pressuretrol
or LA409 Surface Aquastat)—$ 3.05
or LA119A Airstat

R117 Relay —$11.10

From the volume of business you are doing at present, Earl, I don't think it will be very long before you will be able to earn the prices quoted above.

I certainly hope that the next time I have the pleasure of seeing you we can have lunch together but after your experience with the oyster stew, I think I'll stick to sirloin steak.

Here's wishing you and yours a Happy and Prosperous New Year!

Very truly yours,

Minneapolis-Honeywell Regulator Co.
John
J. C. Dorsey.

JCD:JH

472 COMMISSION'S EXHIBIT NO. 204-A.

September 5, 1940.

Minneapolis-Honeywell Regulator Co.
Minneapolis, Minnesota

Gentlemen:

We have an order from one of our customers for Minneapolis Honeywell controls type 793X01 marked transformer relays and #254L immersion aquastats.

We have made a careful search and cannot determine what controls are meant. We do know that they are Minneapolis controls and that they are special numbers that have been made up, we have been told, for the Detroit Lubricator Company.

What we would like to learn is what controls are desired by our customer so that we can give his order prompt attention.

Very truly yours,
Penn Boiler & Burner Mfg. Corp.
A. S. Kimmel:rh Per E. C. Stauffer.

473 COMMISSION'S EXHIBIT NO. 204-B.

Air Mail

(Letterhead of Minneapolis-Honeywell Regulator Company, Minneapolis, Minn.)

September 9, 1940.

Penn Boiler & Burner Mfg. Corp.,
Lancaster, Pennsylvania.

Attention: Mr. A. S. Kimmel

Gentlemen:

Thank you very much for your letter of September 5th. The type 793 relay is a control manufactured by the Penn Electric Switch Co., and the type 254 Immersion Aquastat is manufactured by the Detroit Lubricator Co.

Inasmuch as your customer specifies Minneapolis-Honeywell controls, we are enclosing installation leaflets on con-

trols that may be used in place of those mentioned in your letter. The R19A relay may be used in place of the type 793 relay, and the L444A Immersion Aquastat may be used in place of the type 254 Immersion Aquastat. Figure 4, page 2, of the enclosed installation leaflet on our Series 10 relays will show you a typical hook-up incorporating the use of the R19A relay, and the installation leaflet on the L444 Immersion Aquastat will give you the complete specifications and installation data of that control.

In the event that you may have any further questions on either the R19A relay or the L444 Immersion Aquastat in your customer's particular application, please don't hesitate to call on us here in Minneapolis, or more conveniently for you, our Harrisburg office, located at 6 N. 5th St. They regularly serve your territory, and we assure you that they will be glad to be of any assistance possible.

Yours very truly,
Minneapolis-Honeywell Regulator Co.
W. H. Christensen,
Original Equipment Division.

NLA

478 COMMISSION'S EXHIBIT NO. 205.

January 30, 1940.

Minneapolis-Honeywell Regulator Co.
Wayne & Roberts Ave.
Philadelphia, Pa.

Attention: Mr. John Dorsey, Manager

Dear John:

I am very sorry that we could not conclude our difficulties pertaining to costs, etc. while at the Cleveland Show, but as I explained to you we are now paying your company $6 more for controls; whereas, last year we paid $4. However, I have found a source of supply for controls where I actually can buy a set of controls that you charge me $21 for at a price of $13. Therefore, as soon as I can complete the multigraph work, I am sending a bulletin to my dealers in which we will quote $12 for M-H controls when such controls are purchased direct from the M-H factory and one dollar less when such purchases are made through a com-

petitive manufacturer using Mercoid as our base price and standard equipment.

You see, I can't help but see that you are so justified in making the $6 extra charge that I must do likewise, hence the $12 additional cost. I find now that I can buy oil burners to use in my Units with an oil burner at approximately $13 per set and since my Mercoid price in the former case is $6 lower than your price or in the latter case $1 more it will be necessary for me to make this distinction in my price brackets and I am accordingly sending out a bulletin of which I will submit you a copy within a few days. With kind personal and trusting that you got over the Show alright, I am

Very truly yours,

Penn Boiler & Burner Mfg. Corp.
Per E. C. Stauffer.

ECS:RH

479 COMMISSION'S EXHIBIT NO. 206-A.

May 10, 1940.

Mr. John Dorsey
Minneapolis-Honeywell Regulator Co.
Wayne & Roberts Ave.
Philadelphia, Pa.

Dear John:

Since going over our agreement and discussion which we had on your last visit here, I wish to advise you that I don't believe it will be necessary for us to sign any contract or purchase any controls directly from you as a manufacturer.

The set up is such that we can purchase them at considerably lower price from various sources competitive to us and since we carry in our heart a great sympathy for competitors, we would much rather help them out than the manufacturer as well as the fact that we desire to buy at prices commensurate with our competition.

In checking over the prices quoted some dealers who handle our boilers and competitive burners, we find that they can buy oil burner controls cheaper than we can with the results that on this basis it would be practically hopeless

for us to sell them controls. In fact comparing our dealers' prices with your prices to us, we could still purchase controls cheaper from our own dealers than from you.

In order to be logical, the set up should be such that we could sell our dealers controls at a profit.

Very truly yours,

Penn Boiler & Burner Mfg. Corp.
Per E. C. Stauffer.

E. C. Stauffer;rh

480 COMMISSION'S EXHIBIT NO. 206-B.

(Letterhead of Minneapolis-Honeywell Regulator Company, Philadelphia, Pa.)

May 14, 1940.

Penn Boiler and Burner Mfg. Corporation
Lancaster, Pennsylvania

Attention: Mr. E. C. Stauffer

Dear Earl:

I have your somewhat surprising letter of May 10th and as you have expressed yourself so forcefully to me, not only in your letter but in our many conversations, there isn't much that I can say in answering said letter of May 10th other than what I have already told you numerous times in the past.

However, I will drop in to see you from time to time and in the meantime would appreciate your returning the contract recently left for your signature.

Yours very truly,

Minneapolis-Honeywell Regulator Co.
John Dorsey.
J. C. Dorsey.

JCD:JH

481 COMMISSION'S EXHIBIT NO. 207-A.

(Letterhead of Penn Electric Switch Co.,
Goshen, Indiana.)

September 13, 1940.

Mr. I. D. Royal,
1118 New Post Office Bldg.,
433 W. Van Buren St.,
Chicago, Ill.

Dear Mr. Royal:

I am attaching a sheet incorporating the data which you requested.

Yours very truly,
Penn Electric Switch Co.,
Albert Penn,
President.

APenn:eh

482 COMMISSION'S EXHIBIT NO. 207-B.

Thermostats, Saftrols and Fan & Limit Controls.

1939	
Thermostats	31,072
Saftrols	28,258
Fan and Limit Switches	40,690
	100,020
1938	
Thermostats	23,617
Saftrols	13,070
Fan and Limit Switches	28,612
	65,299
1937	
Thermostats	44,224
Saftrols	22,532
Fan and Limit Switches	40,426
	107,182

	1939	1938	1937
Hall-Neal Furnace Co.	0	0	0
Timken Silent Automatic Co.	0		
Thermostats			1
Saftrols			—89
Fan & Limit Switches			4
Quiet Heat Co.	0	0	0
Penn Boiler & Burner Mfg. Corp.		0	0
Thermostats	2		
Saftrols	0		
Fan & Limit Switches	40		
Herco Oil Burner Co.	0	0	0
Desoto Oil Burner Co.	0	0	0
Micro-Westco Vo.			0
Thermostats	65	133	
Saftrols	1	115	
Fan & Limit Switches	41	215	
Hart Oil Burner Co.	0	0	0
Century Engineering Co.			
Thermostats	163 (Century) 874 (Crane)	62 (Century) 462 (Crane)	1222
Saftrols	175 (Century) 1159 (Crane)	53 (Century) 557 (Crane)	1219
Fan & Limit Switches	252 (Century) 1384 (Crane)	75 (Century) 602 (Crane)	828

486 COMMISSION'S EXHIBIT NO. 210.

Penn's Sales of Oil Burner Controls, Consisting of Thermostats, Stack Switches and Limit Switches for the Years 1940 and 1941.

(Furnished Major W. W. Shepard, Dec. 2, 1943)

	1940	1941
Thermostats	40,629	54,513
Stack Switches.....	39,428	43,029
Limit Controls.....	61,073	72,441
	141,130	169,963

487 COMMISSION'S EXHIBIT NO. 210-A.

(Letterhead of Penn Electric Switch Co., Goshen, Ind.)

Malcolm E. Henning
Vice President

December 2, 1943

Major W. W. Shepard,
Federal Trade Commission,
Washington, D. C.

Dear Major Shepard:

I have been able to obtain the information which you require sooner that I anticipated. Under the circumstances, I see no reason why I should not forward this to you in Chicago by way of Mr. Freeman, who I hope will be good enough to pass it on to you.

The tabulation is as follows:

Penn's Sales of Oil Burner Controls, Consisting of Thermostats, Stack Switches and Limit Switches During the years 1940 and 1941.

	1940	1941
Thermostats	40,629	54,513
Stack Switches	39,428	43,029
Limit Controls	61,073	72,441
	141,130	169,963

It will be noted that we sold 141,130 controls for oil burners in 1940 and 169,963 in 1941. This excludes all miscellaneous controls, such as clocks, relays, transformers, and a wide assortment of accessory items of this kind which likewise are chargeable to the oil burner heating industry. I have excluded these since they were excluded in the information given to Mr. Royal by Albert Penn for the years 1937, 1938 and 1939.

The average price for a thermostat is a little more than $3.00, a limit switch $2.50, and a stack switch a little better than $9.00. If you total these and divide by three, you will arrive at an average price per piece of very close to $5.00 each. Now, if you will multiply this by the number of units we sold in 1941, you can understand why I stated the Penn Co. was doing a $1,000,000 business in the heating field for oil burners alone. I say this because, as stated previously, many accessories we have excluded to make this tabulation coincide with that which we furnished Mr. Royal for 1937, 1938, and 1939.

Had the Penn Co. not moved its plant in July 1937, swelling its sales for the first six months to prevent tying up of its customers for the following six months, there would have been no difference in our sales curve in

any of the years in question. That is why I contend it is reasonable to say that our growth has been steadily upward.

I hope you will pardon me for injecting more than you asked for, but it has not been our policy to hurt a competitor by any abuse or misuse of facts, and I am sure this is the way you would prefer to have it.

It was a pleasure to make your acquaintance, and I am going to give you a ring the first time I am in Washington.

Sincerely yours,

Malcolm E. Henning.

MEH:TG
Enc. (1)

489 COMMISSION'S EXHIBIT NO. 211-A.

(Letterhead of Penn Electric Switch Co., Goshen, Ind.)

Malcolm E. Henning
Vice President

July 25, 1944

Major W. W. Sheppard,
Trial Examiners' Division,
Federal Trade Commission,
Washington, D. C.

Re:—Minneapolis-Honeywell Regulator Co.
Docket No. 4920

Dear Major Sheppard:

In connection with my testimony before you in the above matter on behalf of the Penn Electric Switch Co. on November 30, 1943, there was introduced in evidence as Respondent's Ex. 102, a schedule showing for the years 1937 through 1941 the bracket prices at which Penn Electric primary controls, limit controls and thermostats were offered and sold to oil burner manufacturers.

Subsequently it was brought to my attention that the schedule did not set forth the quantities applicable to each bracket, and I have now been asked by Counsel for the Respondent to supplement Respondent's Exhibit 102 by furnishing the quantities applicable to the price brackets shown by that schedule. Such supplemental information is attached hereto for inclusion in the record.

Very truly yours,
Malcolm E. Henning.

MEH: TG

490 COMMISSION'S EXHIBIT NO. 211-B.

Supplement to Respondent's Ex. 102

Penn Electric Switch Co.

Annual Volume of Control Purchases Applicable to Price Brackets

Bracket I	Applicable Quantity
1937	50-849
1938	50-849
1939	1-99
1940	50-349
1941	50-349
Bracket II	
1937	850-2999
1938	850-2999
1939	100-999
1940	350-999
1941	350-999
Bracket III	
1937	3000-11,999
1938	3000-11,999
1939	1000-4949
1940	1000-2499
1941	1000-2499
Bracket IV	
1937	12,000-Up
1938	12,000-Up
1939	4950-9499
1940	2500-7499
1941	2500-7499
Bracket V	
1939	9500-Up
1940	7500-Up
1941	7500-Up

7/25/44
MEH

491 COMMISSION'S EXHIBIT NO. 212-A.

(1) Copies of any and all contracts for the sale of automatic temperature controls for domestic oil burners entered into by the Mercoid Corporation with each of the following oil burner manufacturers, for the years 1937 through 1941 inclusive:

	'37	'38	'39	'40	'41
Acme Tool & Gauge Co. Pawtucket, R. I.	7c	3c	27c	21c	20c
Alida Mfg. Co. Brooklyn, N. Y.	—	—	—	—	—
Arcweld Mfg. Co. Seattle, Washington	—	—	—	—	—
Automatic Burner Corp. Chicago, Illinois	—	—	2	20	12
Bedard Johnson Co. Minneapolis, Minn.	—	—	—	—	—
Berggren Engr. Co. Brooklyn, N. Y.	—	—	—	—	—
Bock Corp. Madison, Wisconsin	—	—	—	—	—
Braden Engrg. Inc. Providence, R. I.	93	70	23	13	13
Brown Oil Burner Eq. Co. Cambridge, Mass.	—	—	—	—	—
Buck Engineering Co. Inc. Freehold, N. J.	—	—	—	—	—
Burner Parts & Serv. (now Penn Boiler & Burner Co.) Lancaster, Pa.	37	107	137	142	132
Campbell Machinery Minneapolis, Minn.	—	—	—	—	—
Century Engineering Co. Cedar Rapids, Iowa	20	2	4	—	—
Cleveland Steel Products Corp. Cleveland, Ohio	68	9	6	1	2
Citro Oil Burner Corp. Pompton Lakes, N. J.	—	—	—	—	—
Concord Oil Corp. Brooklyn, N. Y.	—	—	—	—	2
D'Elia Oil Burner Co. Bridgeport, Conn.	—	—	—	—	—

	'37	'38	'39	'40	'41
DeSoto Oil Burner Corp. York, Pa.	—	—	—	—	—
Diesel Burners, Inc. Moosup, Conn.	—	—	7	8	2
David Duff & Sons New Bedford, Mass.	—	—	—	—	—
Eisler Engineering Co. Newark, N. J.	—	—	—	—	—
Electrol, Inc, Clifton, N. J.	21	19	13	14	13
Electromatic Oil Burner Co. Malverne, N. Y.	—	—	—	—	—
Enterprise Oil Burner Corp. San Francisco, Calif.	—	—	—	—	—
Fairfield Oil Htg. Co. Greenwich, Conn.	23	15	13	32	15
Fargo Foundry Co. Fargo, N. D.	—	—	—	—	—
Gar Wood Industries, Inc, Detroit, Mich.	—	—	—	—	—
General Oil Burner Corp. Baltimore, Md.	55	34	22	24	14
General Oil Heating Corp. West New York, N. Y.	57	48	34	31	52

492. COMMISSION'S EXHIBIT NO. 212-B.

	'37	'38	'39	'40	'41
Capitol Oil Burner Co. Hartford, Conn.	—	—	—	—	—
Carlson Bros. Tool & Machine Co. Boston, Mass.	—	—	—	—	—
Carter-Korth Oil Burner Co. Roselle Park, N. J.	—	—	—	—	—
Gold Star Oil Burner Mfg. Co. Yonkers, N. Y.	—	—	—	—	—
Goodrich Oil Burner Mfg. Corp. New Haven, Conn.	1	64	41	55	48
Greenwood Engineering Co. Glenarm, Md.	—	—	—	—	—
Hall-Neal Furnace Co. Indianapolis, Ind.	10	2	—	—	13

	'37	'38	'39	'40	'41
Harrison Sales Co. Seattle, Wash.	—	—	—	—	—
Hart Oil Burner Corp. Peoria, Ill.	—	—	—	3	3
Harvey-Whipple, Inc. Springfield, Mass.	6	6	1	5	3
Hayward Mfg. Co. Inc. Brooklyn, N. Y.	8	2	4	—	—
The Heil Co. Milwaukee, Wis.	—	—	—	—	—
Herco Oil Burner Corp. Lancaster, Pa.	121	137	294	258	216
Hi-Point Corp Bellefontaine, Ohio	9	2	1	1	—
Hoben Mfg. Co. Waltham, Mass.	—	—	—	—	—
Holtum Mfg. Co. Freeport, Ill.	2	—	—	—	—
Homestead Engrg. Corp. Brooklyn, N. Y.	—	—	—	—	—
Hubbard Oil Burner Co. Minneapolis, Minn.	—	—	—	—	—
Hupp Oil Burner Co. Brooklyn, N. Y.	5	23	—	—	—
Hyle Oil Burner Co. Baltimore, Md.	—	2	—	—	—
Jacobson Mfg. Co. Racine, Wis.	—	—	—	—	—
Kelly Oil Sales Corp. Arlington, Mass.	32	71	700	—	—
LaGrace Oil Burner Co. Woonsocket, R. I.	—	—	—	—	—
Liberty Research Lab., Inc. Farmingdale, N. Y.	—	—	—	—	—
Lynn Products, Inc. Lynn, Mass.	26	6	5	2	—
Malleable Iron Fittings Co. Branford, Conn.	—	6	32	153	239
Master Oil Burner Co. Seattle, Wash.	—	—	—	—	—
Messer Co. Newark, N. J.	—	—	—	—	—
Micro-Westco, Inc. Bettendorf, Iowa	—	—	—	—	—

	'37	'38	'39	'40	'41
Am. Mohawk Corp.)	—	—	—	—	—
Mohawk Oil Burner Mfg. Co.)	—	—	—	—	36
New York, N. Y.)					
Jos. Toker Utilities)	—	—	5	41	17
New York, N. Y.)					
Montag Stove & Furnace Wks. Portland, Ore.	—	—	—	—	—
Muehlbach, G. T. Minneapolis, Minn.	—	—	—	—	—
National Devices Co. Bellmore, N. Y.	—	—	—	—	—
Neis & Brechtl, West Allis, Wis.	—	—	—	—	—

	'37	'38	'39	'40	'41
Oil Equipment Laboratories Elizabeth, N. J.	—	—	—	—	—
Old Colony Machine Works Co. Fall River, Mass.	—	—	—	—	—
Osher and Reiss, Inc. Brooklyn, N. Y.	—	1	—	—	3
Packard Oil Burner Mfg. Co. Bridgeport, Conn.	—	—	—	—	—
Pan-American Engineering Corp. Berkeley, Calif.	13	2	—	—	—
Penn Petroleum Products Co. Providence, R. I.	—	—	—	—	—
Petroleum Heat & Power Co. Stamford, Conn.	76	36	37	11	58
Quiet Heet Mfg. Corporation Newark, N. J.	12	37	139	50	16
Quiet Heat Oil Burner Co. Brooklyn, N. Y.	9	1	—	—	—
Reliable Oil Burner Corp. Madison, Wis.	—	—	—	—	—
Reif-Rexoil, Inc. Buffalo, N. Y.	2	—	—	—	—
Rossoe Mfg. Co. Seattle, Wash.	—	—	—	—	—

	'37	'38	'39	'40	'41
Silent Flash Oil Burner Corp. Brooklyn, N. Y.	—	—	—	—	—
S-K Co. Camden, N. J.	—	9	—	—	—
Simplex Oil Heating Corp New York, N. Y.	3	80	2	2	1
Standard Products Co. Clinton, Mass.	9	—	—	—	—
Scott-Newcomb, Inc. St. Louis, Mo.	—	—	—	—	—
Sunray Oil Burner Corp. Rockaway Park, N. Y.	—	—	—	—	—
Todd Combustion Equipment, Inc. New York, N. Y.	13	23	35	30	42
Timken-Detroit Axle Co. Detroit, Mich.	—	—	—	—	—
Volcano Burner Corp. New York, N. Y.	—	—	—	5	9
Wayne Oil Burner Corp. Ft. Wayne, Ind.	—	20	13	3	3
Harry C. Weiskittel Co. Inc. Baltimore, Md.	—	—	—	—	—
Westchester Home Equipt. Co. Mt. Vernon, N. Y.	5	12	3	4	4
Williams Oil-O-Matic Bloomington, Ill.	288	104	90	90	244
Wisconsin Oil Burner Co. Madison, Wis.	—	—	—	—	—
York Oil Burner Co. Inc. York, Pa.	6	10	21	13	3

(2) Price lists, discount sheets or other data showing the various prices at which Mercoid Corporation offered and sold such controls to said oil burner manufacturers during the years 1937 through 1941 inclusive.

512 RESPONDENT'S EXHIBIT NO. 8.

Manufacturers' Purchase Contract

The Mercoid Corporation
4201 Belmont Ave. Chicago, Ill.

This Agreement, entered into between The Mercoid Corporation, a Delaware corporation, hereinafter called the "Company," and Cleveland Steel Products Co. of Cleveland, Ohio, hereinafter called the "Purchaser,"

Witnesseth:

Whereas the Company is engaged in manufacturing automatic electric controls for heating, refrigerating, air conditioning and other apparatus, machinery and equipment, and

Whereas the Purchaser is desirous of purchasing such controls for use in connection with products of the Purchaser's own manufacture,

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter set forth the parties hereto agree as follows:

Quantity

Subject to the terms and provisions hereinafter contained, the Company agrees to sell and the Purchaser agrees to purchase, during the term of this agreement, ... units of the Company's automatic controls (each unit consisting of one of the controls listed herein), at the prices shown.

Miscellaneous Controls and Control Equipment

Miscellaneous automatic controls and control equipment of the Company's manufacture, not listed herein but shown in the Company's catalogue attached hereto, will be furnished at the catalogue list prices less the discounts shown on the manufacturers' discount sheet attached hereto. The list prices and discounts shall be subject to change at any time and from time to time, without notice. All orders for such miscellaneous controls and control equipment shall be subject to acceptance and approval by the Company.

Term of Agreement

This agreement shall become effective on the date of acceptance by the Company and shall continue to and including December 31, 1938, unless sooner terminated as herein provided.

Terms of Payment

All shipments shall be made f.o.b. the point of shipment with Factory Sight Draft attached to the Bill of Lading, the Company to have the right to designate the point of shipment. If the draft is paid within 10 days from the date of the invoice a special cash discount of two per cent (2%) will be allowed. If Purchaser desires open account credit accommodation arrangements therefor should be made with the Company's credit department. If such arrangements are made invoices will be due net thirty days after the date of the invoice and a cash discount of two per cent. (2%) will be allowed if payment is made within 10 days from the invoice date. Credit terms and delivery of all equipment are subject to the Company's approval and the Company shall have the right at all times to change or alter the terms of payment and to fix, change or alter such credit accommodations as may be extended to Purchaser. Sales, excise and other taxes will be added to all prices and the amount of such taxes shall not be subject to discount. Invoices covering emergency shipments from a Branch Office of the Company shall be subject to such discounts as are in effect at such Branch Office at the time of shipment, anything herein contained to the contrary notwithstanding.

Use of Controls by Purchaser

This agreement is made upon the understanding and condition that Purchaser, who is a manufacturer, will not use or sell the controls or appliances purchased pursuant hereto except as a part of or in conjunction with machinery or equipment of Purchaser's own manufacture. If Purchaser shall use or sell such controls or appliances otherwise than as above specified the Company shall have the right to immediately terminate this agreement without notice.

Impossibility of Performance

The Company agrees that it will, in good faith and to the best of its ability, promptly fill all orders received from Purchaser and deliver the same to the carrier for shipment; provided, however, that the Company shall not be obliged to fill orders in the event and to the extent that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires, floods, tornados, acts of God, mechanical breakdowns, short-

ages of raw materials, delays in receipt of raw materials and any other causes or conditions beyond the control of the Company.

Assignment of Contract

The Purchaser shall not assign this contract or any interest therein without the written consent of the Company.

Price Revisions

The Company reserves the right to change and revise the prices listed herein upon thirty (30) days' written notice to Purchaser. Revised prices shall apply to all orders received by the Company after the expiration of the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in the Company's possession at the expiration of such period. If the revised prices are not satisfactory to Purchaser the Purchaser may terminate this agreement by written notice received by the Company within fifteen (15) days from the expiration of the aforesaid thirty (30) day period; provided, however, that such termination shall not affect completion of any orders received by the Company prior to the Company's receipt of the Purchaser's notice of termination. During the aforesaid thirty (30) day price change notice period the Purchaser may not order more than one-twelfth of the number of control units herein agreed to be purchased, or, at the Company's option, more than an equivalent number of control units shipped to Purchaser during the same period of the previous year.

513 Control Units and Prices

	Single Shipment Quantities		
	List Price	1 to 249 Assorted.	250 up Assorted
Primary Controls			
Type KMW Pyratherm	$23.00	$9.00	$8.70
Type KMI Pyratherm	24.00	9.50	9.50
Type RMI Pyratherm		9.50	9.20
Special Note: Deduct 50c Each Net From The Respective Assorted Quantity Prices Below When Ordering 10 or More Instruments of One Type and Specification.			

	Single Shipment Quantities		
	List Price	1 to 249 Assorted	250 up Assorted
Thermostats			
Type H Sensatherm (Standard) 55-85°, with Thermometer...	6.00	3.35	3.20
Type DNH Sensatherm, 55-85°, with Thermometer	16.00	8.50	8.50
Type HH Dual Sensatherm, 55-85°, with Thermometer	12.50	6.50	6.50
Type T-41 Timercoid and Transformer, 110-24 V., 60 cyc.....	20.00	10.25	10.25
No. 855 Line Voltage Thermostat, with Thermometer.....	10.00	5.25	5.00
Limit Controls			
Type DA-31 Steam Control, 0 to 14 lb.	6.00	3.35	3.25
Fig. 35 Risertherm (Clamp-on) Hot Water Control	6.00	3.35	3.25
Type 115W Immersatherm, 50 to 250° F.	8.00	4.35	4.25
Type DA-36 or DA-37 Immersion Hot Water	11.00	5.75	5.75
Type M-51 or M-53 Warm Air Fan or Limit	8.00	4.35	4.25
Type M-80 Combination Fan and Limit	14.00	7.25	7.00
Type DA-121 Combination Low Water and Pressure, 0 to 14 lb.	22.00	11.25	11.00
Type 123 Low Water Only, 30 lb. Max.	15.00	7.85	7.75

Other Standard or Odd Model Controls at Prevailing Manufacturers Prices.

Prices Relating to All Controls Are for 110 or 220 Volt, 60 Cycle Specifications Only, Unless Otherwise Specified.

514 Special Units and Prices.

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Guarantee and Returns

The Company guarantees all control units and equipment manufactured by it and bearing its name or mark to be free from defects in workmanship and material. The Company will, without charge, replace or repair within one year from date of shipment from the Company's factory any control unit or equipment that may be found to be defective upon inspection at the Company's factory. This guarantee does not obligate the Company in any manner in cases where control units or equipment have been subjected to careless handling, improper application or faulty installation. In all cases the Company's liability on the guarantee herein expressed shall be limited to the repair or replacement of the defective control or equipment and in no event shall its liability extend to indirect or consequential damages. The guarantee herein expressed is made in lieu of all other warranties, guaranties, obligations, or liabilities expressed or implied by the Company or its representatives. All statutory or implied warranties, other than of title, are hereby expressly negatived and excluded.

Returns must not be made without the Company's consent and in all cases the returned controls or equipment must be carefully handled, properly packed and shipped prepaid. If credit is allowed for returns the Company will deduct ten per cent. (10%) to cover handling and inspection charges and a further deduction will be made where recalibrating or refinishing is necessary. Specially made controls may not be returned for credit except at what the Company determines is a fair value for the same.

Patent Warranty

The Company agrees that it will, at its own expense, defend any suit or proceeding that may be instituted against the Purchaser based upon a claim that any apparatus of the Company's manufacture furnished by the Company to the Purchaser constitute an infringement of any Letters Patent of the United States, provided, that the Purchaser shall not be in default hereunder and shall cause the Company to be promptly notified in writing of such suit and shall give the Company authority to defend such suit through the

Company's counsel and shall furnish to the Company all needed information and assistance for the defense of such suit. The Company will pay all damages and costs awarded against Purchaser in any suit defended by the Company, provided notice of such suit and authority, information and assistance shall have been given to the Company as aforesaid, and in the event the device or apparatus furnished by the Company, or any part thereof, is held to constitute infringement and its use is enjoined the Company will, at its own expense and at the Company's option, either: procure for the Purchaser the right to continue using the infringing devices or apparatus; or replace the same with non-infringing devices or apparatus; or modify the infringing devices or apparatus so that they become non-infringing; or accept the return of the infringing devices or apparatus and refund the purchase price thereof. The foregoing constitutes the Company's only liability in connection with patent infringement by devices or apparatus furnished by the Company.

Whenever the Company deems it necessary for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such products, and the Purchaser agrees, upon receipt of such notice, to make no further sales or installations of any such products unless or until authorized so to do in writing by the Company.

Termination

In addition to any and all other provisions herein contained relating to termination or cancellation of this agreement, the following circumstances are hereby agreed to be and shall be deemed to be conclusive evidence of the breach of this agreement by either of the parties hereto, and in any of these events the other party hereto may, at its election, without prejudice to any other remedy it may have, terminate all further obligations on the part of such non-defaulting party made and to be performed under this agreement:

(a) The breach of or the failure to comply with any or all of the terms, covenants, conditions and provisions of this agreement, and a continuance of such breach for thirty or more days after receipt by the defaulting party of written notice thereof.

(b) The adjudicated bankruptcy, either voluntary or in-

voluntary or the adjudicated insolvency of either party hereto, or the making of an assignment for the benefit of creditors or the appointment of a trustee or receiver for either of the parties hereto.

(c) The repudiation of this agreement, in whole or in part, by either party hereto.

Field Service

The Company will welcome the opportunity of cooperating with the Purchaser in educating the Purchaser's factory personnel in the servicing and the proper installation of the Company's controls but the Company does not agree or bind itself to render any such service.

The foregoing constitutes the entire agreement between the parties hereto and no change, alteration or modification of this agreement shall be binding unless reduced to writing and signed by the respective parties hereto. The validity, enforceability and interpretation of this agreement shall be determined and governed by the laws of the State of Illinois.

..... Purchaser

By .....

..... Title

Date Submitted: .....

The Mercoid Corporation

By .....

..... Title

Date Accepted: .....

516 RESPONDENT'S EXHIBIT NO. 9-A.

Dec. 14, 1939

Mr. J. W. Owens
The Mercoid Corporation
4201 Belmont Ave.,
Chicago, Ill.

Dear Jim:

In answer to your letter of December 8, regarding information received from your Philadelphia office to the effect that the Eastern Light Company, Allentown, Penna., had some difficulty in securing Toridheet burners with Mercoid controls, will say that I have checked up and I cannot find

any order received from that company calling for Mercoid controls. I will say very postively that they can secure Mercoid controls with any of our pressure burners without any difficulty. We will be very glad to furnish them if they are specified.

With kindest regards.

Yours very truly,

J. L. O'Brien.

JLO:EP

517 RESPONDENT'S EXHIBIT NO. 9-B.

(Letterhead of The Mercoid Corporation
Chicago, U. S. A.)

December 8, 1939

Mr. J. L. O'Brien
Toridheet Division
Cleveland Steel Products Corp.
Madison at W. 74th Street
Cleveland, Ohio

Dear J. L.:

It has been called to the writer's attention by our Philadelphia Office that Eastern Light Corporation of Allentown, Pennsylvania, have had some difficulty in securing Toridheet Burners with Mercoid Controls.

It is possible that this Company might have been referring to the rotary burner when they voiced this complaint to our representative. However, the writer would sincerely appreciate it if you would check into this matter, as I am confident from past experience that wherever any of your trade specify Mercoid that you are only too glad, indeed, to supply our controls. I have, from time to time, impressed this upon our various representatives, and any information that you give to me on this particular account will be appreciated.

With kindest regards, remain,

Sincerely,

Jim.

JWO:C

RESPONDENT'S EXHIBIT NO. 23.

Year 1937

	Total Sales	Thermo-stat No. 100	Thermo-stat No. 150	Limit Control	Primary Control No. 5200	Primary Control No. 5500	Sets No. 100 Thermo-stat, Limit Control and No. 5200 Primary Control	Sets No. 150 Thermo-stat, Limit Control and No. 5200 Primary Control	Sets No. 100 Thermo-stat, Limit Control and No. 5500 Primary Control	Sets No. 150 Thermo-stat, Limit Control and No. 5500 Primary Control
Acme Tool	$ 150.00	$3.00	$3.40	$2.95	$11.05	$12.55	$16.75	$17.15	$18.25	$18.65
Brown Oil Burner	348.00	3.20	3.60	3.25	12.30	13.80	18.75	19.15	20.25	20.65
Burner Parts	2,548.00	3.10	3.50	3.00		12.65			18.75	
Campbell	125.00	3.15	3.55	3.10	11.75	13.25	17.90	18.30	19.40	19.80
Carlson Bros.	128.00	3.15	3.55	3.10	11.75	13.25	17.90	18.30	19.40	19.80
Carter Korth	425.00	3.00	3.40	2.95	11.05	12.55	16.75	17.15	18.25	18.65
Citro	149.00	3.15	3.55	3.10		13.25			19.40	19.80
Concord	322.00	3.00	3.40	2.95	11.05	12.55	16.75	17.15	18.25	18.65
Electrol	11,155.00	2.85		2.85	11.50					
Fairfield	558.00	3.15	3.55	3.10	11.75	13.25	17.90	18.30	19.40	19.80
General Oil Burner	260.00	3.00	3.40	2.95	11.05	12.55	16.75	17.15	18.25	18.65
General Oil Heating	184.00	3.00	3.40	2.95	11.05	12.55	16.75	17.15	18.25	18.65
Gold Star	2,008.00	3.00	3.40	2.95	11.05	12.55	16.75		18.25	
Harvey-Whipple	325.00	2.90	3.30	2.85	10.70	12.20	15.25	15.65		
Heil	319.00	2.85	3.25	2.85	10.70	12.20	15.50		17.00	
Hoben	408.00	3.10	3.50	3.00	11.15	12.65	17.25	17.65	18.75	19.15
Hyle	296.00	3.15	3.55	3.10		13.25			19.40	
LaGace	117.00	3.00	3.40	2.95	11.05	12.40) 12.55)			18.25	18.65
Liberty	133.00	3.15	3.55	3.10	11.75	13.25				
Mohawk	699.00	3.10	3.45	3.00	11.25	12.75	16.60	17.10	19.40	19.80
National Devices	140.00	3.15	3.55	3.10	11.75	13.25	17.90	18.30	18.10	18.60
Petro	976.00	2.75	3.10	2.80				15.15	19.40	19.80
Standard Products	3,305.00	2.95	3.35	2.90	10.70	12.20	15.50	15.90	17.00	17.40
Timken	37,158.00	2.55	2.95	2.40	7.90	8.90				
Volcano	299.00	3.00	3.40	2.95	11.05	12.55	16.75		18.25	
Wayne	1,581.00	2.95	3.35	2.90	10.70	12.20	15.50	15.90	17.00	17.40
Westchester	309.00	3.15	3.55	3.10	11.75	13.25	17.90	18.30	18.60) 19.40)	19.80
Wisconsin Oil Burner	2,574.00	3.10	3.50	2.90	11.15	12.65			18.10) 18.75)	18.50) 19.15)
York	899.00	2.90	3 30	2.85	10.70	12.20	15.25	15.65	16.75	17.15

Respondent's Exhibit No. 23.

RESPONDENT'S EXHIBIT NO. 43.

Perfex Sales for Year 1938

	Total Sales	Thermostat No. 100	Thermostat No. 150	Limit Control	Primary Control No. 5200	Primary Control No. 5500	Sets: No. 100 Thermostat and No. 5200 Primary Control	Sets: No. 150 Thermostat and No. 5200 Primary Control	Sets: No. 100 Thermostat and No. 5500 Primary Control	Sets: No. 150 Thermostat and No. 5500 Primary Control
Acme Tool	—	$2.80	$3.20	$2.90	$11.30	$12.80	$13.60	$14.00	$15.10	$15.50
ABC	$ 66.00	2.45	2.85	2.65	9.55	10.55				
Burner Parts	735.00	2.95	3.35	3.00	12.00	13.50	14.45	14.85	15.95	16.35
Carlson Bros.	—	2.95	3.35	3.00	12.00	13.50	14.45	14.85	15.95	16.35
Cleveland Steel	2,231.00	2.45	2.85	2.65	9.05	10.05				
Electrol	21,676.00	2.25	2.65	2.50	8.10	9.10				
Fairfield	472.00	2.80	3.20	2.90	11.30	12.80	13.60	14.00	15.10	15.50
General Oil Heat	761.00	2.80	3.20	2.90	11.30	12.80	13.60	14.00	15.10	15.50
Gold Star	991.00	2.80	3.20	2.90	10.80	12.30	13.10	13.50	14.60	15.00
Hart	—	2.70	3.10	2.75	10.30	11.80	12.50	12.90	14.00	14.40
Harvey-Whipple	891.00	2.70	3.10	2.75	9.80	11.30	12.00	12.40		
Heil	16,538.00	2.70	3.10	2.75	10.80	12.30	13.00		14.50	14.90
Herco	306.00	2.95	3.35	3.00	12.00	13.50	14.45	14.85	15.95	16.35
Hoben	—	2.80	3.20	2.90	11.30	12.80	13.60	14.00	14.30	15.50
Hupp	1,105.00	2.80	3.20	2.90	11.30	12.80	13.60	14.00	15.10	15.50
Muehlbach	131.00	3.20	3.60	3.25	12.90	14.40			17.10	17.50
National Devices	302.00	2.95	3.35	3.00	12.60	13.50	14.45	14.85	15.95	16.35
Reif	6,077.00	2.45	2.85	2.65	9.05	10.05				
Scott-Newcomb	6,744.00	2.75	3.15	2.80	10.95	12.45				
Standard Products	499.00	2.70	3.10	2.75	10.80	12.30	13.00	13.40	14.50	14.90
Timken	34,276.00	2.25	2.65	2.40) 2.50)	7.90	8.90				
Volcano	19.00	2.80	3.20	2.90	11.30	12.80	13.60	14.00	15.10	15.50
Wayne	16,387.00	2.70	3.10	2.75		11.80			14.00	14.40
Westchester	—	2.95	3.35	3.00	12.00	13.50	14.45	14.85	15.95	16.35
Williams	257.00	2.45	2.85	2.65	9.55	10.55				
Wisconsin Oil Burner	—	2.80	3.20	2.90	10.80	12.30	13.10		14.60	15.00
York	2,447.00	2.70	3.10	2.75	10.80	12.30	13.00	13.40	14.50	14.90

2010 Respondent's Exhibit No. 43.

765 RESPONDENT'S EXHIBIT NO. 70.

Year 1939

	Total Sales	Thermo-stat No. 150	Thermo-stat No. 155	Limit Control	Primary Control No. 5200	Contro No. 55 No. 552
Burner Parts (Penn.)	$ 1,293.00	$3.00	$3.15	$2.90	$10.10	$11.05
Cleveland Steel	709.00	2.65	2.80	2.65	8.40	9.35
Electrol	42,366.00	2.45	2.60	2.50	7.60	8.55
Hart	—	2.80	2.95	2.75		9.55
Harvey-Whipple	6,394.00	2.65	2.80	2.65	8.40	
Hayward	—	2.90		2.75	9.60	10.55
Heil	22,625.00	2.65	2.80	2.65	8.90	9.85
Hupp	430.00	3.00	3.15	2.90	10.10	11.05
Lynn	5,198.00	2.65	2.80	2.65	8.40	9.35
Reif	9,879.00	2.65	2.80	2.65		9.35
Scott-Newcomb	1,205.00	2.90	3.05	2.75	9.10	10.05
Timken	68,911.00	2.45		2.50	7.60	8.55
Wayne	17,989.00	2.80	2.95	2.75		9.55
York	20,197.00	2.65	2.80	2.65	8.90	9.85

Year 1940

ABC	2.65	2.80	2.60		8.90
Burner Parts (Penn.)	3.00		2.80		
Carlson Bros.	3.00	3.15	2.80	9.60	10.55
Cleveland Steel	2.65	2.80	2.60	7.95	8.90
Electrol	2.45	2.60	2.50	7.60	8.10
Gold Star	3.00	3.15	2.80	9.60	10.55
Harvey-Whipple	2.65	2.80	2.60	7.95	
Heil	2.65	2.80	2.60	8.90	9.85
Hoben	3.00		2.80	9.60	10.55
Lynn	2.65	2.80	2.60	7.95	8.90
Reif	2.65	2.80	2.60	7.95	8.90
Timken	2.45		2.50	7.60	8.10
Wayne	2.80	2.95	2.65	8.60	9.55
York	2.65	2.80	2.60	7.95	8.90

Year 1941

ABC	2.45	2.60	2.50	7.60	8.10
Carlson Bros.	3.00	3.15	2.80	9.60	10.55
Cleveland Steel	2.65	2.80	2.60	7.95	8.45
Electrol	2.45	2.60	2.50	7.60	8.10
Gar Wood	2.80	2.95	2.65		9.55
Gold Star	3.00	3.15	2.80	9.60	10.55
Harvey-Whipple	2.65	2.80	2.60	7.95	8.45
Heil	2.65	2.80	2.60	7.95	8.45
Hoben	3.00	3.15	2.80	9.60	10.55
Lynn	2.65	2.80	2.60	7.95	8.45
Reif	2.65	2.80	2.60	7.95	8.45
Timken	2.45	2.60	2.50	7.60	8.10
Wayne	2.80	2.95	2.65	8.60	9.55
York	2.65	2.80	2.60	7.95	8.45

766 RESPONDENT'S EXHIBIT NO. 71.

	Thermostat No. 150	Thermostat No. 155	Limit Control	Primary Control No. 5200	Primary Control No. 5500 No. 5520
Bracket 1					
1939	$3.45	$3.60	$3.25	$11.20	$12.15
1940	3.45	3.60	3.10	11.20	12.15
1941	3.45	3.60	3.10	11.20	12.15
Bracket 2					
1939	3.00	3.15	2.90	9.60	10.55
1940	3.00	3.15	2.80	9.60	10.55
1941	3.00	3.15	2.80	9.60	10.55
Bracket 3					
1939	2.90	3.05	2.75	9.10	10.05
1940	2.90	3.05	2.75	9.10	10.05
1941	2.90	3.05	2.75	9.10	10.05
Bracket 4					
1939	2.80	2.95	2.75	8.60	9.55
1940	2.80	2.95	2.65	8.60	9.55
1941	2.80	2.95	2.65	8.60	9.55
Bracket 5					
1939	2.65	2.80	2.65	8.40	9.35
1940	2.65	2.80	2.60	7.95	8.90
1941	2.65	2.80	2.60	7.95	8.45
Bracket 6					
1939	2.45	2.60	2.50	7.60	8.55
1940	2.45	2.60	2.50	7.60	8.10
1941	2.45	2.60	2.50	7.60	8.10

RESPONDENT'S EXHIBIT NO. 73.

OIL BURNER MANUFACTURERS' PRICES—1938

Form No. 11

For Manufacturers Requiring From 1 to 50 Sets.

	Single Shipment Quantities			
	List Price	1-23 Asstd.	24-49 Asstd.	50 Up Asstd.
Primary Controls:				
Type KMW Pyratherm (For Constant Ign.)	$23.00	$11.25	$10.75	$10.25
Type KMI Pyratherm (For Intermittent Ign.)	24.00	11.75	11.25	10.75
Special Note:				
Deduct 50¢ each net from the respective assorted quantity prices below when ordering 10 or more instruments of one type and specification.				
Thermostats:				
Type H Sensatherm, 55-85°, (Standard), with Thermometer	6.00	4.25	4.25	4.15
Type DNH Sensatherm, 55-85°, with Therm	16.00	8.50	8.50	8.50
Type HH Dual Sensatherm, 55-85°, with Thermometer	12.50	6.75	6.75	6.50
Type T-41 Timercoid and Transformer	20.00	10.50	10.50	10.25
No. 855 Line Voltage Thermostat, Standard Ranges	10.00	5.50	5.25	5.00
Limit Controls:				
Type DA-31 Steam Control, 0-14 lbs.	6.00	3.55	3.55	3.35
Fig. 35 Risertherm (Clamp-On) H. W. Con.	6.00	3.55	3.55	3.35
Type 115W Immersatherm, 50-250° F.	8.00	4.55	4.55	4.35
Type DA-36 or DA-37 Immersion H. W.	11.00	6.00	5.85	5.75
Type M-51 or M-53 Warm Air F. or L.	8.00	4.55	4.55	4.35
Type M-80 Combination Fan & Limit	14.00	8.00	7.75	7.50
Type DA-121 Comb. L. W. & Press., 0-14#	22.00	11.50	11.50	11.50
Type 123 Low Water Only, 30 lb. Max.	15.00	8.00	8.00	8.00

Other Standard or Odd Model Controls at Prevailing Manufacturers' Prices

Respondent's Exhibit No. 73. 2013

RESPONDENT'S EXHIBIT NO. 74.

Form No. 22

OIL BURNER MANUFACTURERS' PRICES—1938

For Manufacturers Requiring 50 to 300 Sets.

	Single Shipment Quantities			
	List Price	1-49 Asstd.	50-149 Asstd.	150 Up Asstd.
Primary Controls:				
Type KMW Pyratherm (For Constant Ign.)	$23.00	$10.50	$10.00	$ 9.50
Type KMI Pyratherm (For Intermittent Ign.)	24.00	11.00	10.50	10.00
Special Note:				
Deduct 50¢ each net from the respective assorted quantity prices below when ordering 10 or more instruments of one type and specification.				
Thermostats:				
Type H Sensatherm, 55-85°, (Standard), with Thermometer	6.00	4.25	4.15	4.00
Type DNH Sensatherm, 55-85°, with Therm.	16.00	8.50	8.50	8.50
Type HH Dual Sensatherm, 55-85°, with Thermometer	12.50	6.75	6.50	6.50
Type T-H Timercoid and Transformer	20.00	10.50	10.25	10.25
No. 855 Line Voltage Thermostat, Standard Ranges	10.00	5.50	5.25	5.00
Limit Controls:				
Type DA-31 Steam Control, 0-14 lbs.	6.00	3.55	3.35	3.25
Fig. 35 Risertherm (Clamp-On) H. W. Con.	6.00	3.55	3.35	3.25
Type 115W Immersatherm, 50-250° F.	8.00	4.55	4.35	4.25
Type DA-36 or DA-37 Immersion H. W.	11.00	6.00	5.85	5.75
Type M-51 or M-53 Warm Air F. or L.	8.00	4.55	4.35	4.25
Type M-80 Combination Fan & Limit	14.00	7.75	7.50	7.25
Type DA-121 Comb. L. W. & Press., 0-14#	22.00	11.50	11.50	11.50
Type 123 Low Water Only, 30 lb. Max.	15.00	8.00	8.00	8.00

Other Standard or Odd Model Controls at Prevailing Manufacturers' Prices.

2014 Respondent's Exhibit No. 74.

RESPONDENT'S EXHIBIT NO. 75.

OIL BURNER MANUFACTURERS' PRICES—1938

Form No. 33

For Manufacturers Requiring 300 to 1000 Sets.

	List Price	Single Shipment Quantities 1-74 Asstd.	75-149 Asstd.	150 Up Asstd.
Primary Controls:				
Type KMW Pyratherm (For Constant Ign.)	$23.00	$ 9.75	$ 9.50	$ 9.25
Type KMI Pyratherm (For Intermittent Ign.)	24.00	10.25	10.00	9.75
Special Note:				
Deduct 50¢ each net from the respective assorted quantity prices below when ordering 10 or more instruments of one type and specification.				
Thermostats:				
Type H Sensatherm (Standard), 55-85° with Thermometer	6.00	4.00	3.85	3.50
Type DNH Sensatherm, 55-85°, with Therm.	16.00	8.50	8.50	8.50
Type HH Dual Sensatherm, 55-85°, with Thermometer	12.50	6.50	6.50	6.50
Type T-41 Timercoid and Transformer	20.00	10.50	10.25	10.25
No. 855 Line Voltage Thermostat, Standard Ranges	10.00	5.50	5.25	5.00
Limit Controls:				
Type DA-31 Steam Control, 0-14 lbs.	6.00	3.55	3.35	3.25
Fig. 35 Risertherm (Clamp-On) H. W. Con.	6.00	3.55	3.35	3.25
Type 115W Immersatherm, 50-250° F.	8.00	4.55	4.35	4.25
Type DA-36 or DA-37 Immersion H. W.	11.00	6.00	5.85	5.75
Type M-51 or M-53 Warm Air F. or L.	8.00	4.55	4.35	4.25
Type M-80 Combination Fan & Limit	14.00	7.75	7.50	7.25
Type DA-121 Comb. L. W. & Press., 0-14#	22.00	11.50	11.25	11.00
Type 123 Low Water Only, 30 lb. Max.	15.00	8.00	7.85	7.75

Other Standard or Odd Model Controls at Prevailing Manufacturers' Prices.

Respondent's Exhibit No. 75. 2015

RESPONDENT'S EXHIBIT NO. 76.

Form No. 44

OIL BURNER MANUFACTURERS' PRICES—1938

For Manufacturers Requiring 1000 to 2500 Sets.

	Single Shipment Quantities			
	List Price	1-99 Asstd.	100-249 Asstd.	250 Up Asstd.
Primary Controls:				
Type KMW Pyratherm (For Constant Ign.)	$23.00	$ 9.25	$ 9.00	$ 8.70
Type KMI Pyratherm (For Intermittent Ign.)	24.00	9.75	9.50	9.20
Special Note:				
Deduct 50¢ each net from the respective assorted quantity prices below when ordering 10 or more instruments of one type and specification.				
Thermostats:				
Type H Sensatherm (Standard), 55-85°, with Thermometer	6.00	3.50	3.35	3.20
Type DNH Sensatherm, 55-85°, with Therm	16.00	8.50	8.50	8.50
Type HH Dual Sensatherm, 55-85°, with Thermometer	12.50	6.50	6.50	6.50
Type T-41 Timercold and Transformer	20.00	10.25	10.25	10.25
No. 855 Line Voltage Thermostat, Standard Ranges	10.00	5.50	5.25	5.00
Limit Controls:				
Type DA-31 Steam Control, 0-14 lbs	6.00	3.35	3.25	3.25
Fig. 35 Risertherm (Clamp-On) H. W. Con	6.00	3.35	3.25	3.25
Type 115W Immersatherm, 50-250° F.	8.00	4.35	4.25	4.25
Type DA-36 or DA-37 Immersion H. W.	11.00	5.75	5.75	5.75
Type M-51 or M-53 Warm Air F. or L.	8.00	4.35	4.25	4.25
Type M-80 Combination Fan & Limit	14.00	7.50	7.25	7.00
Type DA-121 Comb. L. W. & Press., 0-14#	22.00	11.50	11.50	11.50
Type 123 Low Water Only, 30 lb. Max.	15.00	7.85	7.75	7.75

Other Standard or Odd Model Controls at Prevailing Manufacturers' Prices.

2016. Respondent's Exhibit No. 76.

RESPONDENT'S EXHIBIT NO. 77.

Form No. 55

OIL BURNER MANUFACTURERS' PRICES—1938

For Manufacturers Requiring 2500 or More Sets.

	Single Shipment Quantities		
	List Price	1-249 Assorted	250 Up Assorted
Primary Controls:			
Type KMW Pyratherm (For Constant Ign.)	$23.00	$ 9.00	$ 8.70
Type KMI Pyratherm (For Intermittent Ign.)	24.00	9.50	9.20
Special Note:			
Deduct 50¢ each net from the respective assorted quantity prices below when ordering 10 or more instruments of one type and specification.			
Thermostats:			
Type H Sensatherm (Standard), 55-85°, with Thermometer	6.00	3.35	3.20
Type DNH Sensatherm, 55-85°, with Therm	16.00	8.50	8.50
Type HH Dual Sensatherm, 55-85°, with Thermometer	12.50	6.50	6.50
Type T-41 Timercoid and Transformer	20.00	10.25	10.25
No. 855 Line Voltage Thermostat, Standard Ranges	10.00	5.25	5.00
Limit Controls:			
Type DA-31 Steam Control, 0-14 lbs.	6.00	3.35	3.25
Fig. 35 Risertherm (Clamp-On) H. W. Con.	6.00	3.35	3.25
Type 115W Immersatherm, 50-250° F.	8.00	4.35	4.25
Type DA-36 or DA-37 Immersion H. W.	11.00	5.75	5.75
Type M-51 or M-53 Warm Air F. or L.	8.00	4.35	4.25
Type M-80 Combination Fan & Limit	14.00	7.25	7.00
Type DA-121 Comb. L. W. & Press., 0-14#	22.00	11.50	11.50
Type 123 Low Water Only, 30 lb. Max.	15.00	7.85	7.75

Other Standard or Odd Model Controls at Prevailing Manufacturers' Prices.

Respondent's Exhibit No. 77. 2017

773 RESPONDENT'S EXHIBIT NO. 78.

Sales Force

From A. N. S.

To

Jan. 14, 1938.

Sales Bulletin No. 41.

1938 Contract Prices.

New contract forms are being printed at the present time and will be submitted to oil burner and stoker manufacturers within the next week. The various items, as well as net prices, will be printed on the face of the contracts so that it will merely be necessary to type in customer's name. Please retain all blank 1937 contract forms, as these will be used in making up special contracts to other than oil burner or stoker manufacturers.

Oil burner manufacturers are to be divided into five groups, depending upon the number of burners manufactured. Each contract will bear a Form No., for ready identification, which corresponds to the Form No. shown on attached mimeographed schedules of prices. One contract only (Form ST 1-5) is to be submitted to all stoker manufacturers regardless of their requirements.

Important.

Contracts Will Not Be Accepted by the Company, Nor Will Contract Prices Become Effective, Unless Signed Contract Is Accompanied by an Order, for Immediate Delivery, in Amounts Not Less Than Those Listed Below:

Contract Form	Min. Order Requirement
No. 11	25 Units
No. 22	50 Units
No. 33	75 Units
No. 44	100 Units
No. 55	250 Units
No. ST 1-5	100 Units

Our sales force should make every possible effort to obtain order at the time customer accepts our contract. If contract is accepted by the customer but the required order not placed with us, any purchases made by the customer will be billed at list and discount, up until such time as required order is received. There are to be no exceptions made to this policy.

Discount Changes.

Distributors have become a very important factor in the sale of our controls to dealers. In order to meet the competitive situation, it has been necessary to change our discount structure from 33⅓% to 25% base or trade discount. Attached mimeographed schedule covers new discounts, to all trade classifications, effective February 1, 1938. With this new discount structure, distributors have a higher profit rate than heretofore, which should be immediately called to the attention of all distributors in your territory.

858 RESPONDENT'S EXHIBIT NO. 102.

PENN ELECTRIC NET PRICES TO MFGS.

		I	II	III	IV	V
1937 April 15	Thermostat	3.88	3.61	3.21	2.81	
	Limit Switch	3.53	3.32	3.01	3.01	
	Int. Ign. 672	13.67	12.81	11.03	9.91	
	Set Price	21.08	19.74	17.25	15.73	
	Cons. Ign. 670	17.85	16.20	14.91	14.51	
1938 March 7	Thermostat	3.88	3.61	3.21	2.81	
	Limit Switch	3.05	2.85	2.75	2.75	
	Int. Ign. 672	12.32	11.79	10.89	9.07	
	Set Price	19.25	18.25	16.85	14.53	
	Cons. Ign. 670	17.90	16.90	15.50	13.55	
1939 Jan. 5 May 15	Thermostat	3.80	3.60	3.15	2.80	2.80
	Limit Switch	2.95	2.85	2.75	2.75	2.75
	Int. Ign. 672	10.55	10.10	9.95	9.60	9.10
	Set Price	17.30	16.55	15.83	15.15	14.65
	Cons. Ign. 670	16.05	15.35	14.70	14.15	13.65
1940 Jan. 1 Mar. 26	Thermostat	3.80	3.40	3.10	2.80	2.70
	Limit Switch	2.95	2.85	2.75	2.50	2.50
	Int. Ign. 672	10.55	10.10	9.95	9.60	9.10
	Set Price	17.30	16.35	15.80	15.15	14.30
	Cons. Ign. 670	16.05	15.15	14.65	14.15	13.30
	Cons. Ign. 661	14.60	14.05	13.50	13.05	12.55
1941 Jan. 10	Thermostat	3.80	3.40	3.10	2.80	2.70
	Limit Switch	2.95	2.85	2.50	2.50	2.50
	Int. Ign. 672	10.55	10.10	9.95	9.60	9.10
	Set Price	17.30	16.35	15.55	14.90	14.30
	Cons. Ign. 670	16.05	15.15	14.40	13.90	13.30
	Cons. Ign. 661	14.60	14.05	13.25	12.80	12.55

868 RESPONDENT'S EXHIBIT NO. 112.

UNITED STATES DISTRICT COURT
Northern District of Illinois,
Eastern Division.

In the Matter of
Minneapolis-Honeywell Regulator
Company.

Sirs:

Please take notice that upon the attached Petition verified November 30, 1943, the undersigned, Minneapolis-Honeywell Regulator Company, will apply to the Honorable John P. Barnes, one of the Judges of this Court, at Room 653, Federal Court House, Chicago, Illinois, on Wednesday, December 1, 1943, at ten o'clock in the forenoon, for an order under Section 9 of the Federal Trade Commission Act (15 USCA 49), requiring Mr. James William Owens, Executive Vice President of The Mercoid Corporation, to appear before Mr. W. W. Sheppard, Trial Examiner for the Federal Trade Commission, at Room 1118 New Post Office Building, Chicago, Illinois, on the 3d day of December, 1943, at ten o'clock in the forenoon, to testify in a proceeding now pending before the Federal Trade Commission entitled—"In the Matter of Minneapolis-Honeywell Regulator Company, Docket 4920"—and to produce the documentary evidence specified in the subpoena duces tecum issued by the Federal Trade Commission on November 2, 1943, and served on said James William Owens on November 5, 1943.

869 Respectfully,
Minneapolis-Honeywell Regulator Company
By (Sgd) Bair & Freeman
and
(Sgd) Cravath, deGersdorff, Swaine & Wood,

(Sgd) Will Freeman,
Of Counsel.

135 South La Salle Street
Chicago, Illinois,
Its Attorneys.

To
Nicholson, Snyder, Chadwell & Fagerburg
135 South La Salle Street
Chicago, Illinois

Copy to
Mr. Everett F. Haycraft
Attorney for Federal Trade Commission
1118 New Post Office Building
Chicago, Illinois

2022 *Respondent's Exhibit No. 112.*

870 UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

In the Matter of the Petition of
Minneapolis-Honeywell Regulator
Company.

PETITION FOR ORDER REQUIRING JAMES WILLIAM OWENS TO APPEAR TO TESTIFY AND TO PRODUCE DOCUMENTARY EVIDENCE BEFORE THE FEDERAL TRADE COMMISSION.

Minneapolis-Honeywell Regulator Company, a Delaware Corporation, of Minneapolis, Minnesota, (hereinafter called the Petitioner), hereby petitions this Court and shows as follows:

1. The Petitioner, a manufacturer of automatic temperature controls for use on domestic oil burners, is the Respondent in a proceeding instituted by the Federal Trade Commission, (hereinafter called the Commission), entitled "In the Matter of Minneapolis-Honeywell Regulator Company, Docket No. 4920", under Section 5 of the Federal Trade Commission Act and Sections 2 and 3 of the Clayton Act as amended. The Complaint in said proceeding sets forth, among other things, the following charges:

A. Count I of the Complaint alleges that the Petitioner has entered into annual contracts with oil burner manufacturers which obligated them to purchase their requirements of controls from the Petitioner and that, as result of
871 such contracts, competitors of the Petitioner have been prevented from selling their makes of controls to such oil burner manufacturers.

B. Count III of the Complaint alleges that the Petitioner has discriminated in prices between different purchasers of controls and that the effect of such discriminations has been substantially to lessen competition in that line of commerce.

2. In support of the above-described allegations, Counsel for the Commission called Mr. James William Owens (hereinafter called Owens), Vice President of The Mercoid Corporation, a manufacturer of automatic temperature con-

trols, whose principal office and place of business is at 4201 Belmont Avenue, Chicago, Illinois, and which is a competitor of the Petitioner, and from Owens elicited testimony as to the sale of controls by The Mercoid Corporation to various oil burner manufacturers. There was also introduced during the Commission's case evidence that The Mercoid Corporation had entered into contracts with oil burner manufacturers which at the same time had contracts with Petitioner (Commission Ex. 53, Pages 765 and following, and Respondent's Ex. 7), and evidence as to the prices charged by Mercoid Corporation for certain types of its controls (R. 328-31).

3. In order to substantiate its defenses to the allegations in the Complaint referred to under Paragraph 1
872 hereof, the Petitioner has endeavored to introduce as evidence in said proceeding

A. The names of the oil burner manufacturers who entered into contracts for the purchase of controls with competitors of the Petitioner, as well as the Petitioner, and copies of such contracts; and

B. Statements of the various prices at which competitors of the Petitioner have sold controls to oil burner manufacturers;

which evidence, Petitioner believes and alleges would show that competitors have not been prevented from selling their makes of controls, and that the alleged price discrimination has not substantially lessened competition. To obtain such evidence, on October 27, 1943, the Petitioner applied to the Commission under Rule XV of its Rules of Practice for the issuance of subpoenas duces tecum directed to the officers of the Petitioner's competitors, including Owens, as an officer of The Mercoid Corporation. As required by that Rule, the Petitioner's application specified the documents desired and showed their competency, relevancy and materiality. The Commission granted the Petitioner's application and on November 2, 1943 issued the subpoenas applied for, including a subpoena duces tecum addressed to and received by Owens on November 5, 1943. A photostatic copy of that subpoena with proof of service is attached hereto as Exhibit A.

873 4. On November 29, 1943, the return date of the subpoenas, Owens appeared as directed before Mr. W. W. Sheppard, a Trial Examiner for the Commission, at Room 1118 in the New Post Office Building, Chicago, Illinois, but refused to produce the documents specified in the

subpoena or to testify concerning them on the ground that the information called for by the subpoena was confidential and of a nature not required to be divulged to competitors (R. 1189-90). The Petitioner is advised and believes that the refusal of Owens to comply with the subpoena was unjustified and not in good faith for the following reasons, inter alia:

A. The information called for by the subpoena is not confidential. Similar information has already been introduced into evidence both with respect to the Petitioner and its other two principal competitors, Perfex Corporation and Penn Electric Switch Co., officers of the latter two Corporation appearing and testifying in response to subpoenas identical to that served upon Owens. Moreover, information as to Mercoid's contracts with oil burner manufacturer has already become part of the record as stated above in Paragraph 2 hereof. Indeed, The Mercoid Corporation, in another proceeding before this Court, itself introduced copies of its own contracts with a certain oil burner manufacturer, who also had entered into contracts with the Petitioner. Information as to Mercoid's prices has, 874 according to Owens' own testimony, already been made available to a considerable number of third parties, i. e., oil burner manufacturers (R. 1204, 1208). The information in question can not therefore be properly considered confidential.

B. Whether or not rightfully regarded by The Mercoid Corportion as confidential, the information called for by the subpoena served on Owens can not be withheld in a proceeding such as that brought by the Commission against the Petitioner, in which the basic issue is the existence of competition, to show which the Petitioner is entitled to bring out the prices and trade practices of its competitors. Particularly is this so where the Petitioner is seeking to avail itself of the defense afforded by Section 2(b) of the Clayton Act, as amended, under which a respondent may rebut the charge of price discrimination by showing that this lower prices were made in good faith to meet competition.

C. The confidential nature of information required to be produced in response to a subpoena issued by the Commission does not excuse a failure to produce such information. Nothing in the Federal Trade Commission Act supports the position taken by Owens. Indeed under Section 9 of that Act, no person may be excused from producing, in obedi-

ence to a subpoena of the Commission, evidence that
875 may tend to incriminate him or subject him to penalty or forfeiture. A fortiori, there can be no excuse under the Act for not producing information which the person served with the subpoena may, according to his own lights, consider confidential.

5. Upon the refusal of Owens to comply with the subpoena of the Commission, Counsel for the Petitioner advised him that an application would be made to this Court for an Order directing obedience, and pending a ruling thereon, Owens has been kept subject to the jurisdiction of the Commission and the call of the Trial Examiner. This application is made returnable on short notice in view of the statement of Owens (R. 1227) that he will be in town the rest of this week and available on thirty minutes notice, but will be away all next week.

6. This application is made pursuant to Section 9 of the Federal Trade Commission Act (15 USCA 49), which provides in part as follows:

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

876 Wherefore, the Petitioner prays that this Court issue an Order requiring Owens to appear before the Trial Examiner in the above-mentioned proceeding before the Commission and there to produce the documentary evidence specified in the subpoena of the Commission heretofore served upon him.

Respectfully submitted
Minneapolis-Honeywell Regulator Company
By (s) Bair & Freeman
and
(s) Cravath, deGersdorff, Swaine & Wood,
Room 1400,
(Sgd) Will Freeman, 135 South La Salle St.
Of Counsel. Chicago, Illinois.

November 30, 1943
Chicago, Illinois.

877 **Verification.**

State of Illinois }
County of Cook } ss.

Will Freeman, being duly sworn, deposes and says that he is a member of the firm of Bair & Freeman, one of the Counsel of record for Minneapolis-Honeywell Regulator Company, the above-named Petitioner, and is fully conversant with the facts in the above case; that he has read the foregoing Petition and that the same is true to the best of his knowledge, information and belief.

(Sgd) Will Freeman.

Subscribed and Sworn to before me, this 30th day of November, 1943.

(Sgd) Dorothy Cope,
Notary Public.

Acceptance of Service.

Service of the foregoing Notice and Petition and receipt of copy thereof acknowledged this 30th day of November, 1943 at 4:45 p. m.

Nicholson, Snyder, Chadwell & Fagerburg
By (s) Erwin P. Snyder,
Attorneys for James William Owens.

It Is So Ordered, this ..... day of December, 1943.

.....
Judge, United States District Court.

878 (1) Copies of any and all contracts for the sale of automatic temperature controls for domestic oil burners entered into by the Mercoid Corporation with each of the following oil burner manufacturers, for the years 1937 through 1941 inclusive:

Acme Tool & Gauge Co.—Pawtucket, R. I.
Alida Mfg. Co.—Brooklyn, N. Y.
Arcweld Mfg. Co.—Seattle, Washington
Automatic Burner Corp.—Chicago, Illinois
Bedard Johnson Co.—Minneapolis, Minn.
Berggren Engr. Co.—Brooklyn, N. Y.

Bock Corp.—Madison, Wisconsin
Braden Engrg., Inc.—Providence, R. I.
Brown Oil Burner Eq. Co.—Cambridge, Mass.
Buck Engineering Co. Inc.—Freehold, N. J.
Burner Parts & Serv. (now Penn Boiler & Burner Co.)—Lancaster, Pa.
Campbell Machinery—Minneapolis, Minn.
Century Engineering Co.—Cedar Rapids, Iowa.
Cleveland Steel Products Corp.—Cleveland, Ohio
Citro Oil Burner Corp.—Pompton Lakes, N. J.
Concord Oil Corp.—Brooklyn, N. Y.
D'Elia Oil Burner Co.—Bridgeport, Conn.
DeSoto Oil Burner Corp.—York, Pa.
Diesel Burners, Inc.—Moosup, Conn.
David Duff & Sons—New Bedford, Mass.
Eisler Engineering Co.—Newark, N. J.
Electrol, Inc.—Clifton, N. J.
Electromatic Oil Burner Co.—Malverne, N. Y.
Enterprise Oil Burner Corp.—San Francisco, Calif.
Fairfield Oil Htg. Co.—Greenwich, Conn.
Fargo Foundry Co.—Fargo, N. D.
879 Gar Wood Industries, Inc.—Detroit, Mich.
General Oil Burner Corp.—Baltimore, Md.
General Oil Heating Corp.—West New York, N. Y.
Capitol Oil Burner Co.—Hartford, Conn.
Carlson Bros. Tool & Machine Co.—Boston, Mass.
Carter-Korth Oil Burner Co.—Roselle Park, N. J.
Gold Star Oil Burner Mfg. Co.—Yonkers, N. Y.
Goodrich Oil Burner Mfg. Corp.—New Haven, Conn.
Greenwood Engineering Co.—Glenarm, Md.
Hall-Neal Furnace Co.—Indianapolis, Ind.
Harrison Sales Co.—Seattle, Wash.
Hart Oil Burner Corp.—Peoria, Ill.
Harvey-Whipple, Inc.—Springfield, Mass.
Hayward Mfg. Co. Inc.—Brooklyn, N. Y.
The Heil Co.—Milwaukee, Wis.
Herco Oil Burner Corp.—Lancaster, Pa.
Hi-Point Corp.—Bellefontaine, Ohio
Hoben Mfg. Co.—Waltham, Mass.
Holtum Mfg. Co.—Freeport, Ill.
Homestead Engrg. Corp.—Brooklyn, N. Y.
Hubbard Oil Burner Co.—Minneapolis, Minn.
Hupp Oil Burner Co.—Brooklyn, N. Y.
Hyle Oil Burner Co.—Baltimore, Md.
Jacobson Mfg. Co.—Racine, Wis.

Kelly Oil Sales Corp.—Arlington, Mass.
LaGrace Oil Burner Co.—Woonsockett, R. I.
Liberty Research Lab., Inc.—Farmingdale, N. Y.
Lynn Products, Inc.—Lynn, Mass.
880 Malleable Iron Fittings Co.—Branford, Conn.
Master Oil Burner Co.—Seattle, Wash.
Messer Co.—Newark, N. J.
Micro-Westco, Inc.—Bettendorf, Iowa.
Mohawk Oil Burner Mfg. Co.—New York, N. Y.
Montag Stove & Furnace Wks.—Portland, Ore.
Muehlbach, G. T.—Minneapolis, Minn.
National Devices Co.—Bellmore, N. Y.
Neis & Bechtl—West Allis, Wis.
Oil Equipment Laboratories—Elizabeth, N. J.
Old Colony Machine Works Co.—Fall River, Mass.
Osher and Reiss, Inc.—Brooklyn, N. Y.
Packard Oil Burner Mfg. Co.—Bridgeport, Conn.
Pan-American Engineering Corp.—Berkeley, Calif.
Penn Petroleum Products Co.—Providence, R. I.
Petroleum Heat & Power Co.—Stamford, Conn.
Quiet Heet Mfg. Corporation—Newark, N. J.
Quiet Heat Oil Burner Co.—Brooklyn, N. Y.
Reliable Oil Burner Corp.—Madison, Wis.
Reif-Rexoil, Inc.—Buffalo, N. Y.
Rossoe Mfg. Co.—Seattle, Wash.
Silent Flash Oil Burner Corp.—Brooklyn, N. Y.
S - K Co.—Camden, N. J.
Simplex Oil Heating Corp.—New York, N. Y.
Standard Products Co.—Clinton, Mass.
Scott-Newcomb, Inc.—St. Louis, Mo.
Sunray Oil Burner Corp.—Rockaway Park, N. Y.
881 Todd Combustion Equipment, Inc.—New York, N. Y.
Timken-Detroit Axle Co.—Detroit, Mich.
Volcano Burner Corp.—New York, N. Y.
Wayne Oil Burner Corp.—Ft. Wayne, Ind.
Harry C. Weiskittel Co., Inc.—Baltimore, Md.
Westchester Home Equipt. Co.—Mt. Vernon, N. Y.
Williams Oil-O-Matic—Bloomington, Ill.
Wisconsin Oil Burner Co.—Madison, Wis.
York Oil Burner Co., Inc.—York, Pa.

(2). Price lists, discount sheets or other data showing the various prices at which Mercoid Corporation offered and sold such controls to said oil burner manufacturers during the years 1937 through 1941 inclusive.

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EXHIBIT "A".

Subpena Duces Tecum

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

To Mr. James Williams Owens, Executive Vice President,
Mercoid Corporation,
4201 Belmont,—Chicago, Illinois.

You are hereby required to appear before Mr. William W. Sheppard, a Trial Examiner for the Federal Trade Commission, at 1118 New Post Office Bldg., in the City of Chicago, Illinois on the 29th day of November, 1943, at 10:30 o'clock a. m. E.S.T. (i.e.) E.W.T. of that day, to testify on behalf of the respondent, in the matter of Minneapolis-Honeywell Regulator Company, Docket 4920, and you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

Fail not at your peril.

In testimony whereof, the undersigned, a member of the Federal Trade Commission, has hereunto set his hand and caused the seal of said Federal Trade Commission to be affixed at Washington, D. C., this 2nd day of November, 19.....

Garland S. Ingerson,
Commissioner.

(Stamp) Mailed Nov 3 1943 Records Division.

Form 3811
Rev. 1-4-40

Exhibit A.

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this card.

1 J. W. Owens
(Signature or name of addressee)

2 (Illegible)
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery 11-5, 1943

U. S. Government Printing Office 16—12421
4920 Respondent subpoena duces tecum

Post Office Department
Official Business

Penalty for Private Use
To Avoid Payment
Of Postage, $300

(Postmark of Delivering)
(Office)
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(Nov 5 2 30 PM 1943)
(Irving Park Sta.)

Return to Federal Trade Commission,
(Name of Sender)
Street and Number,
or Post Office Box. 8th & Constitution Ave.,
Washington, D. C.

Registered Article
No. 370174
Insured Parcel
No. .....

883 Endorsed: No. ..... United States District Court Northern District of Illinois Eastern Division In the Matter of Minneapolis-Honeywell Regulator Company Notice and Petition for Order requiring James William Owens to appear to testify and produce documentary evidence before the Federal Trade Commission Bair & Freeman 1400 Field Building 135 South La Salle Street Chicago, Illinois Randolph 5777.

RESPONDENT'S EXHIBIT NO. 113.

RX 113-A
FEDERAL TRADE COMMISSION
DOCKET NO. 113-A

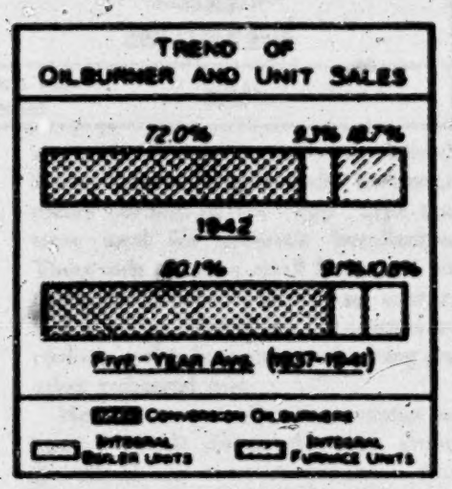
Industry Bows To Mars

Equipment Sales Hit Mid-Depression Levels

OILHEATING DEALERS sold 99,914 domestic oilburners and units during 1942, the least since 1933, when depression fear held the market by the throat. War was responsible for the 70% decrease in the industry's domestic burner business from the 1941 level. Sales of commercial heating burner sales increased more than 99% during last year to 11,360 burners.

Prohibition against new oilburner installations (except under rigid regulations on replacements), a concerted governmental campaign to convert existing installations to coal, and actual fuel oil shortages in eastern areas late in the year, all contributed to a chaotic statistical picture in the industry. These pressures during 1942 conspired to change the oil burner from an instrument of emancipation in the minds of two million American families, to a machine of doubtful utility; a hero whose virtue had been besmirched. In spite of threats of dire consequences, owners defended their burners and resisted pressure to convert. Tardy prospects asked the connivance of dealers to get burners installed after the deadline, and in general showed a considerable affection for their burners, actual or prospective.

Like the year before, 1942 got away to a flying start compared with the doldrums of the later months. Dealers made 47.4% of their domestic oilburner sales in the first quarter of 1942, against a normal 14.2% in the preceding five years, but the prohibitions against new installations at the start of the second and third quarters reduced domestic sales to a pitiful trickle by the end of the year. Replacements in non-convertible heating plants was the only installation business left at the end of the second quarter.



For the first time since 1929, the industry registered an actual decline in the number of domestic oilburners operating. There were 19,770 fewer domestic installations at the end of 1942 than the year before, in spite of 66,270 new installations during the year. Conversions to coal and other fuels totalled 82,040, or 3.9% of the burners operating in the rationed area. Domestic installations operating at the end of 1942 were down 2% to 2,386,290 from the all-time high of 2,402,060 at the first of the year (See Table 1). Continued pressure to effect conversions, and actual fuel oil shortages that have developed in the East, probably will increase domestic conversions before spring. Commercial and industrial burners are being removed under government orders, though the number and extent has not been fully determined. It is estimated there were 293,120 commercial heating installations (exclusive of industrial) still operating at the end of the year, though many of these had been given fuel oil rations only through Period 2, and were slated for early removal.

Though the domestic oilburner industry ended the year with fewer burners in operation, oil still is the most popular automatically fired fuel by a margin of more than two-to-one over gas. Best estimates of domestic automatic heating equipment in operation are:

Oil	2,386,290—53.9%
Gas	1,098,000—24.9%
Stoker	938,319—21.2%

The oilburner industry as a whole sold about 20,000 more burners than were accounted for by dealer sales last year. These sales by manufacturers were made to government agencies for uses other than domestic heating, and many of them were shipped out of the country for use in foreign operations. This number, however, was almost exactly offset by withdrawals from dealer stocks for replacement purposes and such other installations as were permitted.

Present programs for the use of many

TABLE 1

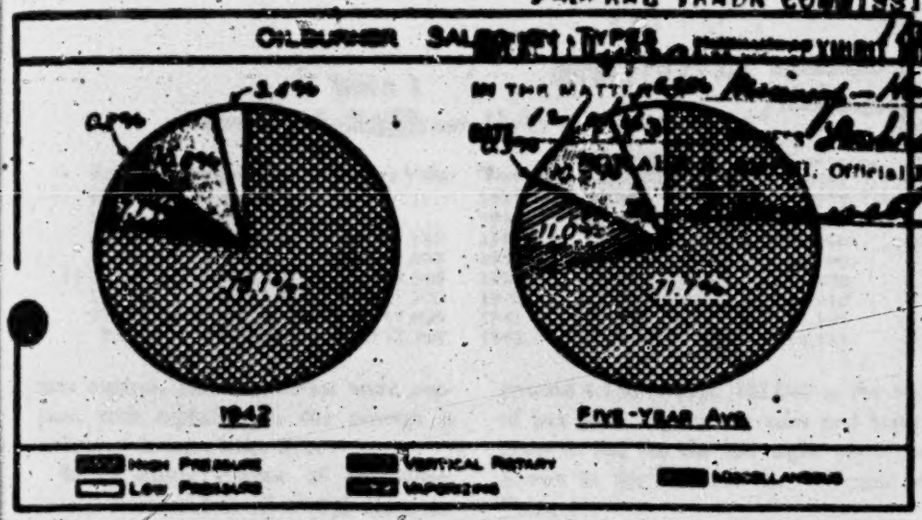
Domestic Conversion Burners and Units

Sales	Retail Value	Factory Value	Year	No. in Use (End of Year)
190,910	$59,342,900	.....	1935	1,192,129
220,075	74,014,700	.....	1936	1,340,679
210,740	69,269,100	$22,238,200	1937	1,530,949
179,360	54,183,900	18,292,900	1938	1,667,749
236,140	66,720,400	23,352,300	1939	1,862,330
302,210	89,148,800	32,273,600	1940	2,139,129
333,290	113,146,400	41,931,800	1941	2,402,060
99,914	29,871,600	14,047,900	1942	2,386,290

TABLE 2

Domestic Conversion Oilburners

Sales	Retail Value	Factory Value	Year	No. in Use (End of Year)
136,829	$43,373,900	$13,408,900	1935	1,119,129
197,430	59,229,000	18,918,600	1936	1,281,309
184,920	54,181,600	17,903,100	1937	1,446,299
193,890	60,462,600	12,154,200	1938	1,599,679
200,020	48,004,800	14,601,600	1939	1,719,940
238,849	57,641,900	18,152,200	1940	1,933,609
237,969	59,490,200	19,279,200	1941	2,113,160
71,698	16,592,700	6,090,900	1942	2,073,260



facturer and dealer stocks of burners in the immediate future probably will slow oilburner manufacturing during 1943, though the demand at present is for about 6,000 burners a month. A large part of this demand was manufactured each month during 1942.

Domestic Burner Types

The trend of oilfiring in domestic sizes of conversion burners and units last year was toward the high pressure type of burner. The reason for this is not entirely clear, though it may be that this was the type of burner most heavily pushed by dealers, since 77,660 of these burners were used, representing 78.1% of total domestic burner sales. Sales of domestic burners by types last year compared to the previous five-year average is shown in the table below:

	1942	Five-Year Average
High Pressure	77,660—78.1%	71.7%
Low Pressure	3,874— 3.4%	6.2%
Vertical Rotary	7,648— 7.7%	11.0%
Vaporizing	10,553—10.6%	10.8%
Miscellaneous	279— .2%	.3%

High pressure oilburners were manufactured by 248 firms at the first of 1942, and stocks were reasonably heavy, anticipating a good year ahead. Many of these companies were small, but continued to manufacture as long as materials were available. Low pressure burners, on the other hand, were made principally by only two large manufacturers, both of which were in war work by the first of 1942, and had rather limited stocks available. There were only 18 manufacturers of all types of vertical rotary burners. Eighty-five makers of vaporizing burners started the year, and contributed largely to the new building that was oilfired early in the year. Miscellaneous types are principally horizontal rotary burners of the "Pup" type that were used for domestic installations. Thousands of other small horizontal rotaries have been sold to civilian, military and naval establishments for commercial cooking, water heating, steam raising and other industrial uses.

New sources of oilburner statistics became available during the year, giving an official and more recent check than before has been available. These sources, their limitations, and how they were used, is described briefly in the text that accompanies the breakdown of oilburners operating by states. Where possible, all tables appearing in this issue have been revised to give a more accurate picture of the industry's past performance.

Domestic Conversion Burners

Conversion oilburners continued to lead the products parade in 1942, according to preliminary estimates, accounting for 71,618 or 72% of the 99,514 total domestic burners and units sold. This represents a decline of little less than 70% from the 237,969 conversion burners sold in 1941 (See Table 2). Since more conversions to coal were made during operating conversion burners, the total conversions operating declined more sharply than the grand total for all burners and units. The decline to 2,073,260 conversion burners is 1.9%, while the decrease in total domestic units was only 0.6% to 2,386,290.

A third of all burners and units were installed last year to replace other oilburners, but 42% of all conversion burners went for replacements, or 30,100 of the 71,618 conversion burners sold. Conversion burner replacements and reconversions to coal have been deducted from the totals in Table 2.

Conversion burner installed prices stiffened in 1942 to an average of $267, up 6.8% from the $250-average of the year before. Better demand against the growing shortage of materials pushed up the average minimum retail prices 8.4% to $245 for the price leaders of the conversion business. Average conversion prices are shown in Table 5.

Factory prices for all conversion burners increased 4.9% to an average of $85 from the $81-average of 1941. Minimum price burners, however, increased 12.3% to average $73. This higher average for the lower price burners reflects buying in smaller quantities during the year as well as the uncertain supply of parts and accessories.

Average wholesales and retail prices for each type of conversion burner in 1942 and 1941 were as follows:

Retail 1942	Retail 1941		Wholesale 1942	Wholesale 1941
$293	$244	High Pressure	$ 84	$ 80
278	273	Low Pressure	109	103
303	332	Vert. Rotary	114	126
176	162	Vaporizing	98	94

Average retail price for replacement burners only was $161 last year. Where

Table 5. Conversion Burner Price Trends

Retail Average	% change prev. yr.	Retail Min.	% change prev. yr.		Factory Average	% change prev. yr.	Factory Min.	% change prev. yr.
$492	..	$114	..	1929	$240	..	..	..
629	-- 9.1	916	-- 6.8	1930	191	18.7	..	..
491	--21.3	413	- 19.9	1931	160	16.0	..	..
438	--11.4	371	- 10.1	1932	140	12.5	..	..
391	— 9.8	341	— 8.1	1933	129	7.8	$109	..
341	—13.6	310	-- 9.0	1934	118	8.5	99	9.1
317	— 7.0	279	—11.2	1935	98	16.9	88	11.1
300	— 5.3	266	-- 3.2	1936	94	4.1	89	5.4
293	-- 2.3	255	2.6	1937	86	8.5	82	3.5
263	— 10.2	236	7.4	1938	79	8.1	76	7.3
240	— 8.7	218	7.6	1939	78	1.3	69	9.2
233	-- 2.9	210	-- 3.7	1940	76	2.6	63	8.7
250	+ 7.2	226	+ 7.6	1941	81	+ 6.9	69	+ 9.5
267	+ 6.8	245	+ 8.4	1942	85	+ 4.9	73	+12.3

(P. 2033)

FEDERAL TRADE COMMISSION

DOCKET NO. 5720 XHIBIT NO. 113-CX-1132-C

IN THE MATTER OF

BOWARD H

By

TABLE 3

Integral Boiler-Burner Units

Sales	Retail Value	Factory Value	Year	No. in Use (End of Year)
10,710	$9,711,600	.....	1935	31,600
11,025	9,781,300	.....	1936	46,290
14,430	8,197,000	$3,799,100	1937	60,240
14,220	7,877,900	3,711,600	1938	73,916
19,220	9,744,900	4,286,100	1939	92,740
26,915	13,322,700	7,001,300	1940	118,160
39,990	21,874,900	9,717,600	1941	151,720
9,313	9,289,800	2,877,700	1942	163,040

TABLE 4

Integral Furnace-Burner Units

Sales	Retail Value	Factory Value	Year	No. in Use (End of Year)
3,111	$3,077,600	.....	1935	7,600
7,420	7,044,400	.....	1936	13,120
11,380	6,724,300	$2,940,000	1937	24,010
11,290	6,243,400	2,427,300	1938	34,140
16,900	8,771,100	3,464,900	1939	49,810
36,410	19,115,300	7,646,100	1940	82,960
51,291	32,181,700	12,939,000	1941	133,180
18,743	8,029,100	5,099,300	1942	149,990

new controls and accessories were supplied with replacements the average is estimated to have been $181.

Retail dollar volume of conversion burner business was off 65.7% from the 1941 sales volume. The $16,552,700 retail conversion burner volume was 55.4% of the total industry retail burner and unit business, compared with 52.4% in the year before.

Factory sales of conversion burners last year amounted to $6,090,900, 31.8% of 1941 dollar volume. This factory income represented only 43.3% of the total 1942 value of all burners and units, against the 45.9% of total income represented by conversion burner sales in 1941. Both retail value and wholesale value of conversion burner business is given for recent years in Table 2.

Integral Boiler-Burner Units

Sales of integral, factory-assembled oil-fired boiler-burner units were off 76.7% to 9,313 last year compared to 1941, reflecting the stoppage of new construction, and the prohibition against replacements of heating plants for oilfiring. This unit volume represented only 9.4% of the total domestic oilburner sales in 1942, compared to 12% in 1941. Only 1.5% of these integral boiler units were used for replacement.

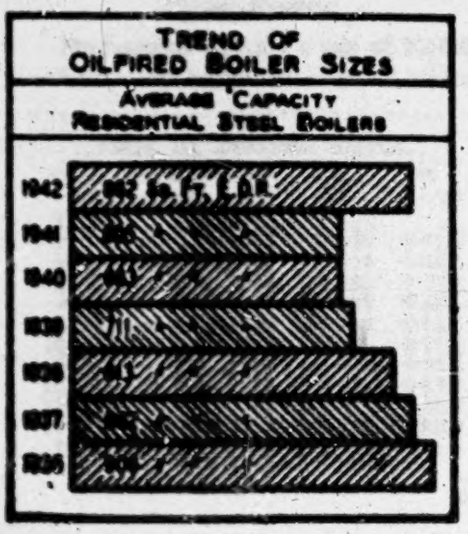
Integral boiler units in operation increased 4.7% to total 163,040 at the end of last year. Figures on sales and boiler units in use for the last eight years are shown in the first and last columns of Table 3.

Retail and wholesale prices of boiler units increased substantially during the year to register an average retail rise of 3.8% to $168, and a wholesale increase of 27.1% to an average of $309. The average minimum prices at retail were up 25.1% at retail to $473, and rose 13.4% wholesale to $229, as shown in Table 6.

Retail value of integral boiler units last year was only $1,289,800, a decrease of 75.8% from the year before. This dollar volume represented 17.9% of the total domestic oilburner business at retail, compared to 19.2% in 1941.

Factory value of integral boiler units last year was only 29.6% of the 1941 wholesale value, off to $2,877,700, representing 20.4% of the total factory value of all domestic burners and units. Totals of retail and wholesale values of integral boiler units in recent years are shown in Table 3.

In addition to integral, factory-assembled domestic boiler-burner units, there were an estimated 8,690 units assembled in the field by dealers who used a new boiler with a conversion burner. Of these dealer-assembled units, 1650, or 19% were steel, and 8040 were cast iron. Combining all boiler units, there were an indicated 18,003 total installed last year.



All Boiler Sales

Total heating boiler sales in 1942 for all fuels amounted to 124,875, of which only 18,003, or 14.4% were oilfired. As shown in Table 7, 111,875 of these were cast iron, of which only 9.6% were oilfired last year, against 45% in 1941. The 13,000 steel boiler total included 7,238 that were oilfired, or 55.7%, against 94.2% in the year before.

Boiler sizes and weight increased during 1942, reflecting the stoppage of small building. Average sizes of residential steel boilers in recent years is shown graphically in the accompanying chart. The increase in steel boiler size during 1942 was 25.8%, and the average weight of cast iron boilers increased 20.8% during the same time. More than 10% of the nearly 200-million tons of boiler castings last year was for "repairs," in which is included new grates and cast parts necessary for conversion to coal. Only 8.4% of the tonnage was for repairs in 1941.

Domestic Furnace-Burner Units

Integral, factory-assembled furnace-burner units totalled 18,743 last year, a

Table 6. Prices of Factory-Assembled Boiler-Burner Units

Aver. ago	% change prev. yr.		Aver. Min.	% change prev. yr.
RETAIL				
$901	....	1935	$723	....
671	—28.0	1936	546	—24.7
593	— 8.9	1937	516	— 8.8
554	— 6.7	1938	482	— 6.6
507	— 8.3	1939	441	— 8.9
491	— 3.4	1940	361	—17.2
517	+ 1.9	1941	378	+ 3.6
548	+ 3.5	1942	473	+25.1
FACTORY				
$361	....	1935	$246	....
361	— 0.0	1936	244	— 0.8
333	—14.9	1939	208	—14.7
317	— 5.6	1940	183	—12.0
348	+12.0	1941	201	+ 9.9
369	+ 6.1	1942	229	+13.4

Table 7. Boiler Sales

	Total Output	No. for oil	% for oil
CAST IRON			
1935	160,107	29,310	18.3
1936	186,780	41,923	22.5
1937	189,707	28,462	14.2
1938	137,282	54,139	40.0
1939	146,919	61,070	41.6
1940	168,839	77,764	46.1
1941	170,076	80,176	47.0
1942	111,877	10,769	9.6
STEEL			
1935	14,611	14,181	98.1
1936	19,243	18,822	94.8
1937	16,789	15,521	92.9
1938	19,000	17,212	90.3
1939	23,618	21,857	92.4
1940	24,780	23,304	94.7
1941	37,666	34,173	94.2
1942	13,000	7,238	55.7

(P.2034)

Table 8. Price Trends of Factory-Assembled Forced-Air Units

Aver. age	% change prev. yr.		Aver. Min.	% change prev. yr.
RETAIL				
$774	...	1935	$642	...
662	14.4	1936	576	—10.2
573	13.4	1937	499	—13.3
553	- 3.5	1938	481	— 3.4
519	- 6.2	1939	402	—16.4
525	+ 1.2	1940	360	—10.4
582	+10.9	1941	402	+11.7
611	+ 4.9	1942	413	+ 2.7
FACTORY				
$223	...	1937	$210	...
215	- 3.6	1938	204	— 2.8
209	- 4.7	1939	198	— 2.9
210	+ .24	1940	196	— 2.0
234	+11.4	1941	201	+ 2.9
275	+17.1	1942	236	+17.4

slump of 66.1% from the 55,295 integral units sold in 1941. Furnace unit sales accounted for 18.6% of the total burners in 1942, compared with 10.6% of the 1941 total. Figures on annual sales and units operation at the end of each of the last eight years are shown in the first and last columns of Table 4.

Both retail and wholesale prices of furnace units increased last year. Average prices, and average minimum prices, both wholesale and retail, are given for recent years in Table 8. The relatively larger increase in factory prices, compared to retail reflects the increasing manufacturing difficulties, as well as the buying in smaller quantities. Wholesale buying for development work, common in recent years, has all but stopped.

Retail and factory value of furnace units last year compared with preceding years, is shown in Table 4.

In addition to the integral furnace units sold last year, there were an estimated 2,777 dealer-assembled units installed with conversion burners and new furnaces. These represent 13% of the new oilfired furnaces sold, compared to 11,105, or 16.7% in 1941.

Table 9 gives a break-down of furnace sales by types for all fuels in 1942 and 1941.

Competitive Firing

Sales of domestic and small commercial stokers (Classes 1 and 2) last year totalled 96,420, of which 14,325, or 14.8%, were anthracite, and 82,095 were bituminous. Small stokers in operation at the end of the year had increased 11.3% to 938,319, as shown in Table 10.

Gas burner sales for residential central heating are estimated at 46,465 last year, off to only 41.8% of the 1941 record of

Table 9. Warm Air Furnace Sales

	1942 Cast Iron	Steel	1941 Cast Iron	Steel
Coal	7,120	11,430	8,720	25,445
Gas	7,370	16,580	32,265	91,670
Oil	1,060	14,810	3,100	47,100
Total	15,910	46,820	44,085	124,215
GRAVITY				
Coal	118,800	46,570	181,780	76,210
Gas	9,730	13,590	17,085	14,190
Oil	400	9,090	3,100	13,100
Total	124,930	69,210	201,965	143,500

101,340. Total central heating gas installations at the end of the year were estimated at 1,098,000, up 2.1% for the year. Pressure to convert gas heating installations has not yet been organized, though no new installations are allowed, effective September 1, 1942. It is possible that an effort to reconvert some gas installations may be made in some areas, if supplies of gas become more critical.

Commercial Burners

The 11,360 commercial burners sold last year represent an increase of 59% over the 1941 mark, and bring the total in operation at the end of 1942 to 293,120, up less than 2%. As explained earlier, many of these burners are scheduled to be removed, and the exact number that had been actually converted at the year-end is difficult to establish. Table 11 shows commercial burner sales and the number operating at the end of recent years.

Space Heaters

Oilheating dealers sold 27,100 oilfired space heaters during 1942, a decrease of 37.8 from the 43,590 space heaters these dealers sold in 1941. Oilheating dealers are believed to have sold about 20% of the total space heater output last year.

Total space heaters in operation at the end of the year numbered 1,861,860.

Water Heaters

Field reports indicate a sale of 20,760 oilfired water heaters in 1942, of which

Table 10. Domestic Stokers

Sales	% change		No. in use	% change
11,961	..	1931	20,811	..
11,144	— 1.9	1932	31,917	+53.9
15,818	+33.0	1933	47,573	+49.8
25,710	+73.3	1934	73,883	+55.6
45,194	+77.1	1935	118,377	+61.5
84,421	+86.8	1936	202,498	+71.1
101,373	+22.4	1937	302,870	+51.0
96,907	— 4.3	1938	408,807	+35.0
106,208	+ 7.4	1939	507,412	+24.2
159,513	+48.6	1940	698,970	+37.7
198,341	+24.3	1941	845,315	+20.9
96,420	—51.3	1942	938,319	+11.3

Table 11. Commercial Oilburners

Sales		COMMERCIAL OILBURNERS No. Operating (End of year)
14,990	1935	178,240
18,435	1936	192,830
19,380	1937	210,275
13,995	1938	222,880
16,445	1939	237,680
20,710	1940	256,320
34,750	1941	287,595
11,360	1942	293,120

4,995, or 24.1% were fired by mechanical burners, contrasted to 28.7% in 1941. There were 15,750 vaporizing type burners used in water heaters, or 75.9% of the total water heaters. Average price at retail for mechanically fired water heaters was $224, and for vaporizing type burners, the price was $105.

Summary

Total dealer product sales at retail during 1942 amounted to slightly more than $40-million, exclusive of fuelOil sales and service charges. Accessory sales for heating plants and oilburners alone totalled $3-million; water heaters brought in $2,772,000; space heaters, $1,755,000.

It is probable that dealers will lean more heavily on their oil and service income as parts and accessories become more scarce, but considering the problems that confronted dealers in 1942, and the need for speedy adjustment, the year ended with a surprisingly large total dollar volume of business.

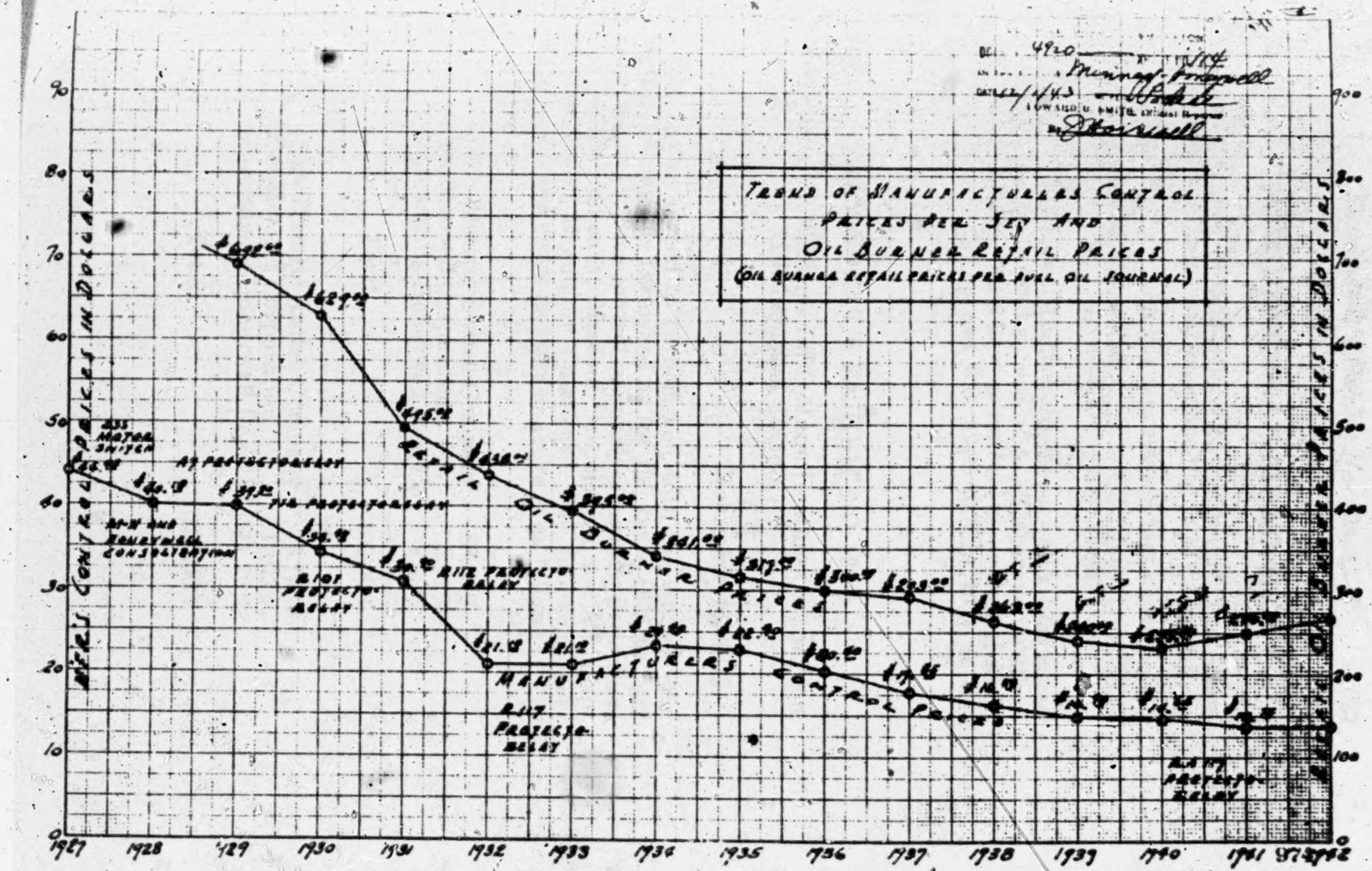
◆

Eric L. Kohler has been named executive officer of the Petroleum Administration for War, to handle organizational and administrative problems.

W. P. Hopkins has been appointed purchasing agent of Tuthill Pump Co., Chicago. Mr. Hopkins formerly was assistant purchasing agent for the Ordnance plant at Marion, Ohio, and formerly for the Illinois Central system.

James T. Buckley, president of Philco Corp., Philadelphia, is celebrating his 30th anniversary with the company. He started at the age of 16 years, as a laboratory clerk and assistant.

Dr. Albert W. Davison, formerly head of industrial engineering at Rensselaer Polytechnic Institute, has joined Owens-Corning Fiberglas Corp. as scientific director of its research laboratories at Newark, Ohio.



RESPONDENT'S EXHIBIT NO. 114.

2085

889 RESPONDENT'S EXHIBIT NO. 115.

Comparison of M-H 1939 Selling Prices With "The Allowable Selling Prices" as Determined by 1938 Cost Study.

	Brkt. 1	Brkt. 2	Brkt. 3	Brkt. 4	Brkt. 5	Brkt. 6
Allowable selling price.....	$18.05	$17.28	$17.00	$15.29	$14.93	$14.73
1939 selling price.....	$18.10	$17.25	$16.65	$15.95	$14.90	

It will be noted that Minneapolis-Honeywell's 1939 actual prices carried on overall spread of $3.20 whereas its allowable selling prices would have permitted an overall of $3.32. In 1940 the overall spread was $3.35 and in 1941, it was $3.60.

930 RESPONDENT'S EXHIBIT NO. 126-A.

(Letterhead of Williams O'-O-Matic Heating Corporation, Bloomington, Illinois.)

November 16, 1943.

The writer agreed to furnish you with the volume percentage of controls furnished us for the years 1936 to 1942 inclusive on all three control companies; namely, Penn Electric Switch Company, Mercoid Corporation and Minneapolis-Honeywell Regulator Company. The following percentages for the years mentioned above is as follows:

1936	
Penn Electric Switch Company	88.81%
The Mercoid Corporation	2.71%
Minneapolis-Honeywell Reg. Co.	8.48%
Total	100.00%
1937	
Penn Electric Switch Company	78.75%
The Mercoid Corporation	10.03%
Minneapolis-Honeywell Reg. Co.	11.22%
Total	100.00%

1938

Penn Electric Switch Company.	77.28%
The Mercoid Corporation	9.56%
Minneapolis-Honeywell Reg. Co.	13.16%
Total	100.00%

1939

Penn Electric Switch Company	55.21%
The Mercoid Corporation	9.17%
Minneapolis-Honeywell Reg. Co.	35.62%
Total	100.00%

1940

Penn Electric Switch Company	67.32%
The Mercoid Corporation	8.42%
Minneapolis-Honeywell Reg. Co.	24.26%
Total	100.00%

1941

Penn Electric Switch Company	42.58%
The Mercoid Corporation	14.18%
Minneapolis-Honeywell Reg. Co.	43.24%
Total	100.00%

1942

Penn Electric Switch Company	64.84%
The Mercoid Corporation	9.65%
Minneapolis-Honeywell Reg. Co.	25.51%
Total	100.00%

Yours very truly,
Williams Oil-O-Matic Heating Corporation
R. H. Ellerbrock,
Purchasing Agent.

RHE/esw

953 RESPONDENT'S EXHIBIT NO. 133-A.

(Letterhead of Aldrich Company,
Wyoming, Illinois.)

November 15, 1943.

Minneapolis-Honeywell Regulator Co.
Minneapolis, Minnesota

Atten: Art Lockrae

Gentlemen:

Here are our Control purchases for the years listed:

1936-1943 Mercoid	$129,376.61
1936-1943 Minneapolis	589,647.43
1938-1943 Penn Electric	30,627.94
1936-1943 Perfex Controls Co.	30,741.31

Yours very truly,

Aldrich Company,
By L. I. Aldrich.

LIA:fh

RESPONDENT'S EXHIBIT NO. 133-G.

OIL BURNER CONTROL PRICES.

Aldrich Company, Wyoming, Illinois.

Revised Net Prices

November 15, 1941

NOTE—Our Oil Burners are priced with 3 Standard Controls. This sheet is our selling price of controls bought in excess of those furnished with our burners. When ordering burners with less than 3 controls, we will deduct our actual cost of the items left out. All Extra Controls will be priced as per the list shown below:

Control	Minneapolis		Perfex		Mercoid		Penn	
Constant Ign. Stack Relay	R116A	$10.00	5200D4	$10.00	"JM" Pyr.	$10.00	#661	$10.00
Intermit. Ign. Stack Relay	R117A	11.00	5500D4	11.00	"JMI" Pyr.	11.00	#672	11.00
Low Voltage Thermostat	T11A	5.50	100A	3.50	"H" Sens.	3.50	870A01C	3.50
	T109A	8.50						
Clock Thermostat	T111A	15.00	126D4-D8	14.00	"T41"	14.00	#772	14.00
	T105A	23.85						
Line Voltage Thermostat	T44-T45	4.50	200D	5.50	#855	6.50	#874A01	6.50
	T42	5.75						
Strap-On Aquastat	LA409A	3.25	400D4	3.25	Fig. 35	3.25	#420	3.25
Submerged Aquastat	L170A	4.25	650D2	3.75	115A	3.75	440AT02	4.50
					DA-36 & DA-37	6.50		
Steam Pressure Control	P404A	3.25	700D	3.25	DA-31	3.75	#400	3.50
Combination High-Low Aquas.	L428B	7.50	———	———	———	———	#441AT13	7.50
Warm Air Limit Control	D419	3.25	400D4	3.25	M-51	4.25	512AT02	3.50
Fan Control	LA412A	3.75	450D5	3.75	M-53	4.25	#511	3.50
Comb. Fan & Furnace Control	LA401A	6.25	475D4	7.00	M-80	6.25	#515	6.25
			5010D7	5.50				
Power Relays	R19A	5.50	5000D4	4.50	V2-3A	5.50	———	———
			5010D6	5.00				

983 RESPONDENT'S EXHIBIT NO. 143.

TABLE OF CERTAIN OIL BURNER MANUFACTURERS SHOWING PRICE BRACKETS EXTENDED BY MINNEAPOLIS-HONEYWELL REGULATOR CO.

1937 TO 1941.

Manufacturer's Name	Price Bracket and Minimum Quantity of Units 1937	1938	1939	1940	1941
Electrol, Inc., Clifton, N. J.	3 3,000	2 2,250	2 1,050	3 3,000	3 3,000
Gold Star Oil Burner Mfg. Co., Yonkers, N. Y.	3 3,000	2 2,250	3 3,000	3 3,000	3 3,000
Goodrich Oil Burner Mfg. Co., New Haven, Conn.	1 300	1 150	1 150	2 1,050	1 150
Herco Oil Burner Corp., Lancaster, Pa.	3 3,000	1 150	3 3,000	3 3,000	3 3,000
Korth Oil Burner Corp., Roselle Park, N. J.	3 3,000	2 2,250	3 3,000	3a 7,500	4a 22,500
Malleable Iron Fittings Co., Bradford, Conn.	3 3,000	2 2,250	2 1,050	3 3,000	3 3,000
National Airoil Burner Corp., Philadelphia, Pa.	1 300	1 150	1 150	1 150	1 150
Oil Equipment Laboratories Inc., Elizabeth, N. J.	2 1,050	1 150	2 1,050	2 1,050	2 1,050
Petroleum Heat & Power Co., Stamford, Conn.	5 22,500	4 22,500	5 30,000	5 30,000	5 30,000
Joseph Toker Co., New York, N. Y.			2 1,050	3a 7,500	3a 7,500
Volcano Oil Burner Corp., New York, N. Y.	3 3,000	2 2,250	3 3,000	3 3,000	3 3,000
York Oil Burner Corp., York, Pa.	3 3,000	3 9,000	3 3,000	3 3,000	3 3,000

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RESPONDENT'S EXHIBIT NO. 144-A.

UNIT PRICES FOR MINNEAPOLIS-HONEYWELL CONTROLS

1937-1941.

	1937	1938	1939	1940	1941
Bracket I					
T11 Thermostat	4.50	4.25	3.95	3.95	3.95
Limit Control	3.60	3.05	3.05	3.05	3.05
R117 Intermittent Primary	15.75	13.75	11.10	11.10	10.35
Total Intermittent Ignition Set	23.85	21.05	18.10	18.10	17.35
Total Constant Ignition Set	22.10	19.70	16.85	16.85	16.20
Bracket II					
T11 Thermostat	4.25	4.05	3.75	3.75	3.75
Limit Control	3.40	3.05	2.85	2.85	2.85
R117 Intermittent Primary	14.95	12.25	10.65	10.65	9.85
Total Intermittent Ignition Set	22.60	19.35	17.25	17.25	16.45
Total Constant Ignition Set	20.95	18.00	16.05	16.05	15.40
Bracket III					
T11 Thermostat	4.05	3.75	3.30	3.30	3.30
Limit Control	3.05	2.85	2.85	2.85	2.85
R117 Intermittent Primary	14.20	11.75	10.50	10.50	9.75
Total Intermittent Ignition Set	21.30	18.35	16.65	16.65	15.90
Total Constant Ignition Set	19.70	17.00	15.50	15.50	14.85
Bracket IIIA					
T11 Thermostat				3.10	3.10
Limit Control				2.75	2.75
R117 Intermittent Primary				10.40	9.50
Total Intermittent Ignition Set				16.25	15.35
Total Constant Ignition Set				15.10	14.45
Bracket IV					
T11 Thermostat	3.75	3.30	2.95	2.95	2.95
Limit Control	3.05	2.75	2.75	2.65	2.65
R117 Intermittent Primary	13.05	11.20	10.25	10.25	9.30
Total Intermittent Ignition Set	19.85	17.25	15.95	15.85	14.90
Total Constant Ignition Set	18.40	16.05	14.85	14.75	14.05
Bracket IVA					
T11 Thermostat				2.85	2.85
Limit Control				2.50	2.50
R117 Intermittent Primary				9.80	8.90
Total Intermittent Ignition Set				15.15	14.25
Total Constant Ignition Set				14.15	13.45
Bracket V					
T11 Thermostat	3.30	2.95	2.70	2.70	2.70
Limit Control	3.05	2.75	2.75	2.50	2.50
R117 Intermittent Primary	11.50	10.55	9.45	9.45	8.55
Total Intermittent Ignition Set	17.85	16.25	14.90	14.65	13.75
Total Constant Ignition Set	16.55	15.10	13.90	13.65	13.00

985 RESPONDENT'S EXHIBIT NO. 144-B.

	1937
Bracket VI	
T11 Thermostat	2.95
Limit Control	3.05
R117 Intermittent Primary	10.55
Total Intermittent Ignition Set	16.55
Total Constant Ignition Set	15.40

989 RESPONDENT'S EXHIBIT NO. 147.

1937 Manufacturers' Prices.

Contemplated changed in several list prices has made necessary corrections on contract prices sent you under date of 12/16/36.

Replace page 2 previously sent you with attached page 2A and destroy old page 2.

The quantities applying to various brackets for contracts are as follows:

Bracket	Quantity (Single Units)	Odd Model Disc.
1	Less than 300	Reg. Mfg. Schedule
2	300 to 1,000	Reg. Mfg. Schedule
3	1,000 to 3,000	24-Lot Price
4	3,000 to 7,500	24-Lot Price
5	7,500 or more	24-Lot Price

RESPONDENT'S EXHIBIT NO: 149-A.

COMPLETE DISCOUNTS FOR MERCOID SALES DEPT. ONLY

6/8/37

MERCOID DISCOUNTS.

The discounts applying to prevailing Mercoid list prices are as follows for various trade classifications:

DISCOUNTS ON MERCOID CONTROLS & MERCOID SWITCHES.

Trade Classification	Quantity in Single Shipment	F.O.B. Factory	F.O.B. Distr. Warehouse
Consumers, Industrials not having their own electrical department, Educational Institutions, Federal, State, or City Governments	Any Quantity	10%	10%
Industrials having their own Elec. Department	Any Quantity	33⅓%	30%
Dealers	1 to 9 (Assorted)	33⅓%	30%
	10 Up (Assorted)	33⅓-5%	30-5%
Non-Stocking Jobbers	Any Quantity	33⅓-15%	30-15%
Gas Utility Cos.	Any Quantity	33⅓-15%	30-15%
Stocking Jobbers	1 to 23 (Assorted)	33⅓-15%	30-15%
	24 Up (Assorted)	33⅓-20%	30-20%
Manufacturers	1 to 9 (Assorted)	33⅓-15%	30-15%
	10 to 23 (Assorted)	33⅓-20%	30-20%
	24 Up (Assorted)	33⅓-25%	30-25%

On Mercoid Controls only (not switches) with the exception of Type H Sensatherm and Types M-51 and M-53 Warm Air Controls, an additional 5% is allowed manufacturers on single shipments of 100 or more controls of one type and specification. Assortments are not permitted to obtain this additional discount.

Distributors	1 to 23	(Assorted)	33⅓-25%
	24 Up	(Assorted)	33⅓-25-5%

Note: For discounts on Valves, Transformers, and Louvre Controls see Sheet No. 2.

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RESPONDENT'S EXHIBIT NO. 149-B.

1937 MANUFACTURERS' PRICES, CONT'D—Page 2A.

CONTRACT PRICES.

Units	Brackets				
Primary Controls:	1	2	3	4	5
Type KM Pyratherm (Type MK when available)	$11.55	$11.10	$10.65	$10.25	$ 9.75
Type KMI Pyratherm (Type MKI when available)	12.05	11.60	11.15	10.75	10.25
Type TV2 Stokatimer	11.50	11.00	10.50	9.75	8.75
Type JMV Stokatherm	15.00	14.50	14.00	13.80	13.80
For Types KM or KMI Pyratherms (Types MK or MKI when available), 110 or 220 V., 25 or 50 cyc.	add each net 50¢				
For TV2 or JMV Stoker Controls, 110 or 220 V. 50 cyc.	add each net $1.00				
For TV2 or JMV Stoker Controls, 110 or 220 V. 25 cyc.	add each net $1.25				
Thermostats:					
Type H Sensatherm (Low Voltage)	4.25	4.00	3.75	3.65	3.35
855T, with thermometer, 10 Amp.	5.60	5.60	5.25	5.00	5.00
Boiler Limit Controls:					
Note: When Boiler or Limit Controls are ordered in shipments of 10 or more of the same type and specification, Deduct 50¢ Each Net from following prices:					
Steam:					
Type ST-2 (when available)	3.75	3.50	3.35	3.35	3.35
Type DA-31, O-14#	4.25	4.25	4.00	4.00	4.00
Type DA-31, 10" vac.-12#	5.25	5.25	5.00	5.00	5.00
Clamp-on Hot Water:					
Type HW-2 (when available)	3.75	3.50	3.35	3.35	3.35
Fig. 35 Risertherm	4.25	4.25	4.00	4.00	4.00
Immersion Hot Water:					
Types DA-36 or DA-37	6.15	5.90	5.75	5.75	5.75
Warm Air:					
Type WA-2 (when available)	4.75	4.50	4.30	4.30	4.30
Types M-51 or M-53	5.00	5.00	5.00	5.00	5.00

SPECIAL COMPLETE SET NET PRICES NOT TO BE SHOWN ON CONTRACTS.

The complete set net prices below include Primary Control as shown for 110 or 220 V. 60 cycle, Type H Sensatherm, and either Type ST-2 Steam Control, or Type HW-2 Hot Water Control. Other Limit Controls may be included in complete sets by adding to the net set prices the difference between the contract net price of the Limit Control desired and the net price of the Type ST-2 Steam Control.

994 RESPONDENT'S EXHIBIT NO. 149-C.

1937 MANUFACTURERS' PRICES, CONT'D--Page 3.

Bracket No. 1.

On orders covering from 10 to 100 complete sets to be taken in shipments of not less than 10 complete sets.

KM	Sets (MK Pyratherm when available)	Net Per Set $18.45
KMI	Sets (MKI Pyratherm when available)	Net Per Set 18.95
TV2	Stokatimer Sets	Net Per Set 17.75
JMV	Stokatherm Sets	Net Per Set 21.75

Bracket No. 2.

On orders covering from 100 to 300 complete sets to be taken in shipments of not less than 10 complete sets.

KM	Sets (MK Pyratherm when available)	Net Per Set $17.35
KMI	Sets (MKI Pyratherm when available)	Net Per Set 17.85
TV2	Stokatimer Sets	Net Per Set 17.25
JMV	Stokatherm Sets	Net Per Set 20.75

Bracket No. 3.

On orders covering from 300 to 1000 complete sets to be taken in shipments of not less than 25 complete sets.

KM	Sets (MK Pyratherm when available)	Net Per Set $16.60
KMI	Sets (MKI Pyratherm when available)	Net Per Set 17.10
TV2	Stokatimer Sets	Net Per Set 16.20
JMV	Stokatherm Sets	Net Per Set 20.10

Bracket No. 4.

On orders covering from 1000 to 2500 complete sets to be taken in shipments of not less than 100 complete sets.

KM	Sets (MK Pyratherm when available)	Net Per Set $16.10
KMI	Sets (MKI Pyratherm when available)	Net Per Set 16.60
TV2	Stokatimer Sets	Net Per Set 15.45
JMV	Stokatherm Sets	Net Per Set 19.80

Bracket No. 5.

On orders covering 2500 or more complete sets to be taken in shipments of not less than 250 complete sets.

KM	Sets (MK Pyratherm when available)	Net Per Set $15.65
KMI	Sets (MKI Pyratherm when available)	Net Per Set 16.15
TV2	Stokatimer Sets	Net Per Set 14.50
JMV	Stokatherm Sets	Net Per Set 19.50

Manufacturers not under contract or who have not placed orders for sets are not to receive net prices but should be quoted regular list and discount. Manufacturers are not permitted to assort controls to obtain quantity discounts.

RESPONDENT'S EXHIBIT NO. 152-A.

THE MERCOID CORPORATION.
Prices Extended '37 to '41 Incl.

	1937	1938	1939	1940	1941
Acme Tool & Gauge Co. Pawtucket, R. I.	#3-1/1 #1-7/1	#33	B-33	MB-2	LB-X
Alida Mfg. Co. (Lida Mfg. Co.) Brooklyn, New York	#2	—	B-11 Canc. 8/15	No Record	—
Arcweld Mfg. Co. Seattle, Washington	No Record	—	—	—	—
Automatic Burner Corp. Chicago, Illinois	KMI & "H" 14.90 Net Set	#55	B-44	LB-3Spc.	LB-X
Bedard Johnson Co. Minneapolis, Minn.	No Record	—	—	—	
Berggren Engr. Co. Brooklyn, New York (Now John Edwards, Inc.)	#2	#22	B-11 Canc. 8/15	SB-1 Canc. 7/16	SB-1
Bock Corporation Madison, Wisconsin	—	#11 Canc. 4/13	No Record	—	—
Braden Engineering, Inc. Providence, R. I.	#5	#44	B-22	MB-2	MB-2
Brown Oil Burner Eq. Co. Cambridge, Mass.	No Record of Sales until 1942				
Buck Engineering Co., Inc. Freehold, New Jersey	#1	#11	No Record.	—	—
Burner Parts & Serv. (Now Penn Boiler & Burner Co.) Lancaster, Penna.	#3	#33	B-22	MB-2 LB-3	LB-XX
Campbell Machinery Co. Minneapolis, Minnesota	—	#22	B-22 Canc. 8/15	SB-1 Canc. 7/16	No Record
Century Engineering Co. Cedar Rapids, Iowa	#6	#55	B-44	LB-3Spc.	LB-X
Cleveland Steel Products Corp. Cleveland, Ohio	#6 Spec.	#55	B-44(X)	LB-3 Spec.	LB-X
Citro Oil Burner Corp. Pompton Lakes, New Jersey (Haskell, New Jersey)	#2	#22	B-22	SB-1	SB-1
Concord Oil Burner Corp. Brooklyn, New York	#3 Canc. 6/6	#33 #44	No Record	—	MB-2 LB-X&XX
D'Elia Oil Burner Co. Bridgeport, Conn.	No Record	#33	B-44	LB-3	LB-X

RESPONDENT'S EXHIBIT NO. 152-B.

THE MERCOID CORPORATION.

	1937	1938	1939	1940	1941
DeSoto Oil Burner Corp. York, Pennsylvania	No Record	—	B-22	SB-1 MB-2	SB-1
Diesel Burners, Inc. Moosup, Conn.	#3 7/1 #1	#33	B-22	MB-2	MB-2
David Duff & Sons New Bedford, Mass.	#2	—	—	—	—
Eisler Engineering Co. Newark, New Jersey	#2 7/1 #1	#11	No Record	—	—
Electrol Inc. Clifton, N. J.	No Record	#44	B-44	LB-3 Spec.	LB-X
Enterprise Oil Burner Corp. San Francisco, California	Mfrs.	#11	B-11 Canc. 9/7	SB-1 Canc. 7/16	Mfrs.
Fairfield Oil Htg. Co. Greenwich, Conn.	#3 7/1 #1	#33	B-22	LB-3	LB-X
Fargo Foundry Co. Fargo, N. D.	Mfrs.	Mfrs.	Mfrs.	Mfrs.	Mfrs.
Gar Wood Industries, Inc. Detroit, Michigan	No Record	#44	B-44	LB-3 Spec. Canc. 6/3	LB-X
General Oil Burner Corp. Baltimore, Md.	#3	#33	B-33	MB-2	LB-X
General Oil Htg. Corp. West New York, N. Y.	#4	#44	B-44	LB-3	LB-X
Capitol Oil Burner Co. Hartford, Conn.	Dlr.	#22	B-11 Canc. 8/15	SB-1 Canc. 7/16	No Record
Carlson Bros. Tool & Machine Co. Boston, Mass.	No Record	#11	No Record	No Record	No Sales
Korth Oil Burner Corp. Roselle Park, N. J.	#3	#33	B-33 9/9 B-44	LB-3 Spec.	LB-X 4/11 LB-XX
Gold Star Oil Burner Mfg. Co. Yonkers, New York	* See Below	#33	B-33	MB-2	MB-2
Goodrich O. B. Mfg. Corp. New Haven, Conn. (Now Walter H. Goodrich & Co.)	#2 7/1 #1	#33 4/30 #44	B-44	LB-3	LB-X
Greenwood Engrg. Co. Glenarm, Md.	No Record	—	—	—	—

* 9/24/37—For Bal. 1937—Sets of KMI, Sens. & DA-31 O-14 or Fig. #35, Less than 10 Sets $20.05 Net, 10-23 Sets $18.60, 24 or more Sets $18.20 Net. With M-51 in above add $1.00. Other Controls Mfrs. Schedule.

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Respondent's Exhibit No. 152-B.

RESPONDENT'S EXHIBIT NO. 152-C.

THE MERCOID CORPORATION.

	1937	1938	1939	1940	1941
Hall-Neal Furnace Co. Indianapolis, Indiana	No Record	Spec.	F-33	FR-1	SPC-2
Harrison Sales Co. Seattle, Washington	#3	#22	B-22 Canc. 9/8	No Record	—
Hart Oil Burner Corp. Peoria, Illinois	#4	#44	Mfrs.	LB-3 Spec.	LB-X
Harvey-Whipple, Inc. Springfield, Mass.	#5	#44	B-44	LB-3 & Spec. 4/24	LB-X
Hayward Mfg. Co., Inc. Brooklyn, N. Y.	#3	#33	B-33	MB-2 Canc. 7/16	MB-2
The Heil Co. Milwaukee, Wisc.	#5	#44	B-33 Canc. 9-20	LB-3	LB-X
Herco Oil Burner Corp. Lancaster, Pennsylvania	#5	#44	B-44(X)	LB-3 Spec.	LB-XX
Hi-Point Corp. Bellefontaine, Ohio	#3	#33	B-22	MB-2	MB-2
Hoben Mfg. Co. Waltham, Mass.	#2 7/1 #1	#33	No Record	—	MB-2
Holtum Mfg. Co. Freeport, Ill.	#2	#11	B-11	SB-1	SB-1
Homestead Engrg. Corp. Brooklyn, N. Y.	#2	No Record	—	—	—
Hubbard Oil Burner Co. Minneapolis, Minn.	#4	#33	B-83 Canc. 8/15	SB-1 Canc. 7/16	No Record
Hupp Oil Burner Co. Brooklyn, N. Y.	#3 7/1 #1	#33	B-22	SB-1	MB-2
Hyle Oil Burner Co. Catonsville, Md.	#1	#11	B-11	No Record	—
Jacobson Mfg. Co. Racine, Wisc.	#2	#22 Canc. 4/6	No Record	—	—
Kelly Oil Sales Corp. Arlington, Mass.	Spec.	#44	B-44	LB-3	LB-X
La Grace Oil Burner Co. Woonsocket, R. I.	No Record	—	—	—	—
Liberty Research Lab. Inc. (Liberty Airflo Burners, Inc.) Farmingdale, L. I., N. Y.	No Record	#22 #33	B-11	SB-1	SB-1

THE MERCOID CORPORATION.

	1937	1938	1939	1940	1941
Lynn Products, Inc. Lynn, Mass.	#4	#3	B-33	LB-3	LB-X
Malleable Iron Fittings Co. Branford, Conn.	#2 & #3	#4	B-44	LB-3	LB-X
Master Oil Burner Co. Seattle, Wash.	No Record	—	—	—	LB-XX 5/6
Messer Co. Newark, N. J.	#2	#22	No Record	MB-2 Canc. 7/16	No Record
Micro-Westco, Inc. Bettendorf, Iowa	No Record	—	B-44 Spec.	LB-3 LS-2 Canc. 7/10	LB-X
Mohawk Oil Burner Mfg. Co. New York City, N. Y.	#3	None Bankrupt	—	—	—
Montag Stove & Furnace Works Portland, Oregon	#3	#22	F-22	FR-1 Canc. 7/16	No Record
G. T. Muehlbach Minneapolis, Minn.	No Record	—	—	—	—
(National Devices Co. (Bellmore, N. Y. (Liberty Airflow Burners)	No Record	#22	B-11	SB-1	No Record
Nels & Brechtl West Allis, Wisc.	No Record	—	—	—	—
Oil Equip. Laboratories Elizabeth, N. J.	#4	#4	B-44	LB-3	LB-X
Old Colony Machine Works Co. Fall River, Mass.	#3	#3	No Record	—	—
Osher & Reiss, Inc. Brooklyn, N. Y.	#2 7/1 #1	#3	B-22	No Record	—
Packard Oil Burner Mfg. Co. Bridgeport, Conn.	#2 & #3	#2 & #3	B-22 Canc. 7/5	No Record	—
Pan-American Engr. Corp.	#2	#1	B-11	SB-1	Mfrs.
Penn Petroleum Prod. Co. Providence, R. I.	#3	No Record	—	—	—
Petroleum Heat & Power Co. Stamford, Conn.	Mfrs.	#4	B-44	LB-3 Spec.	LB-X
Quiet Heet Mfg. Corp. Newark, N. J.	#5	#5	B-44 Spec.	LB-3 Spec.	LB-X
Quiet Heet Oil Burner Co. Brooklyn, N. Y.	#2	#2	B-11	SB-1	SB-1

THE MERCOID CORPORATION.

	1937	1938	1939	1940	1941
Reliable Oil Burner Corp. Madison, Wisc.	#1	#11	B-11 Canc. 8/15	No Record	—
Reif-Rexoil, Inc. Buffalo, New York	#4	#44	B-44	LB-3 Canc. 7/17	LB-X
Rossoe Mfg. Co. Seattle, Wash.	No Record	#11	B-11 Canc. 9/8	No Record	—
Silent Flash O. B. Corp. Brooklyn, N. Y.	#2 Canc. 6/7	#22	B-11 Canc. 8/15	No Record	—
S-K Company Camden, N. J.	#4 Canc. 6/3	#44	B-33	MB-2 Canc. 7/17	MB-2
Simplex Oil Htg. Corp. New York, N. Y.	Same as Gold Star	#33	B-33	MB-2	MB-2
Standard Products Co. Clinton, Mass.	#3	#33	No Record	—	—
Scott-Newcomb, Inc. St. Louis, Mo.	#4	Stoker ST-1-5	S-33	LB-3 Canc. 7/17	MB-2
Sunray Oil Burner Corp. Rockaway Park, N. Y.	#2	No Record	—	—	—
Todd Combustion Equip. Inc. New York, N. Y.	Mfrs.	Mfrs.	Mfrs.	Mfrs.	Mfrs.
Timken-Detroit Axle Co. (Timken Silent Auto. Div.) Detroit, Michigan	#6	#55	B-44	LB-3 Spec. Canc. 6/21	LB-X
Volcano Burner Corp. New York, N. Y.	#3 7/1 #1	#33	B-33	MB-2	LB-X
Wayne Oil Burner Corp. Fort Wayne, Ind.	#5	#55	B-44	LB-3	LB-X
Harry C. Weiskittle Co. Baltimore, Md.	#2 Canc. 6/3	#11	B-11 Canc. 8/11	No Record	—
Westchester Home Equip. Co. New York, N. Y.	#2	#33	B-33	MB-2	MB-2
Williams Oil-O-Matic Bloomington, Ill.	#6	#55	B-55	LB-3 Spec.	LB-XX
Wisconsin Oil Burner Co. Madison, Wisconsin	#3 7/1 #1	#33	B-22 Canc. 8/17	MB-2	MB-2
York Oil Burner Co., Inc. York, Pa.	#5	#44	B-44 Canc. 8/21	LB-3 Canc. 5/22	LB-X

1007 COMMISSION'S EXHIBIT NO. 153-A.

Manufacturers' Purchase Contract

The Mercoid Corporation
4201 Belmont Ave., Chicago, Ill.

Date Submitted .....

This Agreement, entered into between The Mercoid Corporation, a Delaware corporation, hereinafter called the "Company", and ..... of .....; ..... hereinafter called the "Purchaser,"

Witnesseth:

Whereas the Company is engaged in manufacturing automatic electric controls for heating, refrigerating, air conditioning and other apparatus, machinery and equipment and

Whereas the Purchaser is desirous of purchasing such controls for use in connection with products of the Purchaser's own manufacture,

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter set forth the parties hereto agree as follows:

Quantity

Subject to the terms and provisions hereinafter contained, the Company agrees to sell and the Purchaser agrees to purchase, during the term of this agreement, their requirements of the Company's automatic controls. The special net prices extended herewith by the Company are based on the Purchaser's 1939 control requirements estimated to be ..... units.

Miscellaneous Controls and Control Equipment

Miscellaneous automatic controls and control equipment of the Company's manufacture, not listed herein but shown in the Company's catalogue attached hereto, will be furnished at the catalogue list prices less the discounts shown on the manufacturers' discount sheet attached hereto. The list prices and discounts shall be subject to change at any time and from time to time, without notice. All orders

for such miscellaneous controls and control equipment shall be subject to acceptance and approval by the Company.

Term of Agreement

This agreement shall become effective on the date of acceptance by the Company and shall continue to and including December 31, 1939, unless sooner terminated as herein provided.

Terms of Payment

All shipments shall be made f. o. b. the point of shipment with Factory Sight Draft attached to the Bill of Lading, the Company to have the right to designate the point of shipment. If the draft is paid within 10 days from the date of the invoice a special cash discount of two per cent. (2%) will be allowed. If Purchaser desires open account credit accommodation arrangements therefor should be made with the Company's credit department. If such arrangements are made invoices will be due net thirty days after the date of the invoice and a cash discount of two per cent. (2%) will be allowed if payment is made within 10 days from the invoice date. Credit terms and delivery of all equipment are subject to the Company's approval and the Company shall have the right at all times to change or alter the terms of payment and to fix, change or alter such credit accommodations as may be extended to Purchaser. Sales, excise and other taxes will be added to all prices and the amount of such taxes shall not be subject to discount. Invoices covering emergency shipments from a Branch Office of the Company shall be subject to such discounts as are in effect at such Branch Office at the time of shipment, anything herein contained to the contrary notwithstanding.

Use of Controls by Purchaser

This agreement is made upon the understanding and condition that Purchaser, who is a manufacturer, will not use or sell the controls or appliances purchased pursuant hereto except as a part of or in conjunction with machinery or equipment of Purchaser's own manufacture. If Purchaser shall use or sell such controls or appliances otherwise than as above specified the Company shall have the right to immediately terminate this agreement without notice.

Impossibility of Performance

The Company agrees that it will, in good faith and to the best of its ability, promptly fill all orders received from Purchaser and deliver the same to the carrier for shipment; provided, however, that the Company shall not be obliged to fill orders in the event and to the extent that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires, floods, tornados, acts of God, mechanical breakdowns, shortages of raw materials, delays in receipt of raw materials and any other causes or conditions beyond the control of the Company.

Assignment of Contract

The Purchaser shall not assign this contract or any interest therein without the written consent of the Company.

Price Revisions

The Company reserves the right to change and revise the prices listed herein upon thirty (30) days' written notice to Purchaser. Revised prices shall apply to all orders received by the Company after the expiration of the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in the Company's possession at the expiration of such period. If the revised prices are not satisfactory to Purchaser the Purchaser may terminate this agreement by written notice received by the Company within fifteen (15) days from the expiration of the aforesaid thirty (30) day period; provided, however, that such termination shall not affect completion of any orders received by the Company prior to the Company's receipt of the Purchaser's notice of termination. During the aforesaid thirty (30) day price change notice period the Purchaser may not order more than one-twelfth of the number of control units herein agreed to be purchased, or, at the Company's option, more than an equivalent number of control units shipped to Purchaser during the same period of the previous year.

	List Price	Net Price
Primary Controls		
Type KMW Pyratherm—Constant Ignition Type	$19.00	9.00
Type KMI Pyratherm—Intermittent Ignition Type	22.00	10.25
Type RMI Pyratherm—Int. Ign., Recycling Type	22.00	10.25
Thermostats		
Low Voltage Types		
Type H Sensatherm (Standard) 55-85°, with Thermometer	6.00	3.00
Type DNH Day-Night Sensatherm, with Thermometer	17.00	8.50
Type HH Dual Sensatherm, with Thermometer	12.50	5.00
Type T-41 Timercoid and Transformer, 110-24V., 60 Cyc.	20.00	10.00
Type HBH Two-Stage Sensatherm, with Thermometer	11.00	5.50
Type HBR Two-Stage Sensatherm, with Thermometer	11.00	5.50
Line Voltage Types		
Type HA Sensatherm, with Thermometer, Max. 20 Watts	6.50	3.30
No. 855 Thermostat, with Thermometer, 10 Amp.-115 Volt	10.00	5.00
No. 855 Thermostat, without Thermometer, 10 Amp.-115 Volt	9.00	4.50
Transformer—Relays		
Type V2-3A, S.P.S.T. 10 Amp.-115 Volt	8.00	4.20
Type V2-105-590 with Built-in Summer Switch	13.00	6.75

Limit Controls		
Steam		
Type DA-31, 0 to 14 lb.	6.00	3.00
Type DA-31, Vapor-Vacuum, 10" vac. to 12 lb.	8.00	4.50
Type DA-31, 0 to 35 lb.	8.50	4.75
Type DA-31, 0 to 60 lb.	8.50	4.75
Type DA-31, 0 to 100 lb.	9.00	5.05
Type DA-31, 0 to 150 lb.	9.50	5.35
Hot Water		
Fig. 35 Risertherm (Clamp-On Type), 110 to 200°F.	6.00	3.00
Fig. 34 Risertherm, 140-230°F. (closes on rise in temp.)	7.00	3.50
Type 115W Immersatherm, 50 to 250° (opens on rise in temp.)	7.00	3.75
Type 115W-3 Immersatherm, 50 to 250° (closes on rise in temp.)	7.00	3.75
Type DA-36 Straight Stem Immersion, 110 to 200° or 135 to 235°	10.00	5.00
Type DA-37 Back Angle Stem Immersion, 110 to 200° or 135 to 235°	10.00	5.00
Warm Air		
Type M-51 Limit Control	8.00	4.00
Type M-53 Fan Control	8.00	4.00
Type M-53 SW Fan Control with Summer Switch	8.50	4.25
*Type M-80 or M-80B Combination Fan and Limit Control	11.00	5.75
*Type M-82 or M-82B Combination Fan and Limit Control	12.00	6.25
*Type M-84 or M-84B Combination Fan and Limit Control	12.00	6.25
Type 116 Ductatherm, 50 to 300°	7.00	3.75

*Furnished Standard with Built-in Summer Switch.

1009 Control Units and Prices (Cont'd.)

	List Price	Net Price
Low Water Controls		
Type DA-121 Combination Pressure and Low Water, 0 to 14 lb.	$20.00	$11.25
Type DA-121 Combination Pressure and Low Water, Range 0 to 14 lb., Complete with Quick Hook-Up	23.00	12.75
Type 123 Low Water Cut-Out, 30 lb. Max.	14.00	7.75
Type 123 Low Water Cut-Out, 30 lb. Max., Complete with Quick Hook-Up Attachments	17.00	9.25

Other Standard or Odd Model Controls at List Price Less Prevailing Manufacturers Discounts. Net Price Controls Listed Above May Be Included in Single Shipment Orders to Obtain Quantity Discounts on the List Price Items Specified.

Prices Relating to All Controls Are for Standard Ranges as Listed in Catalog, and for 115 Volt, 60 Cycle Specifications Only, Unless Otherwise Specified.

1010 Special Units and Prices

Guarantee and Returns

The Company guarantees all control units and equipment manufactured by it and bearing its name or mark to be free from defects in workmanship and material. The Company will, without charge, replace or repair within one year from date of shipment from the Company's factory any control unit or equipment that may be found to be defective upon inspection at the Company's factory. This guarantee does not obligate the Company in any manner in cases where control units or equipment have been subjected to careless handling, improper application or faulty installation. In all cases the Company's liability on the guarantee herein expressed shall be limited to the repair or replacement of the defective control or equipment and in no event shall its liability extend to indirect or consequential damages. The

guarantee herein expressed is made in lieu of all other warranties, guaranties, obligations, or liabilities expressed or implied by the Company or its representatives. All statutory or implied warranties, other than of title, are hereby expressly negatived and excluded.

Returns must not be made without the Company's consent and in all cases the returned controls or equipment must be carefully handled, properly packed and shipped prepaid. If credit is allowed for returns the Company will deduct ten per cent. (10%) to cover handling and inspection charges and a further deduction will be made where recalibrating or refinishing is necessary. Specially made controls may not be returned for credit except at what the Company determines is a fair value for the same.

Patent Warranty

The Company agrees that it will, at its own expense, defend any suit or proceeding that may be instituted against the Purchaser based upon a claim that any apparatus of the Company's manufacture furnished by the Company to the Purchaser constitute an infringement of any Letters Patent of the United States, provided, that the Purchaser shall not be in default hereunder and shall cause the Company to be promptly notified in writing of such suit and shall give the Company authority to defend such suit through the Company's counsel and shall furnish to the Company all needed information and assistance for the defense of such suit. The Company will pay all damages and costs awarded against Purchaser in any suit defended by the Company, provided notice of such suit and authority, information and assistance shall have been given to the Company as aforesaid, and in the event the device or apparatus furnished by the Company, or any part thereof, is held to constitute infringement and its use is enjoined the Company will, at its own expense and at the Company's option, either: procure for the Purchaser the right to continue using the infringing devices or apparatus; or replace the same with non-infringing devices or apparatus; or modify the infringing devices or apparatus so that they become non-infringing; or accept the return of the infringing devices or apparatus and refund the purchase price thereof. The foregoing constitutes the Company's only liability in connection with patent infringement by devices or apparatus furnished by the Company.

Whenever the Company deems it necessary for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such products, and the Purchaser agrees, upon receipt of such notice, to make no further sales or installations of any such products unless or until authorized so to do in writing by the Company.

Termination

In addition to any and all other provisions herein contained relating to termination or cancellation of this agreement, the following circumstances are hereby agreed to be and shall be deemed to be conclusive evidence of the breach of this agreement by either of the parties hereto, and in any of these events the other party hereto may, at its election, without prejudice to any other remedy it may have, terminate all further obligations on the part of such nondefaulting party made and to be performed under this agreement:

(a) The breach of or the failure to comply with any or all of the terms, covenants, conditions and provisions of this agreement, and a continuance of such breach for thirty or more days after receipt by the defaulting party of written notice thereof.

(b) The adjudicated bankruptcy, either voluntary or involuntary or the adjudicated insolvency of either party hereto, or the making of an assignment for the benefit of creditors or the appointment of a trustee or receiver for either of the parties hereto.

(c) The repudiation of this agreement, in whole or in part, by either party hereto.

Field Service

The Company will welcome the opportunity of cooperating with the Purchaser in educating the Purchaser's factory personnel in the servicing and the proper installation of the Company's controls but the Company does not agree or bind itself to render any such service.

The foregoing constitutes the entire agreement between the parties hereto and no change, alteration or modification of this agreement shall be binding unless reduced to writing and signing by the respective parties hereto. The validity,

enforceability and interpretation of this agreement shall be determined and governed by the laws of the State of Illinois.

.....Purchaser

By .....

.....Title

The Mercoid Corporation

By .....

.....Title

Date Accepted: .....

1011 RESPONDENT'S EXHIBIT NO. 153-B.

Manufacturers' Purchase Contract

The Mercoid Corporation
4201 Belmont Ave. Chicago, Ill.

Date Submitted .....

This Agreement, entered into between The Mercoid Corporation, a Delaware corporation, hereinafter called the "Company," and ..... of ....., ... hereinafter called the "Purchaser,"

Witnesseth:

Whereas the Company is engaged in manufacturing automatic electric controls for heating, refrigerating, air conditioning and other apparatus, machinery and equipment, and

Whereas the Purchaser is desirous of purchasing such controls for use in connection with products of the Purchaser's own manufacture,

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter set forth the parties hereto agree as follows:

Quantity

Subject to the terms and provisions hereinafter contained, the Company agrees to sell and the Purchaser agrees to purchase, during the term of this agreement, their requirements of the Company's automatic controls. The special net prices extended herewith by the Company are based on the Purchaser's 1939 control requirements estimated to be ..... units.

Miscellaneous Controls and Control Equipment

Miscellaneous automatic controls and control equipment of the Company's manufacture, not listed herein but shown in the Company's catalogue attached hereto, will be furnished at the catalogue list prices less the discounts shown on the manufacturers' discount sheet attached hereto. The list prices and discounts shall be subject to change at any time and from time to time, without notice. All orders for such miscellaneous controls and control equipment shall be subject to acceptance and approval by the Company.

Term of Agreement

This agreement shall become effective on the date of acceptance by the Company and shall continue to and including December 31, 1939, unless sooner terminated as herein provided.

Terms of Payment

All shipments shall be made f.o.b. the point of shipment with Factory Sight Draft attached to the Bill of Lading, the Company to have the right to designate the point of shipment. If the draft is paid within 10 days from the date of the invoice a special cash discount of two per cent. (2%) will be allowed. If Purchaser desires open account credit accommodation arrangements therefor should be made with the Company's credit department. If such arrangements are made invoices will be due net thirty days after the date of the invoice and a cash discount of two per cent. (2%) will be allowed if payment is made within 10 days from the invoice date. Credit terms and delivery of all equipment are subject to the Company's approval and the Company shall have the right at all times to change or alter the terms of payment and to fix, change or alter such credit accommodations as may be extended to Purchaser. Sales, excise and other taxes will be added to all prices and the amount of such taxes shall not be subject to discount. Invoices covering emergency shipments from a Branch Office of the Company shall be subject to such discounts as are in effect at such Branch Office at the time of shipment, anything herein contained to the contrary notwithstanding.

Use of Controls by Purchaser

This agreement is made upon the understanding and condition that Purchaser, who is a manufacturer, will not use

or sell the controls or appliances purchased pursuant hereto except as a part of or in conjunction with machinery or equipment of Purchaser's own manufacture. If Purchaser shall use or sell such controls or appliances otherwise than as above specified the Company shall have the right to immediately terminate this agreement without notice.

Impossibility of Performance

The Company agrees that it will, in good faith and to the best of its ability, promptly fill all orders received from Purchaser and deliver the same to the carrier for shipment; provided, however, that the Company shall not be obliged to fill orders in the event and to the extent that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires, floods, tornadoes, acts of God, mechanical breakdowns, shortages of raw materials, delays in receipt of raw materials and any other causes or conditions beyond the control of the Company.

Assignment of Contract

The Purchaser shall not assign this contract or any interest therein without the written consent of the Company.

Price Revisions

The Company reserves the right to change and revise the prices listed herein upon thirty (30) days' written notice to Purchaser. Revised prices shall apply to all orders received by the Company after the expiration of the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in the Company's possession at the expiration of such period. If the revised prices are not satisfactory to Purchaser the Purchaser may terminate this agreement by written notice received by the Company within fifteen (15) days from the expiration of the aforesaid thirty (30) day period; provided, however, that such termination shall not affect completion of any orders received by the Company prior to the Company's receipt of the Purchaser's notice of termination. During the aforesaid thirty (30) day price change notice period the Purchaser may not order more than one-twelfth of the number of control units herein agreed to be purchased, or, at the Company's option, more than an equivalent number of control units shipped to Purchaser during the same period of the previous year.

	List Price	Net Price
Primary Controls		
Type KMW Pyratherm—Constant Ignition Type	$19.00	$ 8.50
Type KMI Pyratherm—Intermittent Ignition Type	22.00	9.75
Type RMI Pyratherm—Int. Ign., Recycling Type	22.00	9.75
Thermostats		
Low Voltage Types		
Type H Sensatherm (Standard) 55-85°, with Thermometer	6.00	3.00
Type DNH Day-Night Sensatherm, with Thermometer	17.00	8.50
Type HH Dual Sensatherm, with Thermometer	12.50	5.00
Type T-41 Timercoid and Transformer, 110-24V., 60 Cyc.	20.00	10.00
Type HBH Two-Stage Sensatherm, with Thermometer	11.00	5.35
Type HBR Two-Stage Sensatherm, with Thermometer	11.00	5.35
Line Voltage Types		
Type HA Sensatherm, with Thermometer, Max. 20 Watts	6.50	3.30
No. 855 Thermostat, with Thermometer, 10 Amp.-115 Volt	10.00	4.50
No. 855 Thermostat, without Thermometer 10 Amp.-115 Volt	9.00	4.00
Transformer—Relays		
Type V2-3A, S.P.S.T. 10 Amp.-115 Volt	8.00	4.15
Type V2-105-590 with Built-in Summer Switch	13.00	6.50

Limit Controls	List Price	Net Price
Steam		
Type DA-31, 0 to 14 lb.	6.00	2.85
Type DA-31, Vapor-Vacuum, 10" vac. to 12 lb.	8.00	4.40
Type DA-31, 0 to 35 lb.	8.50	4.65
Type DA-31, 0 to 60 lb.	8.50	4.65
Type DA-31, 0 to 100 lb.	9.00	4.90
Type DA-31, 0 to 150 lb.	9.50	5.20
Hot Water		
Fig. 35 Risertherm (Clamp-On Type), 110 to 200°F.	6.00	2.85
Fig. 34 Risertherm, 140-230°F. (closes on rise in temp.)	7.00	3.35
Type 115W Immersatherm, 50 to 250° (opens on rise in temp.)	7.00	3.75
Type 115W-3 Immersatherm, 50 to 250° (closes on rise in temp.)	7.00	3.75
Type DA-36 Straight Stem Immersion, 110 to 200° or 135 to 235°	10.00	5.00
Type DA-37 Back Angle Stem Immersion, 110 to 200° or 135 to 235°	10.00	5.00
Warm Air		
Type M-51 Limit Control	8.00	3.85
Type M-53 Fan Control	8.00	3.85
Type M-53 SW Fan Control with Summer Switch	8.50	4.05
*Type M-80 or M-80B Combination Fan and Limit Control	11.00	5.60
*Type M-82 or M-82B Combination Fan and Limit Control	12.00	6.10
*Type M-84 or M-84B Combination Fan and Limit Control	12.00	6.10
Type 116 Ductatherm, 50 to 300°	7.00	3.75

* Furnished Standard With Built-In Summer Switch

1013 Control Units and Prices (Cont'd.)

	List Price	Net Price
Low Water Controls		
Type DA-121 Combination Pressure and Low Water, 0 to 14 lb.	$20.00	$10.75
Type DA-121 Combination Pressure and Low Water, Range 0 to 14 lb., Complete with Quick Hook-Up	23.00	12.25
Type 123 Low Water Cut-Out, 30 lb. Max.	14.00	7.50
Type 123 Low Water Cut-Out, 30 lb. Max., Complete with Quick Hook-Up Attachments	17.00	9.00

Other Standard or Odd Model Controls at List Price Less Prevailing Manufacturers Discounts. Net Price Controls Listed Above May Be Included in Single Shipment Orders to Obtain Quantity Discounts on the List Price Items Specified.

Prices Relating to All Controls Are for Standard Ranges as Listed in Catalog, and for 115 Volt, 60 Cycle Specifications Only, Unless Otherwise Specified.

Special Units and Prices

1014 Guarantee and Returns

The Company guarantees all control units and equipment manufactured by it and bearing its name or mark to be free from defects in workmanship and material. The Company will, without charge, replace or repair within one year from date of shipment from the Company's factory any control unit or equipment that may be found to be defective upon inspection at the Company's factory. This guarantee does not obligate the Company in any manner in cases where control units or equipment have been subjected to careless handling, improper application or faulty installation. In all cases the Company's liability on the guarantee herein expressed shall be limited to the repair or replacement of the defective control or equipment and in no event shall its liability extend to indirect or consequential damages. The

guarantee herein expressed is made in lieu of all other warranties, guaranties, obligations, or liabilities expressed or implied by the Company or its representatives. All statutory or implied warranties, other than of title, are hereby expressly negatived and excluded.

Returns must not be made without the Company's consent and in all cases the returned controls or equipment must be carefully handled, properly packed and shipped prepaid. If credit is allowed for returns the Company will deduct ten per cent. (10%) to cover handling and inspection charges and a further deduction will be made where recalibrating or refinishing is necessary. Specially made controls may not be returned for credit except at what the Company determines is a fair value for the same.

Patent Warranty

The Company agrees that it will, at its own expense, defend any suit or proceeding that may be instituted against the Purchaser based upon a claim that any apparatus of the Company's manufacture furnished by the Company to the Purchaser constitute an infringement of any Letters Patent of the United States, provided, that the Purchaser shall not be in default hereunder and shall cause the Company to be promptly notified in writing of such suit and shall give the Company authority to defend such suit through the Company's counsel and shall furnish to the Company all needed information and assistance for the defense of such suit. The Company will pay all damages and costs awarded against Purchaser in any suit defended by the Company, provided notice of such suit and authority, information and assistance shall have been given to the Company as aforesaid, and in the event the device or apparatus furnished by the Company, or any part thereof, is held to constitute infringement and its use is enjoined the Company will, at its own expense and at the Company's option, either: procure for the Purchaser the right to continue using the infringing devices or apparatus; or replace the same with non-infringing devices or apparatus; or modify the infringing devices or apparatus so that they become non-infringing; or accept the return of the infringing devices or apparatus and refund the purchase price thereof. The foregoing constitutes the Company's only liability in connection with patent infringement by devices or apparatus furnished by the Company.

Whenever the Company deems it necessary for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such products, and the Purchaser agrees, upon receipt of such notice, to make no further sales or installations of any such products unless or until authorized so to do in writing by the Company.

Termination

In addition to any and all other provisions herein contained relating to termination or cancellation of this agreement, the following circumstances are hereby agreed to be and shall be deemed to be conclusive evidence of the breach of this agreement by either of the parties hereto, and in any of these events the other party hereto may, at its election, without prejudice to any other remedy it may have, terminate all further obligations on the part of such non-defaulting party made and to be performed under this agreement:

(a) The breach of or the failure to comply with any or all of the terms, covenants, conditions and provisions of this agreement, and a continuance of such breach for thirty or more days after receipt by the defaulting party of written notice thereof.

(b) The adjudicated bankruptcy, either voluntary or involuntary or the adjudicated insolvency of either party hereto, or the making of an assignment for the benefit of creditors or the appointment of a trustee or receiver for either of the parties hereto.

(c) The repudiation of this agreement, in whole or in part, by either party hereto.

Field Service

The Company will welcome the opportunity of cooperating with the Purchaser in educating the Purchaser's factory personnel in the servicing and the proper installation of the Company's controls but the Company does not agree or bind itself to render any such service.

The foregoing constitutes the entire agreement between the parties hereto and no change, alteration or modification of this agreement shall be binding unless reduced to writing and signed by the respective parties hereto. The validity,

enforceability and interpretation of this agreement shall be determined and governed by the laws of the State of Illinois.

.....Purchaser

By.....

.....Title

The Mercoid Corporation

By.....

.....Title

Date Accepted:.....

1015 RESPONDENT'S EXHIBIT NO. 153-C.

Manufacturers' Purchase Contract

The Mercoid Corporation

4201 Belmont Ave. Chicago, Ill.

Date Submitted .....

This Agreement, entered into between The Mercoid Corporation, a Delaware corporation, hereinafter called the "Company," and ..... of ....., hereinafter called the "Purchaser,"

Witnesseth:

Whereas the Company is engaged in manufacturing automatic electric controls for heating, refrigerating, air conditioning and other apparatus, machinery and equipment, and

Whereas the Purchaser is desirous of purchasing such controls for use in connection with products of the Purchaser's own manufacture,

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter set forth the parties hereto agree as follows:

Quantity

Subject to the terms and provisions hereinafter contained, the Company agrees to sell and the Purchaser agrees to purchase, during the term of this agreement, their requirements of the Company's automatic controls. The special net prices extended herewith by the Company are based on the Purchaser's 1939 control requirements estimated to be ..... units.

Miscellaneous Controls and Control Equipment

Miscellaneous automatic controls and control equipment of the Company's manufacture, not listed herein but shown in the Company's catalogue attached hereto, will be furnished at the catalogue list prices less the discounts shown on the manufacturers' discount sheet attached hereto. The list prices and discounts shall be subject to change at any time and from time to time, without notice. All orders for such miscellaneous controls and control equipment shall be subject to acceptance and approval by the Company.

Term of Agreement

This agreement shall become effective on the date of acceptance by the Company and shall continue to and including December 31, 1939, unless sooner terminated as herein provided.

Terms of Payment

All shipments shall be made f.o.b. the point of shipment with Factory Sight Draft attached to the Bill of Lading, the Company to have the right to designate the point of shipment. If the draft is paid within 10 days from the date of the invoice a special cash discount of two per cent. (2%) will be allowed. If Purchaser desires open account credit accommodation arrangements therefor should be made with the Company's credit department. If such arrangements are made invoices will be due net thirty days after the date of the invoice and a cash discount of two per cent. (2%) will be allowed if payment is made within 10 days from the invoice date. Credit terms and delivery of all equipment are subject to the Company's approval and the Company shall have the right at all times to change or alter the terms of payment and to fix, change or alter such credit accommodations as may be extended to Purchaser. Sales, excise and other taxes will be added to all prices and the amount of such taxes shall not be subject to discount. Invoices covering emergency shipments from a Branch Office of the Company shall be subject to such discounts as are in effect at such Branch Office at the time of shipment, anything herein contained to the contrary notwithstanding.

Use of Controls by Purchaser

This agreement is made upon the understanding and condition that Purchaser, who is a manufacturer, will not use

or sell the controls or appliances purchased pursuant hereto except as a part of or in conjunction with machinery or equipment of Purchaser's own manufacture. If Purchaser shall use or sell such controls or appliances otherwise than as above specified the Company shall have the right to immediately terminate this agreement without notice.

Impossibility of Performance

The Company agrees that it will, in good faith and to the best of its ability, promptly fill all orders received from Purchaser and deliver the same to the carrier for shipment; provided, however, that the Company shall not be obliged to fill orders in the event and to the extent that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires, floods, tornadoes, acts of God, mechanical breakdowns, shortages of raw materials, delays in receipt of raw materials and any other causes or conditions beyond the control of the Company.

Assignment of Contract

The Purchaser shall not assign this contract or any interest therein without the written consent of the Company.

Price Revisions

The Company reserves the right to change and revise the prices listed herein upon thirty (30) days' written notice to Purchaser. Revised prices shall apply to all orders received by the Company after the expiration of the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in the Company's possession at the expiration of such period. If the revised prices are not satisfactory to Purchaser the Purchaser may terminate this agreement by written notice received by the Company within fifteen (15) days from the expiration of the aforesaid thirty (30) day period; provided, however, that such termination shall not affect completion of any orders received by the Company prior to the Company's receipt of the Purchaser's notice of termination. During the aforesaid thirty (30) day price change notice period the Purchaser may not order more than one-twelfth of the number of control units herein agreed to be purchased, or, at the Company's option, more than an equivalent number of control units shipped to Purchaser during the same period of the previous year.

	List Price	Net Price
Primary Controls		
Type KMW Pyratherm—Constant Ignition Type	$19.00	$ 8.25
Type KMI Pyratherm—Intermittent Ignition Type	22.00	9.50
Type RMI Pyratherm—Int. Ign., Recycling Type	22.00	9.50
Thermostats		
Low Voltage Types		
Type H Sensatherm (Standard) 55-85°, with Thermometer	6.00	2.85
Type DNH Day-Night Sensatherm, with Thermometer	17.00	8.50
Type HH Dual Sensatherm, with Thermometer	12.50	4.85
Type T-41 Timercoid and Transformer, 110-24V., 60 Cyc.	20.00	9.85
Type HBH Two-Stage Sensatherm, with Thermometer	11.00	5.20
Type HBR Two-Stage Sensatherm, with Thermometer	11.00	5.20
Line Voltage Types		
Type HA Sensatherm, with Thermometer, Max. 20 Watts	6.50	3.15
No. 855 Thermostat, with Thermometer, 10 Amp.-115 Volt	10.00	4.50
No. 855 Thermostat, without Thermometer, 10 Amp.-115 Volt	9.00	4.00
Transformer—Relays		
Type V2-3A, S.P.S.T. 10 Amp.-115 Volt	8.00	4.10
Type V2-105-590 with Built-in Summer Switch	13.00	6.25

Limit Controls	List Price	Net Price
Steam		
Type DA-31, 0 to 14 lb.	6.00	2.85
Type DA-31, Vapor-Vacuum, 10" vac. to 12 lb.	8.00	4.30
Type DA-31, 0 to 35 lb.	8.50	4.55
Type DA-31, 0 to 60 lb.	8.50	4.55
Type DA-31, 0 to 100 lb.	9.00	4.75
Type DA-31, 0 to 150 lb.	9.50	5.00
Hot Water		
Fig. 35 Risertherm (Clamp-On Type), 110 to 200° F.	6.00	2.85
Fig. 34 Risertherm, 140-230° F. (closes on rise in temp.)	7.00	3.35
Type 115W Immersatherm, 50 to 250° (opens on rise in temp.)	7.00	3.75
Type 115W-3 Immersatherm, 50 to 250° (closes on rise in temp.)	7.00	3.75
Type DA-36 Straight Stem Immersion, 110 to 200° or 135 to 235°	10.00	5.00
Type DA-37 Back Angle Stem Immersion, 110 to 200° or 135 to 235°	10.00	5.00
Warm Air		
Type M-51 Limit Control	8.00	3.85
Type M-53 Fan Control	8.00	3.85
Type M-53 SW Fan Control with Summer Switch	8.50	4.05
*Type M-80 or M-80B Combination Fan and Limit Control	11.00	5.45
*Type M-82 or M-82B Combination Fan and Limit Control	12.00	5.95
*Type M-84 or M-84B Combination Fan and Limit Control	12.00	5.95
Type 116 Ductatherm, 50 to 300°	7.00	3.75

* Furnished Standard With Built-In Summer Switch

1017 Control Units and Prices (Cont'd.)

	List Price	Net Price
Low Water Controls		
Type DA-121 Combination Pressure and Low Water, 0 to 14 lb.	$20.00	$10.50
Type DA-121 Combination Pressure and Low Water, Range 0 to 14 lb., Complete with Quick Hook-Up	23.00	12.00
Type 123 Low Water Cut-Out, 30 lb. Max.	14.00	7.25
Type 123 Low Water Cut-Out, 30 lb. Max., Complete with Quick Hook-Up Attachments	17.00	8.75

Other Standard or Odd Model Controls at List Price Less Prevailing Manufacturers Discounts. Net Price Controls Listed Above May Be Included in Single Shipment Orders to Obtain Quantity Discounts on the List Price Items Specified.

Prices Relating to All Controls Are for Standard Ranges as Listed in Catalog, and for 115 Volt, 60 Cycle Specifications Only, Unless Otherwise Specified.

Special Units and Prices

1018 Guarantee and Returns

The Company guarantees all control units and equipment manufactured by it and bearing its name or mark to be free from defects in workmanship and material. The Company will, without charge, replace or repair within one year from date of shipment from the Company's factory any control unit or equipment that may be found to be defective upon inspection at the Company's factory. This guarantee does not obligate the Company in any manner in cases where control units or equipment have been subjected to careless handling, improper application or faulty installation. In all cases the Company's liability on the guarantee herein expressed shall be limited to the repair or replacement of the defective control or equipment and in no event shall its liability extend to indirect or consequential damages. The

guarantee herein expressed is made in lieu of all other warranties, guaranties, obligations, or liabilities expressed or implied by the Company or its representatives. All statutory or implied warranties, other than of title, are hereby expressly negatived and excluded.

Returns must not be made without the Company's consent and in all cases the returned controls or equipment must be carefully handled, properly packed and shipped prepaid. If credit is allowed for returns the Company will deduct ten per cent. (10%) to cover handling and inspection charges and a further deduction will be made where recalibrating or refinishing is necessary. Specially made controls may not be returned for credit except at what the Company determines is a fair value for the same.

Patent Warranty

The Company agrees that it will, at its own expense, defend any suit or proceeding that may be instituted against the Purchaser based upon a claim that any apparatus of the Company's manufacture furnished by the Company to the Purchaser constitute an infringement of any Letters Patent of the United States, provided, that the Purchaser shall not be in default hereunder and shall cause the Company to be promptly notified in writing of such suit and shall give the Company authority to defend such suit through the Company's counsel and shall furnish to the Company all needed information and assistance for the defense of such suit. The Company will pay all damages and costs awarded against Purchaser in any suit defended by the Company, provided notice of such suit and authority, information and assistance shall have been given to the Company as aforesaid, and in the event the device or apparatus furnished by the Company, or any part thereof, is held to constitute infringement and its use is enjoined the Company will, at its own expense and at the Company's option, either: procure for the Purchaser the right to continue using the infringing devices or apparatus; or replace the same with non-infringing devices or apparatus; or modify the infringing devices or apparatus so that they become non-infringing; or accept the return of the infringing devices or apparatus and refund the purchase price thereof. The foregoing constitutes the Company's only liability in connection with patent infringement by devices or apparatus furnished by the Company.

Whenever the Company deems it necessary for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such products, and the Purchaser agrees, upon receipt of such notice, to make no further sales or installations of any such products unless or until authorized so to do in writing by the Company.

Termination

In addition to any and all other provisions herein contained relating to termination or cancellation of this agreement, the following circumstances are hereby agreed to be and shall be deemed to be conclusive evidence of the breach of this agreement by either of the parties hereto, and in any of these events the other party hereto may, at its election, without prejudice to any other remedy it may have, terminate all further obligations on the part of such nondefaulting party made and to be performed under this agreement:

(a) The breach of or the failure to comply with any or all of the terms, covenants, conditions and provisions of this agreement, and a continuance of such breach for thirty or more days after receipt by the defaulting party of written notice thereof.

(b) The adjudicated bankruptcy, either voluntary or involuntary or the adjudicated insolvency of either party hereto, or the making of an assignment for the benefit of creditors or the appointment of a trustee or receiver for either of the parties hereto.

(c) The repudiation of this agreement, in whole or in part, by either party hereto.

Field Service

The Company will welcome the opportunity of cooperating with the Purchaser in educating the Purchaser's factory personnel in the servicing and the proper installation of the Company's controls but the Company does not agree or bind itself to render any such service.

The foregoing constitutes the entire agreement between the parties hereto and no change, alteration or modification of this agreement shall be binding unless reduced to writing and signing by the respective parties hereto. The validity,

enforceability and interpretation of this agreement shall be determined and governed by the laws of the State of Illinois.

.....Purchaser

By.....

.....Title

The Mercoid Corporation

By.....

.....Title

Date Accepted:.....

1019 RESPONDENT'S EXHIBIT NO. 153-D.

Manufacturers' Purchase Contract

The Mercoid Corporation

4201 Belmont Ave. Chicago, Ill.

Date Submitted .....

This Agreement, entered into between The Mercoid Corporation, a Delaware corporation, hereinafter called the "Company," and ..... of ....., ..., hereinafter called the "Purchaser."

Witnesseth:

Whereas the Company is engaged in manufacturing automatic electric controls for heating, refrigerating, air conditioning and other apparatus, machinery and equipment, and

Whereas the Purchaser is desirous of purchasing such controls for use in connection with products of the Purchaser's own manufacture,

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter set forth the parties hereto agree as follows:

Quantity

Subject to the terms and provisions hereinafter contained, the Company agrees to sell and the Purchaser agrees to purchase, during the term of this agreement, their requirements of the Company's automatic controls.

The special net prices extended herewith by the Company are based on the Purchaser's 1939 control requirements estimated to be ..... units.

Miscellaneous Controls and Control Equipment

Miscellaneous automatic controls and control equipment of the Company's manufacture, not listed herein but shown in the Company's catalog attached hereto, will be furnished at the catalogue list prices less the discounts shown on the manufacturers' discount sheet attached hereto. The list prices and discounts shall be subject to change at any time and from time to time, without notice. All orders for such miscellaneous controls and control equipment shall be subject to acceptance and approval by the Company.

Term of Agreement

This agreement shall become effective on the date of acceptance by the Company and shall continue to and including December 31, 1939, unless sooner terminated as herein provided.

Terms of Payment

Al shipments shall be made f.o.b. the point of shipment with Factory Sight Draft attached to the Bill of Lading, the Company to have the right to designate the point of shipment. If the draft is paid within 10 days from the date of the invoice a special cash discount of two per cent. (2%) will be allowed. If Purchaser desires open account credit accommodation arrangements therefor should be made with the Company's credit department. If such arrangements are made invoices will be due net thirty days after the date of the invoice and a cash discount of two per cent. (2%) will be allowed if payment is made within 10 days from the invoice date. Credit terms and delivery of all equipment are subject to the Company's approval and the Company shall have the right at all times to change or alter the terms of payment and to fix, change or alter such credit accommodations as may be extended to Purchaser. Sales, excise and other taxes will be added to all prices and the amount of such taxes shall not be subject to discount. Invoices covering emergency shipments from a Branch Office of the Company shall be subject to such dis-

counts as are in effect at such Branch Office at the time of shipment, anything herein contained to the contrary notwithstanding.

Use of Controls by Purchaser

This agreement is made upon the understanding and condition that Purchaser, who is a manufacturer, will not use or sell the controls or appliances purchased pursuant hereto except as a part of or in conjunction with machinery or equipment of Purchaser's own manufacture. If Purchaser shall use or sell such controls or appliances otherwise than as above specified the Company shall have the right to immediately terminate this agreement without notice.

Impossibility of Performance

The Company agrees that it will, in good faith and to the best of its ability, promptly fill all orders received from Purchaser and deliver the same to the carrier for shipment; provided, however, that the Company shall not be obliged to fill orders in the event and to the extent that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires, floods, tornados, acts of God, mechanical breakdowns, shortages of raw materials, delays in receipt of raw materials and any other other causes or conditions beyond the control of the Company.

Assignment of Contract

The Purchaser shall not assign this contract or any interest therein without the written consent of the Company.

Price Revisions

The Company reserves the right to change and revise the prices listed herein upon thirty (30) days' written notice to Purchaser. Revised prices shall apply to all orders received by the Company after the expiration of the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in the Company's possession at the expiration of such period. If the revised prices are not satisfactory to Purchaser the Purchaser may terminate this agreement by written notice received by the Company within fifteen (15) days from the expiration of the aforesaid thirty (30) day period; provided, how-

ever, that such termination shall not affect completion of any orders received by the Company prior to the Company's receipt of the Purchaser's notice of termination. During the aforesaid thirty (30) day price change notice period the Purchaser may not order more than one-twelfth of the number of control units herein agreed to be purchased; or, at the Company's option, more than an equivalent number of control units shipped to Purchaser during the same period of the previous year.

(Rider.)

B-44(X)

These prices same as B-44, except where 1,000 sets KMW And Type H Sensatherms Ordered, prices are

KMW $7.75 net
Type H $2.50 net

1020 **Form No. B-44**

Control Units and Prices	List Price	List Price
Primary Controls		
Type KMW Pyratherm—Constant Ignition Type	$19.00	$ 8.00
Type KMI Pyratherm—Intermittent Ignition Type	22.00	9.20
Type RMI Pyratherm—Int. Ign., Recycling Type	22.00	9.20
Thermostats		
Low Voltage Types		
Type H Sensatherm (Standard) 55-85°, with Thermometer	6.00	2.70
Type DNH Day-Night Sensatherm, with Thermometer	17.00	8.50
Type HH Dual Sensatherm, with Thermometer	12.50	4.75
Type T-41 Timercoid and Transformer, 110-24V., 60 Cyc.	20.00	9.75
Type HBH Two-Stage Sensatherm, with Thermometer	11.00	5.10
Type HBR Two-Stage Sensatherm, with Thermometer	11.00	5.10
Line Voltage Types		
Type HA Sensatherm, with Thermometer, Max. 20 Watts	6.50	3.00
No. 855 Thermostat, with Thermometer, 10 Amp.-115 Volt	10.00	4.50
No. 855 Thermostat, without Thermometer, 10 Amp.-115 Volt	9.00	4.00
Transformer—Relays		
Type V2-3A, S.P.S.T. 10 Amp. 115 Volt	8.00	4.05
Type V2-105-590 with Built-in Summer Switch	13.00	6.00

	List Price	Net Price
Limit Controls		
Steam		
Type DA-31, 0 to 14 lb.	6.00	2.75
Type DA-31, Vapor-Vacuum, 10" vac. to 12 lb.	8.00	4.20
Type DA-31, 0 to 35 lb.	8.50	4.45
Type DA-31, 0 to 60 lb.	8.50	4.45
Type DA-31, 0 to 100 lb.	9.00	4.60
Type DA-31, 0 to 150 lb.	9.50	4.85
Hot Water		
Fig. 35 Risertherm (Clamp-On Type), 110 to 200°F.	6.00	2.75
Fig. 34 Risertherm, 140-230°F. (closes on rise in temp.)	7.00	3.25
Type 115W Immersatherm, 50 to 250° (opens on rise in temp.)	7.00	3.50
Type 115W-3 Immersatherm, 50 to 250° (closes on rise in temp.)	7.00	3.50
Type DA-36 Straight Stem Immersion, 110 to 200° or 135 to 235°	10.00	4.75
Type DA-37 Back Angle Stem Immersion, 110 to 200° or 135 to 235°	10.00	4.75
Warm Air		
Type M-51 Limit Control	8.00	3.75
Type M-53 Fan Control	8.00	3.75
Type M-53 SW Fan Control with Summer Switch	8.50	4.00
*Type M-80 or M-80B Combination Fan and Limit Control	11.00	5.35
*Type M-82 or M-82B Combination Fan and Limit Control	12.00	5.85
*Type M-84 or M-84B Combination Fan and Limit Control	12.00	5.85
Type 116 Ductatherm, 50 to 300°	7.00	3.50

*Furnished Standard with Built-in Summer Switch.

1021 RESPONDENT'S EXHIBIT NO. 153-D.

Control Units and Prices (Cont'd)

	List Price	Net Price
Low Water Controls		
Type DA-121 Combination Pressure and Low Water, 0 to 14 lb.	$20.00	$10.25
Type DA-121 Combination Pressure and Low Water, Range 0 to 14 lbs., Complete with Quick Hook-Up	23.00	11.75
Type 123 Low Water Cut-Out, 30 lb. Max.	14.00	7.00
Type 123 Low Water Cut-Out, 30 lb. Max., Complete with Quick Hook-Up Attachments	17.00	8.50

Other Standard or Odd Model Controls at List Price Less Prevailing Manufacturers Discounts. Net Price Controls Listed Above May Be Included in Single Shipment Orders to Obtain Quantity Discounts on the List Price Items Specified.

Prices relating to all controls are for Standard ranges as listed in catalog, and for 115 volt, 60 cycle specifications only, unless otherwise specified.

Special Units and Prices

1022 Guarantee and Returns

The Company guarantees all control units and equipment manufactured by it and bearing its name or mark to be free from defects in workmanship and material. The Company will, without charge, replace or repair within one year from date of shipment from the Company's factory any control unit or equipment that may be found to be defective upon inspection at the Company's factory. This guarantee does not obligate the Company in any manner in cases where control units or equipment have been subjected to careless handling, improper application or faulty installation. In all cases the Company's liability on the guarantee herein expressed shall be limited to the repair

or replacement of the defective control or equipment and in no event shall its liability extend to indirect or consequential damages. The guarantee herein expressed is made in lieu of other warranties, guaranties, obligations, or liabilities expressed or implied by the Company or its representatives. All statutory or implied warranties, other than of title, are hereby expressly negatived and excluded.

Returns must not be made without the Company's consent and in all cases the returned controls or equipment must be carefully handled, properly packed and shipped prepaid. If credit is allowed for returns the Company will deduct ten per cent. (10%) to cover handling and inspection charges and a further deduction will be made where recalibrating or refinishing is necessary. Specially made controls may not be returned for credit except at what the Company determines is a fair value for the same.

Patent Warranty

The Company agrees that it will, at its own expense, defend any suit or proceeding that may be instituted against the Purchaser based upon a claim that any apparatus of the Company's manufacture furnished by the Company to the Purchaser constitute an infringement of any Letters Patent of the United States, provided, that the Purchaser shall not be in default hereunder and shall cause the Company to be promptly notified in writing of such suit and shall give the Company authority to defend such suit through the Company's counsel and shall furnish to the Company all needed information and assistance for the defense of such suit. The Company will pay all damages and costs awarded against Purchaser in any suit defended by the Company, provided notice of such suit and authority, information and assistance shall have been given to the Company as aforesaid, and in the event the device or apparatus furnished by the Company, or any part thereof, is held to constitute infringement and its use is enjoined the Company will, at its own expense and at the Company's option, either: procure for the Purchaser the right to continue using the infringing devices or apparatus; or replace the same with non-infringing devices or apparatus; or modify the infringing devices or apparatus so that they become non-infringing; or accept the return of the infringing devices or apparatus and refund the purchase price thereof. The foregoing constitutes the Company's only liability in connection with patent in-

fringement by devices or apparatus furnished by the Company.

Termination

Whenever the Company deems it necessary for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such products, and the Purchaser agrees, upon receipt of such notice, to make no further sales or installations of any such products unless or until authorized so to do in writing by the Company.

In addition to any and all other provisions herein contained relating to termination or cancellation of this agreement, the following circumstances are hereby agreed to be and shall be deemed to be conclusive evidence of the breach of this agreement by either of the parties hereto, and in any of these events the other party hereto may, at its election, without prejudice to any other remedy it may have, terminate all further obligations on the part of such non-defaulting party made and to be performed under this agreement:

(a) The breach of or the failure to comply with any or all of the terms, covenants, conditions and provisions of this agreement, and a continuance of such breach for thirty or more days after receipt by the defaulting party of written notice thereof.

(b) The adjudicated bankruptcy, either voluntary or involuntary or the adjudicated insolvency of either party hereto, or the making of an assignment for the benefit of creditors or the appointment of a trustee or receiver for either of the parties hereto.

(c) The repudiation of this agreement, in whole or in part, by either party hereto.

Field Service

The Company will welcome the opportunity of cooperating with the Purchaser in educating the Purchaser's factory personnel in the servicing and the proper installation of the Company's controls but the Company does not agree or bind itself to render any such service.

The foregoing constitutes the entire agreement between the parties hereto and no change, alteration or modification of this agreement shall be binding unless reduced to writing and signed by the respective parties hereto. The

validity, enforceability and interpretation of this agreement shall be determined and governed by the laws of the State of Illinois.

The Mercoid Corporation
By .....
..... Title
Date Accepted .....
..... Purchaser
By .....
..... Title

1023 RESPONDENT'S EXHIBIT NO. 153-E.

Manufacturers' Purchase Contract

The Mercoid Corporation
4201 Belmont Ave. Chicago, Ill.

Date Submitted .....

This Agreement, entered into between The Mercoid Corporation, a Delaware corporation, hereinafter called the "Company," and ..... of ....., ..., hereinafter called the "Purchaser."

Witnesseth:

Whereas the Company is engaged in manufacturing automatic electric controls for heating, refrigerating, air conditioning and other apparatus, machinery and equipment, and

Whereas the Purchaser is desirous of purchasing such controls for use in connection with products of the Purchaser's own manufacture,

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter set forth the parties hereto agree as follows:

Quantity

Subject to the terms and provisions hereinafter contained, the Company agrees to sell and the Purchaser agrees to purchase, during the term of this agreement, their requirements of the Company's automatic controls. The

special net prices extended herewith by the Company are based on the Purchaser's 1939 control requirements estimated to be ..... units.

Miscellaneous Controls and Control Equipment

Miscellaneous automatic controls and control equipment of the Company's manufacture, not listed herein but shown in the Company's catalogue attached hereto, will be furnished at the catalogue list prices less the discounts shown on the manufacturers' discount sheet attached hereto. The list prices and discounts shall be subject to change at any time and from time to time, without notice. All orders for such miscellaneous controls and control equipment shall be subject to acceptance and approval by the Company.

Term of Agreement

This agreement shall become effective on the date of acceptance by the Company and shall continue to and including December 31, 1939, unless sooner terminated as herein provided.

Terms of Payment

All shipments shall be made f.o.b. the point of shipment with Factory Sight Draft attached to the Bill of Lading, the Company to have the right to designate the point of shipment. If the draft is paid within 10 days from the date of the invoice a special cash discount of two per cent. (2%) will be allowed. If Purchaser desires open account credit accommodation arrangements therefor should be made with the Company's credit department. If such arrangements are made invoices will be due net thirty days after the date of the invoice and a cash discount of two per cent. (2%) will be allowed if payment is made within 10 days from the invoice date. Credit terms and delivery of all equipment are subject to the Company's approval and the Company shall have the right at all times to change or alter the terms of payment and to fix, change or alter such credit accommodations as may be extended to Purchaser. Sales, excise and other taxes will be added to all prices and the amount of such taxes shall not be subject to discount. Invoices covering emergency shipments from a Branch Office of the Company shall be subject to such

discounts as are in effect at such Branch Office at the time of shipment, anything herein contained to the contrary notwithstanding.

Use of Controls by Purchaser

This agreement is made upon the understanding and condition that Purchaser, who is a manufacturer, will not use or sell the controls or appliances purchased pursuant hereto except as a part of or in conjunction with machinery or equipment of Purchaser's own manufacture. If Purchaser shall use or sell such controls or appliances otherwise than as above specified the Company shall have the right to immediately terminate this agreement without notice.

Impossibility of Performance

The Company agrees that it will, in good faith and to the best of its ability, promptly fill all orders received from Purchaser and deliver the same to the carrier for shipment; provided, however, that the Company shall not be obliged to fill orders in the event and to the extent that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires, floods, tornados, acts of God, mechanical breakdowns, shortages of raw materials, delays in receipt of raw materials and any other causes or conditions beyond the control of the Company.

Assignment of Contract

The Purchaser shall not assign this contract or any interest therein without the written consent of the Company.

Price Revisions

The Company reserves the right to change and revise the prices listed herein upon thirty (30) days' written notice to Purchaser. Revised prices shall apply to all orders received by the Company after the expiration of the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in the Company's possession at the expiration of such period. If the revised prices are not satisfactory to Purchaser the Purchaser may terminate this agreement by written notice received by the Company within fifteen (15) days from the expiration of the afore-

said thirty (30) day period; provided, however, that such termination shall not affect completion of any orders received by the Company prior to the Company's receipt of the Purchaser's notice of termination. During the aforesaid thirty (30) day price change notice period the Purchaser may not order more than one-twelfth of the number of control units herein agreed to be purchased, or, at the Company's option, more than an equivalent number of control units shipped to Purchaser during the same period of the previous year.

1024 Form No. F-2

Control Units and Prices

	List Price	Net Price
Primary Controls		
Oil Burner		
Type KMW Pyratherm—Constant Ignition Type	$19.00	$9.75
Type KMI Pyratherm—Intermittent Ignition Type	22.00	11.00
Type RMI Pyratherm—Int. Ign., Recycling Type	22.00	11.00
Stoker		
Type THV-2 Stok-A-Timer—Heat Motor Operated	17.00	9.20
Type TV-2 Stok-A-Timer—With Jeweled Bearing Synchronous Motor	21.00	10.95
Type JMV-2 Stokatherm—With Out-Fire Feature	28.0	14.65
Thermostats		
Low Voltage Types		
Type H Sensatherm (Standard) 55-85°, with Thermometer	6.00	3.00
Type DNH Day-Night Sensatherm, with Thermometer	17.00	8.50
Type HH Dual Sensatherm, with Thermometer	12.50	5.00

	List Price	Net Price
Type T-41 Timercoid and Transformer, 110-24V., 60 Cyc.	20.00	10.00
Type HBH Two-Stage Sensatherm, with Thermometer	11.00	5.35
Type HBR Two-Stage Sensatherm, with Thermometer	11.00	5.35
Line Voltage Types		
Type HA Sensatherm, with Thermometer, Max. 20 Watts	6.50	3.30
No. 855 Thermostat, with Thermometer, 10 Amp.-115 Volt	10.00	4.50
No. 855 Thermostat, without Thermometer, 10 Amp.-115 Volt	9.00	4.00
Transformer—Relays		
Type V2-3A, S.P.S.T. 10 Amp.-115 Volt	8.00	4.15
Type V2-105-590 with Built-in Summer Switch	13.00	6.50
Limit Controls		
Steam		
Type DA-31, 0 to 14 lb.	6.00	2.85
Type DA-31, Vapor-Vacuum, 10" vac. to 12 lb.	8.00	4.40
Type DA-31, 0 to 35 lb.	8.50	4.65
Type DA-31, 0 to 60 lb.	8.50	4.65
Type DA-31, 0 to 100 lb.	9.00	4.90
Type DA-31, 0 to 150 lb.	9.50	5.20
Hot Water		
Fig. 35 Risertherm (Clamp-On Type); 110 to 200°F.	6.00	2.85
Fig. 34 Risertherm, 140-230°F. (closes on rise in temp.)	7.00	3.35
Type 115W Immersatherm, 50 to 250° (opens on rise in temp.)	7.00	3.75
Type 115W-3 Immersatherm, 50 to 250° (closes on rise in temp.)	7.00	3.75
Type DA-36 Straight Stem Immersion, 110 to 200° or 135 to 235°	10.00	5.00
Type DA-37 Back Angle Stem Immersion, 110 to 200° or 135 to 235°	10.00	5.00

	List Price	Net Price
Warm Air		
Type M-51 Limit Control	8.00	3.85
Type M-53 Fan Control	8.00	3.85
Type M-53 SW Fan Control with Summer Switch	8.50	4.05
*Type M-80 or M-80B Combination Fan and Limit Control	11.00	5.60
*Type M-82 or M-82B Combination Fan and Limit Control	12.00	6.10
*Type M-84 or M-84B Combination Fan and Limit Control	12.00	6.10
Type 116 Ductatherm, 50 to 300°	7.00	3.75

*Furnished Standard with Built-in Summer Switch.

1025 RESPONDENT'S EXHIBIT NO. 153-E.

Control Units and Prices (Cont'd)

Low Water Controls		
Type DA-121 Combination Pressure and Low Water, 0 to 14 lb.	$20.00	$10.75
Type DA-121 Combination Pressure and Low Water, Range 0 to 14 lb., Complete with Quick Hook-Up	23.00	12.25
Type 123 Low Water Cut-Out, 30 lb. Max.	14.00	7.50
Type 123 Low Water Cut-Out, 30 lb. Max., Complete with Quick Hook-Up Attachments	17.00	9.00

Other Standard or Odd Model Controls at List Price Less Prevailing Manufacturers Discounts. Net Price Controls Listed Above May be Included in Single Shipment Orders to Obtain Quantity Discounts on the List Price Items Specified.

Prices relating to all controls are for Standard ranges as listed in catalog, and for 115 volt, 60 cycle specifications only, unless otherwise specified.

Special Units and Prices.

1026 Guarantee and Returns

The Company guarantees all control units and equipment manufactured by it and bearing its name or mark to be free from defects in workmanship and material. The Company will, without charge, relace or repair within one year from date of shipment from the Company's factory any control unit or equipment that may be found to be defective upon inspection at the Company's factory. This guarantee does not obligate the Company in any manner in cases where control units or equipment have been subjected to careless handling, improper application or faulty installation. In all cases the Company's liability on the guarantee herein expressed shall be limited to the rapair or replacement of the defective control or equipment and in no event shall its liability extend to indirect or consequential damages. The guarantee herein expressed is made in lieu of other warranties, guaranties, obligations, or liabilities expressed or implied by the Company or its representatives. All statutory or implied warranties, other than of title, are hereby expressly negatived and excluded.

Returns must not be made without the Company's consent and in all cases the returned controls or equipment must be carefully handled, properly packed and shipped prepaid. If credit is allowed for returns the Company will deduct ten per cent. (10%) to cover handling and inspection charges and a further deduction will be made where recalibrating or refinishing is necessary. Specially made controls may not be returned for credit except at what the Company determines is a fair value for the same.

Patent Warranty.

The Company agrees that it will, at its own expense, defend any suit or proceeding that may be instituted against the Purchaser based upon a claim that any apparatus of the Company's manufacture furnished by the Company to the Purchaser constitute an infringement of any Letters Patent of the United States, provided, that the Purchaser shall not be in default hereunder and shall cause the Company to be promptly notified in writing of such suit and shall give the Company authority to defend such suit through the Company's counsel and shall furnish to the Company all needed information and assistance

for the defense of such suit. The Company will pay all damages and costs awarded against Purchaser in any suit defended by the Company, provided notice of such suit and authority, information and assistance shall have been given to the Company as aforesaid, and in the event the device or apparatus furnished by the Company, or any part thereof, is held to constitute infringement and its use is enjoined the Company will, at its own expense and at the Company's option, either: procure for the Purchaser the right to continue using the infringing devices or apparatus; or replace the same with non-infringing devices or apparatus; or modify the infringing devices or apparatus so that they become non-infringing; or accept the return of the infringing devices or apparatus and refund the purchase price thereof. The foregoing constitutes the Company's only liability in connection with patent infringement by devices or apparatus furnished by the Company.

Whenever the Company deems it necessary for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such products, and the Purchaser agrees, upon receipt of such notice, to make no further sales or installations of any such products unless or until authorized so to do in writing by the Company.

In addition to any and all other provisions herein contained relating to termination or cancellation of this agreement, the following circumstances are hereby agreed to be and shall be deemed to be conclusive evidence of the breach of this agreement by either of the parties hereto, and in any of these events the other party hereto may, at its election, without prejudice to any other remedy it may have, terminate all further obligations on the part of such non-defaulting party made and to be performed under this agreement:

Termination

(a) The breach of or the failure to comply with any or all of the terms, covenants, conditions and provisions of this agreement, and a continuance of such breach for thirty or more days after receipt by the defaulting party of written notice thereof.

(b) The adjudicated bankruptcy, either voluntary or

involuntary or the adjudicated insolvency of either party hereto, or the making of an assignment for the benefit of creditors or the appointment of a trustee or receiver for either of the parties hereto.

(c) The repudiation of this agreement, in whole or in part, by either party hereto.

The Company will welcome the opportunity of cooperating with the Purchaser in educating the Purchaser's factory personnel in the servicing and the proper installation of the Company's controls but the Company does not agree or bind itself to render any such service.

Field Service

The foregoing constitutes the entire agreement between the parties hereto and no change, alteration or modification of this agreement shall be binding unless reduced to writing and signed by the respective parties hereto. The validity, enforceability and interpretation of this agreement shall be determined and governed by the laws of the State of Illinois.

The Mercoid Corporation

By .....

..... Title

Date Accepted .....

..... Purchaser

By .....

..... Title

1027 RESPONDENT'S EXHIBIT NO. 153-F.

Manufacturers' Purchase Contract.

The Mercoid Corporation.
4201 Belmont Ave. Chicago, Ill.

Date Submitted .....

This Agreement, entered into between The Mercoid Corporation, a Delaware corporation, hereinafter called the "Company," and ..... of ....., ..., hereinafter called the "Purchaser."

Witnesseth:

Whereas the Company is engaged in manufacturing automatic electric controls for heating, refrigerating, air conditioning and other apparatus, machinery and equipment, and

Whereas the Purchaser is desirous of purchasing such controls for use in connection with products of the Purchaser's own manufacture,

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter set forth the parties hereto agree as follows:

Quantity.

Subject to the terms and provisions hereinafter contained, the Company agrees to sell and the Purchaser agrees to purchase, during the term of this agreement, their requirements of the Company's automatic controls. The special net prices extended herewith by the Company are based on the Purchaser's 1939 control requirements estimated to be ..... units.

Miscellaneous Controls and Control Equipment.

Miscellaneous automatic controls and control equipment of the Company's manufacture, not listed herein but shown in the Company's catalogue attached hereto, will be furnished at the catalogue list prices less the discounts shown on the manufacturers' discount sheet attached hereto. The list prices and discounts shall be subject to change at any time and from time to time, without notice. All orders for such miscellaneous controls and control equipment shall be subject to acceptance and approval by the Company.

Term of Agreement.

This agreement shall become effective on the date of acceptance by the Company and shall continue to and including December 31, 1939, unless sooner terminated as herein provided.

Terms of Payment.

All shipments shall be made f. o. b. the point of shipment with Factory Sight Draft attached to the Bill of Lading, the Company to have the right to designate the point of shipment. If the draft is paid within 10 days from the date of the invoice a special cash discount of two per cent. (2%) will be allowed. If Purchaser desires open account credit accommodation arrangements therefor should be made with the Company's credit department. If such arrangements are made invoices will be due net thirty days after the date of the invoice and a cash discount of two per cent. (2%) will be allowed if payment is made within 10 days from the invoice date. Credit terms and delivery of all equipment are subject to the Company's approval and the Company shall have the right at all times to change or alter the terms of payment and to fix, change or alter such credit accommodations as may be extended to Purchaser. Sales, excise and other taxes will be added to all prices and the amount of such taxes shall not be subject to discount. Invoices covering emergency shipments from a Branch Office of the Company shall be subject to such discounts as are in effect at such Branch Office at the time of shipment, anything herein contained to the contrary notwithsfanding.

Use of Controls by Purchaser.

This agreement is made upon the understanding and condition that Purchaser, who is a manufacturer, will not use or sell the controls or appliances purchased pursuant hereto except as a part of or in conjunction with machinery or equipment of Purchaser's own manufacture. If Purchaser shall use or sell such controls or appliances otherwise than as above specified the Company shall have the right to immediately terminate this agreement without notice.

Impossibility of Performance.

The Company agrees that it will, in good faith and to the best of its ability, promptly fill all orders received from

Purchaser and deliver the same to the carrier for shipment; provided, however, that the Company shall not be obliged to fill orders in the event and to the extent that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires, floods, tornados, acts of God, mechanical breakdowns, shortages of raw materials, delays in receipt of raw materials and any other causes or conditions beyond the control of the Company.

Assignment of Contract.

The Purchaser shall not assign this contract or any interest therein without the written consent of the Company.

Price Revisions.

The Company reserves the right to change and revise the prices listed herein upon thirty (30) days' written notice to Purchaser. Revised prices shall apply to all orders received by the Company after the expiration of the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in the Company's possession at the expiration of such period. If the revised prices are not satisfactory to Purchaser the Purchaser may terminate this agreement by written notice received by the Company within fifteen (15) days from the expiration of the aforesaid thirty (30) day period; provided, however, that such termination shall not affect completion of any orders received by the Company prior to the Company's receipt of the Purchaser's notice of termination. During the aforesaid thirty (30) day price change notice period the Purchaser may not order more than one-twelfth of the number of control units herein agreed to be purchased, or, at the Company's option, more than an equivalent number of control units shipped to Purchaser during the same period of the previous year.

Primary Controls	List Price	Net Price
Oil Burner		
Type KMW Pyratherm—Constant Ignition Type	$19.00	$ 9.50
Type KMI Pyratherm—Intermittent Ignition Type	22.00	10.75
Type RMI Pyratherm — Int. Ign., Recycling Type	22.00	10.75
Stoker		
Type THV-2 Stok-A-Timer — Heat Motor Operated	17.00	9.10
Type TV-2 Stok-A-Timer—With Jeweled Bearing Synchronous Motor	21.00	10.85
Type JMV-2 Stokatherm—With Out-Fire Feature	28.00	14.45
Thermostats		
Low Voltage Types		
Type H Sensatherm (Standard) 55-85°, with Thermometer	6.00	2.85
Type DNH Day-Night Sensatherm, with Thermometer	17.00	8.50
Type HH Dual Sensatherm, with Thermometer	12.50	4.85
Type T-41 Timercoid and Transformer, 110-24V., 60 Cyc.	20.00	9.85
Type HBH Two-Stage Sensatherm, with Thermometer	11.00	5.20
Type HBR Two-Stage Sensatherm, with Thermometer	11.00	5.20
Line Voltage Types		
Type HA Sensatherm, with Thermometer, Max. 20 Watts	6.50	3.15
No. 855 Thermostat, with Thermometer, 10 Amp.-115 Volt	10.00	4.50
No. 855 Thermostat, without Thermometer, 10 Amp.-115 Volt	9.00	4.00

	List Price	Net Price
Transformer Relays.		
Type V2-3A, S. P. S. T. 10 Amp.-115 Volt	8.00	4.10
Type V2-105-590 with Built-in Summer Switch	13.00	6.25
Limit Controls.		
Steam.		
Type DA-31, 0 to 14 lb.	6.00	2.85
Type DA-31, Vapor-Vacuum, 10″ vac. to 12 lb.	8.00	4.30
Type DA-31, 0 to 35 lb.	8.50	4.55
Type DA-31, 0 to 60 lb.	8.50	4.55
Type DA-31, 0 to 100 lb.	9.00	4.75
Type DA-31, 0 to 150 lb.	9.50	5.00
Hot Water.		
Fig. 35 Risertherm (Clamp-On Type), 110 to 200° F.	6.00	2.85
Fig. 34 Risertherm, 140-230° F. (closes on rise in temp.)	7.00	3.35
Type 115W Immersatherm, 50 to 250° (opens on rise in temp.)	7.00	3.75
Type 115W-3 Immersatherm, 50 to 250° (closes on rise in temp.)	7.00	3.75
Type DA-36 Straight Stem Immersion, 110 to 200° or 135 to 235°	10.00	5.00
Type DA-37 Back Angle Stem Immersion, 110 to 200° or 135 to 235°	10.00	5.00
Warm Air.		
Type M-51 Limit Control	8.00	3.85
Type M-53 Fan Control	8.00	3.85
Type M-53 SW Fan Control with Summer Switch	8.50	4.05
*Type M-80 or M-80B Combination Fan and Limit Control	11.00	5.45
*Type M-82 or M-82B Combination Fan and Limit Control	12.00	5.95
*Type M-84 or M-84B Combination Fan and Limit Control	12.00	5.95
Type 116 Ductatherm, 50 to 300°	7.00	3.75

* Furnished Standard With Built-In Summer Switch.

1029 Control Units and Prices (Cont'd).

	List Price	Net Price
Low Water Controls.		
Type DA-121 Combination Pressure and Low Water, 0 to 14 lb.	$20.00	$10.50
Type DA-121 Combination Pressure and Low Water, Range 0 to 14 lb., Complete with Quick Hook-Up	23.00	12.00
Type 123 Low Water Cut-Out, 30 lb. Max.	14.00	7.25
Type 123 Low Water Cut-Out, 30 lb. Max., Complete with Quick Hook-Up Attachments	17.00	8.75

Other standard or odd model controls at list price less prevailing manufacturers discounts. Net price controls listed above may be included in single shipment orders to obtain quantity discounts on the list price items specified.

Prices relating to all controls are for standard ranges as listed in catalog, and for 115 volt, 60 cycle specifications only, unless otherwise specified.

Special Units and Prices.

1030 Guarantee and Returns.

The Company guarantees all control units and equipment manufactured by it and bearing its name or mark to be free from defects in workmanship and material. The Company will, without charge, replace or repair within one year from date of shipment from the Company's factory any control unit or equipment that may be found to be defective upon inspection at the Company's factory. This guarantee does not obligate the Company in any manner in cases where control units or equipment have been subjected to careless handling, improper application or faulty installation. In all cases the Company's liability on the guarantee herein expressed shall be limited to the repair or replacement of the defective control or equipment and in no event shall its liability extend to indirect or consequential damages. The guarantee herein expressed is made in lieu of

all other warranties, guaranties, obligations, or liabilities expressed or implied by the Company or its representatives. All statutory or implied warranties, other than of title, are hereby expressly negatived and excluded.

Returns must not be made without the Company's consent and in all cases the returned controls or equipment must be carefully handled, properly packed and shipped prepaid. If credit is allowed for returns the Company will deduct ten per cent. (10%), to cover handling and inspection charges and a further deduction will be made where recalibrating or refinishing is necessary. Specially made controls may not be returned for credit except at what the Company determines is a fair value for the same.

Patent Warranty.

The Company agrees that it will, at its own expense, defend any suit or proceeding that may be instituted against the Purchaser based upon a claim that any apparatus of the Company's manufacture furnished by the Company to the Purchaser constitute an infringement of any Letters Patent of the United States, provided, that the Purchaser shall not be in default hereunder and shall cause the Company to be promptly notified in writing of such suit and shall give the Company authority to defend such suit through the Company's counsel and shall furnish to the Company all needed information and assistance for the defense of such suit. The Company will pay all damages and costs awarded against Purchaser in any suit defended by the Company, provided notice of such suit and authority, information and assistance shall have been given to the Company as aforesaid, and in the event the device or apparatus furnished by the Company, or any part thereof, is held to constitute infringement and its use is enjoined the Company will, at its own expense and at the Company's option, either: procure for the Purchaser the right to continue using the infringing devices or apparatus; or replace the same with non-infringing devices or apparatus; or modify the infringing devices or apparatus so that they become non-infringing; or accept the return of the infringing devices or apparatus and refund the purchase price thereof. The foregoing constitutes the Company's only liability in connection with patent infringement by devices or apparatus furnished by the Company.

Whenever the Company deems it necessary for any rea-

son whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such products, and the Purchaser agrees, upon receipt of such notice, to make no further sales or installations of any such products unless or until authorized so to do in writing by the Company.

Termination.

In addition to any and all other provisions herein contained relating to termination or cancellation of this agreement, the following circumstances are hereby agreed to be and shall be deemed to be conclusive evidence of the breach of this agreement by either of the parties hereto, and in any of these events the other party hereto may, at its election, without prejudice to any other remedy it may have, terminate all further obligations on the part of such non-defaulting party made and to be performed under this agreement:

Termination

(a) The breach of or the failure to comply with any or all of the terms, covenants, conditions and provisions of this agreement, and a continuance of such breach for thirty or more days after receipt by the defaulting party of written notice thereof.

(b) The adjudicated bankruptcy, either voluntary or involuntary or the adjudicated insolvency of either party hereto, or the making of an assignment for the benefit of creditors or the appointment of a trustee or receiver for either of the parties hereto.

(c) The repudiation of this agreement, in whole or in part, by either party hereto.

Field Service

The Company will welcome the opportunity of cooperating with the Purchaser in educating the Purchaser's factory personnel in the servicing and the proper installation of the Company's controls but the Company does not agree or bind itself to render any such service.

The foregoing constitutes the entire agreement between the parties hereto and no change, alteration or modification of this agreement shall be binding unless reduced to writing and signed by the respective parties hereto. The valid-

ity, enforceability and interpretation of this agreement shall be determined and governed by the laws of the State of Illinois.

.....Purchaser

By .....

.....Title

The Mercoid Corporation

By .....

.....Title

Date Accepted: .....

1031 RESPONDENT'S EXHIBIT NO. 154.

May 16, 1939.

Mr. S. L. LaPidus
Quiet Heet Mfg. Corp.
125 Green Street
Newark, New Jersey

Dear Mr. LaPidus:

We are returning herewith, signed acceptance of our contract proposal of May 5.

You will note that we have changed the price of the Type KMW Pyratherm, constant ignition type, to $7.75 each net instead of $8.00 each net. This is in accordance with our conversation at the time of the writer's last visit to New York.

We trust that our action meets with your approval, and with kindest regards, remain,

Very truly yours,

Executive Vice-President.

JWO:C
Enc.

1032 RESPONDENT'S EXHIBIT NO. 155.

(Letterhead of The Mercoid Corporation—Chicago, U.S.A.)

January 10, 1940.

Gentlemen:

As is our custom at this time of the year, we are pleased to present our annual contract covering Mercoid prices and terms of sale. This year we are able to offer, and will outline in this letter, an unusual opportunity which we think will appeal to you and merit your careful consideration.

Signed contracts in their aggregate are of great assistance to us. A manufacturer must act largely on faith in anticipating future inventory needs. With assurance from his trade, however, he can take a greater advantage of favorable buying situations and more accurately arrange production during the off-peak period. This co-operation enables Mercoid, in the face of rising costs, to keep its prices down and do a greater volume.

This improved volume makes possible reductions in the selling prices of many standard control units, as you will note on the attached contract. Furthermore, additional savings can be effected in the manufacture of Primary Controls and Thermostats during the off-peak season just ahead, in view of which we are now prepared to make the offer stated below:

On a blanket order covering 100 or more sets of Primary Controls and Thermostats, with definite dates for shipment throughout the year, specified on the order, we will extend the following special net prices:

Type JM Pyratherm	$8.70 Ea. Net
Type JMI Pyratherm	9.20 Ea. Net
Type H Sensatherm	2.85 Ea. Net

May we urge that you place your orders promptly, as the above stated net prices are subject to withdrawal without notice and will not extend beyond May 15, 1940. Whether or not you take advantage of them, we look forward to your acceptance of the enclosed contract by signing and returning both copies, the original of which will then be signed and returned for your files.

And, a final request. Check your experience with Mercoid Controls and Mercoid's policy of prompt handling of transactions. Check both against the field, and if they are

important to you, 1940 will see a further increase in your Mercoid purchases. If you are not a Mercoid Control user take advantage of our 1940 merchandising program and equip your product with controls that will, by their outstanding performance, bring you greater good will—less service costs—more dollar income.

Very truly yours,

JWO:C *Executive Vice-President.*
(Encl.)

1037 RESPONDENT'S EXHIBIT NO. 157.

(Letterhead of The Mercoid Corporation—Chicago, U.S.A.)

January 10, 1940.

Gentlemen:

As is our custom at this time of the year, we are pleased to present our annual contract covering Mercoid prices and terms of sale. This year we are able to offer, and will outline in this letter, an unusual opportunity which we think will appeal to you and merit your careful consideration.

Signed contracts in their aggregate are of great assistance to us. A manufacturer must act largely on faith in anticipating future inventory needs. With assurance from his trade, however, he can take a greater advantage of favorable buying situations and more accurately arrange production during the off-peak period. This co-operation enables Mercoid, in the face of rising costs, to keep its prices down and do a greater volume.

This improved volume makes possible reductions in the selling prices of many standard control units, as you will note on the attached contract. Furthermore, additional savings can be effected in the manufacture of Primary Controls and Thermostats during the off-peak season just ahead, in view of which we are now prepared to make the offer stated below:

On a blanket order covering 300 or more sets of Primary Controls and Thermostats, with definite dates for shipment throughout the year, specified on the order, we will extend the following special net prices:

Type JM Pyratherm	$8.25 Ea. Net
Type JMI Pyratherm	8.75 Ea. Net
Type H Sensatherm	2.70 Ea. Net

May we urge that you place your orders promptly, as the above stated net prices are subject to withdrawal without notice and will not extend beyond May 15, 1940. Whether or not you take advantage of them, we look forward to your acceptance of the enclosed contract by signing and returning both copies, the original of which will then be signed and returned for your files.

And, a final request. Check your experience with Mercoid Controls and Mercoid's policy of prompt handling of transactions. Check both against the field, and if they are important to you, 1940 will see a further increase in your Mercoid purchases. If you are not a Mercoid Control user take advantage of our 1940 merchandising program and equip your product with controls that will, by their outstanding performance, bring you greater good will—less service costs—more dollar income.

Very truly yours,

Executive Vice-President.

JWO:C
(Encl.)

1042 RESPONDENT'S EXHIBIT NO. 159.

(Letterhead of The Mercoid Corporation—Chicago, U.S.A.)

January 10, 1940.

Gentlemen:

As is our custom at this time of the year, we are pleased to present our annual contract covering Mercoid prices and terms of sale. This year we are able to offer, and will outline in this letter, an unusual opportunity which we think will appeal to you and merit your careful consideration.

Signed contracts in their aggregate are of great assistance to us. A manufacturer must act largely on faith in anticipating future inventory needs. With assurance from his trade, however, he can take a greater advantage of favorable buying situations and more accurately arrange production during the off-peak period. This co-operation enables Mercoid, in the face of rising costs, to keep its prices down and do a greater volume.

This improved volume makes possible reductions in the selling prices of many standard control units, as you will

note on the attached contract. Furthermore, additional savings can be effected in the manufacture of Primary Controls and Thermostats during the off-peak season just ahead, in view of which we are now prepared to make the offer stated below.

On a blanket order covering 1000 or more sets of Primary Controls and Thermostats, with definite dates for shipment throughout the year, specified on the order, we will extend the following special net prices:

Type JM Pyratherm	$7.75 Ea. Net
Type JMI Pyratherm	8.25 Ea. Net
Type H Sensatherm	2.50 Ea. Net.

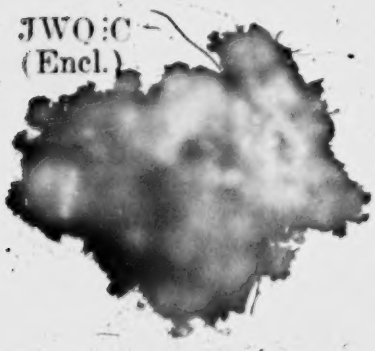
May we urge that you place your orders promptly, as the above stated net prices are subject to withdrawal without notice and will not extend beyond May 15, 1940. Whether or not you take advantage of them, we look forward to your acceptance of the enclosed contract by signing and returning both copies, the original of which will then be signed and returned for your files.

And, a final request. Check your experience with Mercoid Controls and Mercoid's policy of prompt handling of transactions. Check both against the field, and if they are important to you, 1940 will see a further increase in your Mercoid purchases. If you are not a Mercoid Control user take advantage of our 1940 merchandising program and equip your product with controls that will, by their outstanding performance, bring you greater good will—less service costs—more dollar income.

Very truly yours,

Executive Vice-President.

JWO:C
(Encl.)



1055 RESPONDENT'S EXHIBIT NO. 163.

(Letterhead of The Mercoid Corporation—Chicago, U.S.A.)

1941 Mfgs. Net Prices

1056 Mercoid Controls—Special Net Prices to Manufacturers—1941.

	List Price	Net Price
Primary Controls		
Type JM Pyratherm—Constant Ignition Type	$18.00	$ 8.55
Type JMI Pyratherm—Intermittent Ignition Type	20.00	9.50
Type RMI Pyratherm—Int. Ign., Recycling Type	22.00	10.45
Thermostats		
Low Voltage Types		
Type H Sensatherm (Standard) 55-85°, with Thermometer	6.00	3.00
Type DNH Day-Night Sensatherm, with Thermometer	14.00	6.75
Type HH Dual Sensatherm, with Thermometer	11.00	5.25
Type T-41 Timercoid and Transformer, 110-24V., 60 Cyc.	21.50	9.75
Type HBH Two-Stage Sensatherm, with Thermometer	11.00	5.00
Type HBR Two-Stage Sensatherm, with Thermometer	11.00	5.00
Line Voltage Types		
Type HA Sensatherm, with Thermometer, Max. 20 Watts	6.50	3.20
No. 855 Thermostat, with Thermometer, 10 Amp.-115 Volt	10.00	4.50
No. 855 Thermostat, without Thermometer, 10 Amp.-115 Volt	9.00	4.00

	List Price	Net Price
Transformer—Relays		
Type V2-3A, S.P.S.T. 10 Amp.-115Volt	8.50	4.25
Limit Controls.		
Steam		
Type DA-31, 0 to 14 lb.	8.00	3.25
Type DA-31, Vapor-Vacuum, 10" vac. to 12 lb	9.00	4.40
Type DA-31, 0 to 35 lb.	9.50	4.75
Type DA-31, 0 to 60 lb.	9.50	4.75
Type DA-31, 0 to 100 lb.	9.50	4.75
Type DA-31, 0 to 150 lb.	10.50	5.25
Hot Water		
Fig. 35 Risertherm (Clamp-On Type), 110 to 200°F.	7.00	2.85
Fig. 34 Risertherm, 140-230°F. (closes on rise in temp.)	7.50	3.00
Type 115W Immersatherm, 50 to 250° (opens on rise in temp.)	6.50	2.85
Type 115W-3 Immersatherm, 50 to 250° (closes on rise in temp.)	6.50	2.85
Type DA-36 Straight Stem Immersion, 110 to 200° or 135 to 235°	10.50	5.00
Type DA-37 Back Angle Stem Immersion, 110 to 200° or 135 to 235°	10.50	5.00
Warm Air		
Type M-51 Limit Control	7.00	3.35
Type M-53 SW Fan Control with Summer Switch	7.50	3.50
*Type M-80 or M-80B Combination Fan and Limit Control	11.00	5.00
*Type M-84 or M-84B Combination Fan and Limit Control	12.00	5.35
*Type M-88 or M-88B Combination Fan and Limit Control	12.00	5.35
Type 116 Ductatherm, 50 to 300°	7.50	3.75

* Furnished Standard With Built-In Summer Switch.

	List Price	Net Price
Low Water Controls		
Type DA-131Q Combination Pressure and Low Water, Range 0 to 10 lb., Complete with Quick Hook-Up Attachments	$23.00	$11.50
Type 133Q Low Water Cut-Out, 10 lb. Max., Complete with Quick Hook-Up Attachments	17.00	8.50
Type 123 Low Water Cut-Out, 30 lb. Max.	16.00	8.00
Type 123 Low Water Cut-Out, 150 lb. Max.	20.00	10.50
Type 72 Low Water Cut-Out, 300 lb. Max.	35.00	18.50

Other Standard or Odd Model Controls at List Price Less 25-25% Discount.

Prices Relating to All Controls Are for Standard Ranges as Listed in Catalog, and for 115 Volt, 60 Cycle Specifications Only, Unless Otherwise Specified.

Special Units and Prices.

1058 Terms of Payment

All prices are F.O.B. point of shipment. Terms 2%—10 days, net 30 days on approved credit.

Sales, excise and other taxes will be added to all prices, and the amount of such taxes shall not be subject to discount.

Emergency shipments from Branch Office stocks shall be invoiced at prices in effect at such Branch Office at time of shipment.

Trade Customs

Orders entered upon our books cannot be countermanded except with our consent and terms that will indemnify us against loss.

All orders are accepted with the understanding that we

shall not be obliged to fill such orders in the event that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires, floods, tornadoes, acts of God, mechanical breakdowns, shortage of raw materials, delays in receipt of raw materials and any other causes or conditions beyond our control.

Price Revision

Prices listed herein are subject to change on thirty (30) day written notice. Revised prices shall apply to all orders received after the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in our possession at the expiration of such period. During the thirty (30) day price change notice period, we reserve the right to limit the quantity on orders placed with us to the equivalent of the number of control units shipped buyer during the previous thirty (30) day period.

Special prices are extended, herewith, with the understanding that the manufacturer will not use or sell the controls purchased pursuant hereto except in conjunction with machinery or equipment of their own manufacture. If the manufacturers sells such controls otherwise than as specified, we reserve the right to immediately withdraw all prices.

Guarantee and Returns

We guarantee Mercoid products to be free from defects in workmanship or material, and will, without charge, replace or repair within one year from date of shipment from our factory any product that may be found defective upon inspection at our factory. This guarantee does not obligate us where products have been subjected to careless handling, improper application or faulty installation, and we expressly disclaim any obligation, guaranty or liability whatsoever except as above stated.

Returns must not be made without our consent and goods must in all cases be carefully handled, properly packed, and shipped prepaid. If credit is allowed we deduct 10% for handling and inspection, with further deduction for recalibrating or refinishing if necessary. Specially made instruments cannot be credited except at what we determine is fair value to us.

Patent Warranty

We will defend any suit or proceeding brought against our customer so far as based on a claim that any apparatus, or any part thereof, furnished by us, constitutes an infringement of any patent of the United States, provided, that the customer causes us to be notified promptly in writing and given authority, information and assistance, (at our expense), for the defense of same, and we will pay all damages and costs awarded therein against such customer in any action of which said notice and authority and information were given to us. In case the apparatus or any part thereof is in such suit held to constitute infringement and its use is enjoined, we will, at our expense, either: procure for the customer the right to continue using said apparatus; or replace same with non-infringing apparatus; or modify it so it becomes non-infringing; or remove said apparatus and refund the purchase price thereof. The foregoing states our entire liability for patent infringement by said apparatus or any part thereof.

1059 RESPONDENT'S EXHIBIT NO. 164.

(Letterhead of The Mercoid Corporation, Chicago, U. S. A.)

1060 Mercoid Controls—Special Net Prices to Manufacturers—1941

	List Price	Net Price
Primary Controls		
Type JM Pyratherm—Constant Ignition Type	$18.00	$ 8.25
Type JMI Pyratherm—Intermittent Ignition Type	20.00	8.75
Type RMI Pyratherm—Int. Ign., Recycling Type	22.00	9.45
Thermostats		
Low Voltage Types		
Type H Sensatherm (Standard) 55-85°, with Thermometer	6.00	2.85

	List Price	Net Price
Type DNH Day-Night Sensatherm, with Thermometer	14.00	6.00
Type HH Dual Sensatherm, with Thermometer	11.00	5.00
Type T-41 Timercoid and Transformer, 110-24V., 60 Cyc.	21.50	9.75
Type HBH Two-Stage Sensatherm, with Thermometer	11.00	4.75
Type HBR Two-Stage Sensatherm, with Thermometer	11.00	4.75
Line Voltage Types		
Type HA Sensatherm, with Thermometer, Max. 20 Watts	6.50	3.05
No. 855 Thermostat, with Thermometer, 10 Amp.-115 Volt	10.00	4.50
No. 855 Thermostat, without Thermometer, 10 Amp.-115 Volt	9.00	4.00
Transformer—Relays		
Type V2-3A, S.P.S.T. 10 Amp.-115 Volt	8.50	4.15
Limit Controls		
Steam		
Type DA-31, 0 to 14 lb.	8.00	2.75
Type DA-31, Vapor-Vacuum, 10" vac. to 12 lb.	9.00	4.20
Type DA-31, 0 to 35 lb.	9.50	4.50
Type DA-31, 0 to 60 lb.	9.50	4.50
Type DA-31, 0 to 100 lb.	9.50	4.50
Type DA-31, 0 to 150 lb.	10.50	5.00
Hot Water		
Fig. 35 Risertherm (Clamp-On Type), 110 to 200°F.	7.00	2.75
Fig. 34 Risertherm, 140-230°F. (closes on rise in temp.)	7.50	2.85
Type 115W Immersatherm, 50 to 250° (opens on rise in temp.)	6.50	2.75
Type 115W-3 Immersatherm, 50 to 250° (closes on rise in temp.)	6.50	2.75

	List Price	Net Price
Type DA-36 Straight Stem Immersion, 110 to 200° or 135 to 235°	10.50	4.75
Type DA-37 Back Angle Stem Immersion, 110 to 200° or 135 to 235°	10.50	4.75
Warm Air		
Type M-51 Limit Control	7.00	3.25
Type M-53 SW Fan Control with Summer Switch	7.50	3.40
*Type M-80 or M-80B Combination Fan and Limit Control	11.00	4.75
*Type M-84 or M-84B Combination Fan and Limit Control	12.00	5.10
*Type M-88 or M-88B Combination Fan and Limit Control	12.00	5.10
Type 116 Ductatherm, 50 to 300°	7.50	3.50

*Furnished Standard with Built-In Summer Switch.

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Low Water Controls

Type DA-131Q Combination Pressure and Low Water, Range 0 to 10 lb., Complete with Quick Hook-Up Attachments	$23.00	$11.00
Type 133Q Low Water Cut-Out, 10 lb. Max., Complete with Quick Hook-Up Attachments	17.00	8.25
Type 123 Low Water Cut-Out, 30 lb. Max.	16.00	7.75
Type 123 Low Water Cut-Out, 150 lb. Max.	20.00	10.00
Type 72 Low Water Cut-Out, 300 lb. Max.	35.00	18.00

Other Standard or Odd Model Controls at List Price Less 25-25% Discount.

Prices relating to all controls are for Standard ranges as listed in catalog, and for 115 volt, 60 cycle specifications only, unless otherwise specified.

Special Units and Prices

1062 Terms of Payment

All prices are F. O. B. point of shipment. Terms 2%—10 days, net 30 days on approved credit.

Sales, excise and other taxes will be added to all prices, and the amount of such taxes shall not be subject to discount.

Emergency shipments from Branch Office stocks shall be invoiced at prices in effect at such Branch Office at time of shipment.

Trade Customs

Orders entered upon our books cannot be countermanded except with our consent and upon terms that will indemnify us against loss.

All orders are accepted with the understanding that we shall not be obliged to fill such orders in the event that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires, floods, tornadoes, acts of God, mechanical breakdowns, shortage of raw materials, delays in receipt of raw materials and any other causes or conditions beyond our control.

Price Revision

Prices listed herein are subject to change on thirty (30) day written notice. Revised prices shall apply to all orders received after the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in our possession at the expiration of such period. During the thirty (30) day price change notice period, we reserve the right to limit the quantity on orders placed with us to the equivalent of the number of control units shipped buyer during the previous thirty (30) day period.

Special prices are extended, herewith, with the understanding that the manufacturer will not use or sell the controls purchased pursuant hereto except in conjunction with machinery or equipment of their own manufacture. If the manufacturer sells such controls otherwise than as specified, we reserve the right to immediately withdraw all prices.

Guarantee and Returns

We guarantee Mercoid products to be free from defects in workmanship or material, and will without charge, replace or repair within one year from date of shipment from our factory any product that may be found defective upon inspection at our factory. This guarantee does not obligate us where products have been subjected to careless handling, improper application or faulty installation, and we expressly disclaim any obligation, guaranty or liability whatsoever except as above stated.

Returns must not be made without our consent and goods must in all cases be carefully handled, properly packed, and shipped prepaid. If credit is allowed we deduct 10% for handling and inspection, with further deduction for recalibrating or refinishing if necessary. Specially made instruments cannot be credited except at what we determine is fair value to us.

Patent Warranty

We will defend any suit or proceeding brought against our customer so far as based on a claim that any apparatus, or any part thereof, furnished by us, constitutes an infringement of any patent of the United States, provided, that the customer causes us to be notified promptly in writing and given authority, information and assistance, (at our expense), for the defense of same, and we will pay all damages and costs awarded therein against such customer in any action of which said notice and authority and information were given to us. In case the apparatus or any part thereof is in such suit held to constitute infringement and its use is enjoined, we will, at our expense, either: procure for the customer the right to continue using said apparatus; or replace same with non-infringing apparatus; or modify it so it becomes non-infringing; or remove said apparatus and refund the purchase price thereof. The foregoing states our entire liability for patent infringement by said apparatus or any part thereof.

1063 RESPONDENT'S EXHIBIT NO. 165.

(Letterhead of The Mercoid Corporation—Chicago, U.S.A.)

Mercoid Controls—Special Net Prices to Manufacturers—1941

	List Price	Net Price
Primary Controls		
Type JM Pyratherm—Constant Ignition Type	$18.00	$ 7.75
Type JMI Pyratherm—Intermittent Ignition Type	20.00	8.25
Type RMI Pyratherm—Int. Ign., Recycling Type	22.00	9.20
Thermostats		
Low Voltage Types		
Type H Sensatherm (Standard) 55-85°, with Thermometer	6.00	2.70
Type DNH Day-Night Sensatherm, with Thermometer	14.00	5.75
Type HH Dual Sensatherm, with Thermometer	11.00	4.75
Type T-41 Timercoid and Transformer, 110-24V., 60 Cyc.	21.50	9.75
Type HBH Two-Stage Sensatherm, with Thermometer	11.00	4.75
Type HBR Two-Stage Sensatherm, with Thermometer	11.00	4.75
Line Voltage Types		
Type HA Sensatherm, with Thermometer, Max. 20 Watts	6.50	2.90
No. 855 Thermostat, with Thermometer, 10 Amp.-115 Volt	10.00	4.50
No. 855 Thermostat, without Thermometer, 10 Amp.-115 Volt	9.00	4.00
Transformer—Relays		
Type V2-3A, S.P.S.T. 10 Amp.-115 Volt	8.50	3.95

	List Price	Net Price
Limit Controls		
Steam		
Type DA-31, 0 to 14 lb.	8.00	2.75
Type DA-31, Vapor-Vacuum, 10" vac. to 12 lb.	9.00	4.20
Type DA-31, 0 to 35 lb.	9.50	4.50
Type DA-31, 0 to 60 lb.	9.50	4.50
Type DA-31, 0 to 100 lb.	9.50	4.50
Type DA-31, 0 to 150 lb.	10.50	5.00
Hot Water		
Fig. 35 Risertherm (Clamp-On Type), 110 to 200°F.	7.00	2.75
Fig. 34 Risertherm, 140-230°F. (closes on rise in temp.)	7.50	2.85
Type 115W Immersatherm, 50 to 250° (opens on rise in temp.)	6.50	2.75
Type 115W-3 Immersatherm, 50 to 250° (closes on rise in temp.)	6.50	2.75
Type DA-36 Straight Stem Immersion, 110 to 200° or 135 to 235°	10.50	4.75
Type DA-37 Back Angle Stem Immersion, 110 to 200° or 135 to 235°	10.50	4.75
Warm Air		
Type M-51 Limit Control	7.00	3.25
Type M-53 SW Fan Control with Summer Switch	7.50	3.40
*Type M-80 or M-80B Combination Fan and Limit Control	11.00	4.75
*Type M-84 or M-84B Combination Fan and Limit Control	12.00	5.10
*Type M-88 or M-88B Combination Fan and Limit Control	12.00	5.10
Type 116 Ductatherm, 50 to 300°	7.50	3.50

* Furnished Standard With Built-In Summer Switch

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	List Price	Net Price
Low Water Controls		
Type DA-131Q Combination Pressure and Low Water, Range 0 to 10 lb.	$23.00	$11.00
Type 133Q Low Water Cut-Out, 10 lb. Max., Complete with Quick Hook-Up Attachments	17.00	8.25
Type 123 Low Water Cut-Out, 30 lb. Max.	16.00	7.75
Type 123 Low Water Cut-Out, 150 lb. Max.	20.00	10.00
Type 72 Low Water Cut-Out, 300 lb. Max.	35.00	18.00

Other Standard or Odd Model Controls at List Price Less 25-25% Discount. Prices Relating to All Controls are for Standard Ranges as Listed in Catalog, and for 115 Volt, 60 Cycle Specifications Only, Unless Otherwise Specified.

Special Units and Prices

1066 Terms of Payment

All prices are F.O.B. point of shipment. Terms 2%—10 days, net 30 days on approved credit.

Sales, excise and other taxes will be added to all prices, and the amount of such taxes shall not be subject to discount.

Emergency shipments from Branch Office stocks shall be invoiced at prices in effect at such Branch Office at time of shipment.

Trade Customs

Orders entered upon our books cannot be countermanded except with our consent and terms that will indemnify us against loss.

All orders are accepted with the understanding that we shall not be obliged to fill such orders in the event that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires,

floods, tornadoes, acts of God, mechanical breakdown, shortage of raw materials, delays in receipt of raw materials and any other causes or conditions beyond our control.

Price Revision

Prices listed herein are subject to change on thirty (30) day written notice. Revised prices shall apply to all orders received after the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in our possession at the expiration of such period. During the thirty (30) day price change notice period, we reserve the right to limit the quantity on orders placed with us to the equivalent of the number of control units shipped buyer during the previous thirty (30) day period.

Special prices are extended, herewith, with the understanding that the manufacturer will not use or sell the controls purchased pursuant hereto except in conjunction with machinery or equipment of their own manufacture. If the manufacturer sells such controls otherwise than as specified, we reserve the right to immediately withdraw all prices.

Guarantee and Returns.

We guarantee Mercoid products to be free from defects in workmanship or material, and will, without charge, replace or repair within one year from date of shipment from our factory any product that may be found defective upon inspection at our factory. This guarantee does not obligate us where products have been subjected to careless handling, improper application or faulty installation, and we expressly disclaim any obligation, guaranty or liability whatsoever except as above stated.

Returns must not be made without our consent and goods must in all cases be carefully handled, properly packed, and shipped prepaid. If credit is allowed we deduct 10% for handling and inspection, with further deduction for recalibrating or refinishing if necessary. Specially made instruments cannot be credited except at what we determine is fair value to us.

Patent Warrant.

We will defend any suit or proceeding brought against our customer so far as based on a claim that any apparatus,

or any part thereof, furnished by us, constitutes an infringement of any patent of the United States, provided that the customer causes us to be notified promptly in writing and given authority, information and assistance, (at our expense), for the defense of same, and we will pay all damages and costs awarded therein against such customer in any action of which said notice and authority and information were given to us. In case the apparatus or any part thereof is in such suit held to constitute infringement and its use is enjoined, we will, at our expense, either: procure for the customer the right to continue using said apparatus; or replace same with non-infringing apparatus; or modify it so it becomes non-infringing; or remove said apparatus and refund the purchase price thereof. The foregoing states our entire liability for patent infringement by said apparatus or any part thereof.

1067 RESPONDENT'S EXHIBIT NO. 166.

(Letterhead of The Mercoid Company—Chicago, U.S.A.)

Prices to Manufacturers 1941

1068 Mercoid Controls—Special Net

	List Price	Net Price
Primary Controls		
Oil Burner		
Type JM Pyratherm—Constant Ignition Type	$18.00	$ 8.70
Type JMI Pyratherm—Intermittent Ignition Type	20.00	9.20
Type RMI Pyratherm—Int. Ign., Recycling Type	22.00	9.90
Stoker		
Type THV-2 Stok-A-Timer—Heat Motor Operated	16.00	6.90
Type TV-2-Stok-A-Timer—Synchronous Motor Operated	18.00	7.90
Type JMV-2 Stokatherm—With Out-Fire Feature	28.00	13.00

	List Price	Net Price
Type M-63 SW Out-Fire Stoker Control, with Stainless Steel Well and Lock Type Kindling Switch, 50-650°F	9.50	4.50
Thermostats		
Low Voltage Types		
Type H Sensatherm (Standard) 55-85°, with Thermometer	6.00	2.70
Type DNH Day-Night Sensatherm, with Thermometer	14.00	5.75
Type HH Dual Sensatherm, with Thermometer	11.00	4.75
Type T-41 Timercoid and Transformer, 110-24V., 60 Cyc.	21.50	9.75
Type HBH Two-Stage Sensatherm, with Thermometer	11.00	4.75
Type HBR Two-Stage Sensatherm, with Thermometer	11.00	4.75
Line Voltage Types		
Type HA Sensatherm, with Thermometer, Max. 20 Watts	6.50	2.90
No. 855 Thermostat, with Thermometer, 10 Amp.-115 Volt	10.00	4.50
No. 855 Thermostat, without Thermometer, 10 Amp.-115 Volt	9.00	4.00
Transformer—Relays		
Type V2-3A, S.P.S.T. 10 Amp.-115 Volt	8.50	3.95
Warm Air Limit Controls		
Type M-51 Limit Control	7.00	3.25
Type M-53 SW Fan Control with Summer Switch	7.50	3.40
*Type M-80 or M-80B Combination Fan and Limit Control	11.00	4.75
*Type M-84 or M-84B Combination Fan and Limit Control	12.00	5.10
*Type M-88 or M-88B Combination Fan and Limit Control	12.00	5.10
Type 116 Ductatherm, 50 to 300°	7.50	3.50

* Furnished Standard with Built-In

	List Price	Net Price
Summer Switch		
Damper Motors—For Air Conditioning and Zone Control		
Type 11-L Damper Motor with Low Voltage Built-in Switch	15.50	7.25
Type 11-BL Damper Motor with Low Voltage Built-in Switch and Manual Operating Switch	16.50	7.75
Type SB-11 Damper Motor with Line Voltage Built-in Switch and Manual Operating Switch	21.00	10.00
Type B-11 Damper Motor with Manual Operating Switch	15.00	7.00
Type No. 2640 Transformer, 115-24 V., 50-60 Cycle	2.25	1.13
Damper Motor Mounting Accessories—Set No. 42-150	2.00	1.00
Damper Motor Package Sets—See Page 25		
Cat. No. 400		
Damper Motor Set No. 1	23.00	10.90
Damper Motor Set No. 2	31.00	13.95
Damper Motor Set No. 3	30.50	14.30
Damper Motor Set No. 4	44.00	20.05

Other Standard or Odd Model Controls at List Price Less 25-25% Discount.

Prices Relating to All Controls Are for Standard Ranges as Listed in Catalog, and for 115 Volt, 60 Cycle Specifications Only, Unless Otherwise Specified.

	List Price	Single Shipment Quantity 1 to 99 Sets	100 Sets
Complete Gas Package Sets			
See Mercoid Catalog 400—Page 42			
Series K Package Sets			
Each Set Including Type H Mercoid Sensatherm, Type K-3B Gas Valve, Type T-O Transformer, 115V.-24V., 50-60 Cyc., 30 Feet 2 Wire Low Voltage Cable and Staples			
Set No. Valve Size			
K-2 ½"	$13.10	$ 7.00	$ 6.55
K-3 ¾"	13.70	7.30	6.85
For Night Cut-Off Feature on Type H Sensatherm.....No Extra Charge			
Series KDN Sets—With Day-Night Thermostat			
Each Set Includes Type DNH Mercoid Day-Night Sensatherm, Type K-3B Gas Valve, Type T-O Transformer, 115V.,24V., 50-60 Cyc., 30 Feet 2 Wire Low Voltage Cable and Staples			
Set No. Valve Size			
KDN-2 ½"	20.00	10.70	9.60
KDN-3 ¾"	20.60	11.00	9.90
Series B60-1 Sets—With Pilot Generator			
Each set Includes Type H Mercoid Sensatherm, Type B60-1 Gas Valve, Type PG-1 Vertical Pilot Generator, Mounting Straps, 30 Feet 2 Wire Low Voltage Cable and Staples			
Set No. Valve Size			
B-2 ½"	19.40	10.35	9.10
B-3 ¾"	19.40	10.35	9.10

		List Price	Single Shipment Quantity 1 to 99 Sets	Single Shipment Quantity 100 Sets
Series B60-6 Sets—With Pilot Generator				
Each Set Includes Type H Mercoid Sensatherm, Type B60-6 Gas Valve, Type PG-6 Vertical Pilot Generator, Mounting Straps, 30 Feet 2 Wire Low Voltage Cable and Staples				
Set No.	Valve Size			
B-26	⅜"	15.20	8.10	7.60
B-36	½"	15.80	8.45	7.90
Series D Sets—Two Stage Control—High, Low and Off				
Each Set Includes Type HBH Mercoid Two-Stage Sensatherm, Type D40-1 Gas Valve, Type T-1 Transformer, 115-24V., 50-60 Cyc., 30 Feet 2 Wire Low Voltage Cable and Staples				
Set No.	Valve Size			
D-1	½"	22.60	12.05	11.30
D-2	¾"	24.20	12.90	12.10

For Package Sets Containing Valves in Other Sizes or Voltages Than Listed Above, Prices on Application.

Special Units and Prices

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Terms of Payment

All Prices are F.O.B. point of shipment. Terms 2%—10 days, net 30 days on approved credit.

Sales, excise and other taxes will be added to all prices, and the amount of such taxes shall not be subject to discount.

Emergency shipments from Branch Office stocks shall be invoiced at prices in effect at such Branch Office at time of shipment.

Trade Customs

Orders entered upon our books cannot be countermanded except with our consent and upon terms that will indemnify us against loss.

All orders are accepted with the understanding that we shall not be obliged to fill such orders in the event that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires, floods, tornadoes, acts of God, mechanical breakdowns, shortage of raw materials, delays in receipt of raw materials and any other causes or conditions beyond our control.

Price Revision

Prices listed herein are subject to change on thirty (30) day written notice. Revised prices shall apply to all orders received after the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in our possession at the expiration of such period. During the thirty (30) day price change notice period, we reserve the right to limit the quantity on orders placed with us to the equivalent of the number of control units shipped buyer during the previous thirty (30) day period.

Special prices are extended, herewith, with the understanding that the manufacturer will not use or sell the controls purchased pursuant hereto except in conjunction with machinery or equipment of their own manufacture. If the manufacturer sells such controls otherwise than as specified, we reserve the right to immediately withdraw all prices.

Guarantee and Returns

We guarantee Mercoid products to be free from defects in workmanship or material, and will, without charge, replace or repair within one year from date of shipment from our factory any product that may be found defective upon inspection at our factory. This guarantee does not obligate us where products have been subjected to careless handling. improper application or faulty installation, and we expressly disclaim any obligation, guaranty or liability whatsoever except as above stated.

Returns must not be made without our consent and goods must in all cases be carefully handled, properly packed, and shipped prepaid. If credit is allowed we deduct 10% for handling and inspection, with further deduction for recalibrating or refinishing if necessary. Specially made instruments cannot be credited except at what we determine is fair value to us.

Patent Warranty

We will defend any suit or proceeding brought against our customer so far as based on a claim that any apparatus, or any part thereof, furnished by us, constitutes an infringement of any patent of the United States, provided, that the customer causes us to be notified promptly in writing and given authority, information and assistance, (at our expense), for the defense of same, and we will pay all damages and costs awarded therein against such customer in any action of which said notice and authority and information were given to us. In case the apparatus or any part thereof is in such suit held to constitute infringement and its use is enjoined, we will, at our expense, either: procure for the customer the right to continue using said apparatus; or replace same with non-infringing apparatus; or modify it so it becomes non-infringing; or remove said apparatus and refund the purchase price thereof. The foregoing states our entire liability for patent infringement by said apparatus or any part thereof.

1071 RESPONDENT'S EXHIBIT NO. 167.

(Letterhead of The Mercoid Corporation
Chicago, U. S. A.)

1072 Mercoid Controls—Special Net Prices to Manufacturers—1941

	List Price	Net Price
		XX
Primary Controls		1,000 sets
Type J M Pyratherm—Constant Ignition Type	$18.00	75— $ ~~7.75~~
Type JMI Pyratherm—Intermittent Ignition Type	20.00	8.25
Type RMI Pyratherm—Int. Ign., Recycling Type	22.00	9.20
Thermostats		
Low Voltage Types		
Type H Sensatherm (Standard) 55-85°, with Thermometer	6.00	2.50— ~~3.70~~
Type DNH Day-Night Sensatherm, with Thermometer	14.00	5.75
Type HH Dual Sensatherm, with Thermometer	11.00	4.75
Type T-41 Timercoid and Transformer, 110-24V., 60 Cyc.	21.50	9.75
Type HBH Two-Stage Sensatherm, with Thermometer	11.00	4.75
Type HBR Two-Stage Sensatherm, with Thermometer	11.00	4.75
Line Voltage Types		
Type HA Sensatherm, with Thermometer, Max. 20 Watts	6.50	2.90
No. 855 Thermostat, with Thermometer, 10 Amp.-115 Volt	10.00	4.50
No. 855 Thermostat, without Thermometer, 10 Amp.-115 Volt	9.00	4.00

	List Price	Net Price
Transformer—Relays		
Type V2-3A, S.P.S.T. 10 Amp.-115 Volt.	8.50	3.95
Limit Controls		
Steam		
Type DA-31, 0 to 14 lb.	8.00	2.75
Type DA-31, Vapor-Vacuum, 10" vac. to 12 lb.	9.00	4.20
Type DA-31, 0 to 35 lb.	9.50	4.50
Type DA-31, 0 to 60 lb.	9.50	4.50
Type DA-31, 0 to 100 lb.	9.50	4.50
Type DA-31, 0 to 150 lb.	10.50	5.00
Hot Water		
Fig. 35 Risertherm (Clamp-On) Type, 110 to 200° F.	7.00	2.75
Fig. 34 Risertherm, 140-230° F. (closes on rise in temp.)	7.50	2.85
Type 115W Immersatherm, 50 to 250° (opens on rise in temp.)	6.50	2.75
Type 115W-3 Immersatherm, 50 to 250° (closes on rise in temp.)	6.50	2.75
Type DA-36 Straight Stem Immersion, 110 to 200° or 135 to 235°	10.50	4.75
Type DA-37 Back Angle Stem Immersion, 110 to 200° or 135 to 235°	10.50	4.75
Warm Air		
Type M-51 Limit Control	7.00	3.25
Type M-53 SW Fan Control with Sammer Switch	7.50	3.40
*Type M-80 or M-80B Combination Fan and Limit Control	11.00	4.75
*Type M-84 or M-84B Combination Fan and Limit Control	12.00	5.10
*Type M-88 or M-88B Combination Fan and Limit Control	12.00	5.10
Type 116 Ductatherm, 50 to 300°	7.50	3.50

* Furnished Standard with Built-in Summer Switch

	List Price	Net Price
Low Water Controls		
Type DA-131Q Combination Pressure and Low Water, Range 0 to 10 lb., Complete with Quick Hook-Up Attachments	$23.00	$11.00
Type 133Q Low Water Cut-Out, 10 lb. Max., Complete with Quick Hook-Up Attachments	17.00	8.25
Type 123 Low Water Cut-Out, 30 lb. Max.	16.00	7.75
Type 123 Low Water Cut-Out, 150 lb. Max.	20.00	10.00
Type 72 Low Water Cut-Out, 300 lb. Max.	35.00	18.00

Other Standard or Odd Model Controls at List Price Less 25-25% Discount.

Prices Relating to All Controls Are for Standard Ranges as Listed in Catalog, and for 115 Volt, 60 Cycle Specifications Only, Unless Otherwise Specified.

Special Units and Prices

1074

Terms of Payment

All prices are F.O.B. point of shipment. Terms 2%—10 days, net 30 days on approved credit.

Sales, excise and other taxes will be added to all prices, and the amount of such taxes shall not be subject to discount.

Emergency shipments from Branch Office stocks shall be invoiced at prices in effect at such Branch Office at time of shipment.

Trade Customs

Orders entered upon our books cannot be countermanded except with our consent and upon terms that will indemnify us against loss.

All orders are accepted with the understanding that we shall not be obliged to fill such orders in the event that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires, floods, tornadoes, acts of God, mechanical breakdowns,

shortage of raw materials, delays in receipt of raw materials and any other causes or conditions beyond our control.

Price Revision

Prices listed herein are subject to change on thirty (30) day written notice. Revised prices shall apply to all orders received after the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in our possession at the expiration of such period. During the thirty (30) day price change notice period, we reserve the right to limit the quantity on orders placed with us to the equivalent of the number of control units shipped buyer during the previous thirty (30) day period.

Special prices are extended, herewith, with the understanding that the manufacturer will not use or sell the controls purchased pursuant hereto except in conjunction with machinery or equipment of their own manufacture. If the manufacturer sells such controls otherwise than as specified, we reserve the right to immediately withdraw all prices.

Guarantee and Returns

We guarantee Mercoid products to be free from defects in workmanship or material, and will, without charge, replace or repair within one year from date of shipment from our factory any product that may be found defective upon inspection at our factory. This guarantee does not obligate us where products have been subjected to careless handling, improper application or faulty installation, and we expressly disclaim any obligation, guaranty or liability whatsoever except as above stated.

Returns must not be made without our consent and goods must in all cases be carefully handled, properly packed, and shipped prepaid. If credit is allowed we deduct 10% for handling and inspection, with further deduction for recalibrating or refinishing if necessary. Specially made instruments cannot be credited except at what we determine is fair value to us.

Patent Warranty

We will defend any suit or proceeding brought against our customer so far as based on a claim that any apparatus, or any part thereof, furnished by us, constitutes an infringement of any patent of the United States, provided, that the customer causes us to be notified promptly in writing and given authority, information and assistance, (at our

expense), for the defense of same, and we will pay all damages and costs awarded therein against such customer in any action of which said notice and authority and information were given to us. In case the apparatus or any part thereof is in such suit held to constitute infringement and its use is enjoined, we will, at our expense, either: procure for the customer the right to continue using said apparatus; or replace same with non-infringing apparatus; or modify it so it becomes non-infringing; or remove said apparatus and refund the purchase price thereof. The foregoing states our entire liability for patent infringement by said apparatus or any part thereof.

1075 RESPONDENT'S EXHIBIT NO. 168-A.

(Letterhead of Federal Trade Commission,
Washington 25.)

June 9, 1944.

Mr. Will Freeman,
c/o Bair & Freeman,
1400 Field Building,
135 South LaSalle Street,
Chicago, Illinois.

Re: Docket No. 4920

Minneapolis-Honeywell Regulator Company

Dear Mr. Freeman:

Replying to your letter of June 7, I think I made my position clear during our telephone conversation.

For your further information, however, I enclose copy of my letter of this date to Mr. Dinnen, our attorney in charge of the Chicago office. As you see, our general position is that the matter now being before the Court we should enter into no arrangements which would embarrass the Court in entering such order or obtaining such assurances in lieu thereof as the Court may see fit.

Very truly yours,

W. T. Kelley,
Chief Counsel.

Air Mail
cc Mr. William F. Dinnen

1076 RESPONDENT'S EXHIBIT NO. 168-B.

25

June 9, 1944.

Mr. William F. Dinnen,
Attorney in Charge,
1118 New Post Office Building,
433 West Van Buren,
Chicago 7,
Illinois.

Re: Docket No. 4920

Minneapolis-Honeywell Regulator Company

Dear Mr. Dinnen:

Referring to and supplementing the third paragraph of my letter to you dated June 3 and also referring to Mr. Chadwell's letter of May 31, our position before the Court and with Mr. Chadwell should be that if Mr. Chadwell will personally and directly assure the Court that the subpena will be fully complied with, then we would have no objection to a dismissal of the petition. On the other hand, it is entirely possible that the Court even then would wish to enter an order that the subpena be complied with and to which order, of course, we would not want to offer any objection. With the matter in the hands of the Court I do not think we should entertain any proposal from Mr. Chadwell to dismiss the petition without some satisfactory form of commitment on his part to the Court.

I assume that you have permitted Mr. Freeman to see a copy of Mr. Chadwell's letter of May 31. That would be in keeping with my suggestion in my letter of June 3 to you.

I have informed Mr. Freeman of the attitude of this office as above described.

Very truly yours,

W. T. Kelley,
Chief Counsel.

Air Mail
cc Mr. Will Freeman
WBW:mms

1181 **RESPONDENT'S EXHIBIT NO. 171.**

Report to

Minneapolis Honeywell Regulator Company

Summary by Brackets

February 21, 1944

Ross Federal Research Corporation

1182 **Ross Federal Research Corporation**

Minneapolis Honeywell Regulator Company
Minneapolis, Minnesota

Gentlemen:

In July, 1943, Ross Federal Research Corporation was engaged by Minneapolis Honeywell Regulator Company to make a survey of domestic household oil burner manufacturers, wholesalers and dealers to obtain information as to the price structure prevailing in the year 1941 throughout the industry as it affected wholesalers and retail dealers, that is, installers, of domestic household oil burners. The survey was made as it concerns domestic household oil burners of a capacity of 2½ gallons, or less, per hour.

The method by which this survey was to be done was left entirely up to Ross Federal Research Corporation. The only instructions given us was the type of information to be obtained. The selection of manufacturers, wholesalers and dealers was left entirely up to Ross Federal.

After a conference on the subject of method of procedure in this survey on the part of Ross Federal executives, it was decided by Ross Federal that the survey should be conducted in fifteen areas throughout the country which would logically be the greatest market for domestic household oil burners. The fifteen areas appearing in the summary of the study were, therefore, selected as being typical of the domestic household oil burner market.

Inasmuch as no pre-selection of calls had been made, Donald J. Gould, Minneapolis Research Manager of Ross Federal, personally visited all of the markets selected with the exception of Waterloo, Cedar Rapids, Iowa; Milwaukee, Wisconsin, and Seattle, Washington, and set up the survey

with the Ross Federal Supervisor in those areas and examined the first days work in each city before leaving to be sure that the method of doing the survey was properly understood.

In Waterloo, Cedar Rapids, and Milwaukee, the survey was set up by Mr. B. V. Bray, Research Supervisor of the Minneapolis office of Ross Federal, following the same method. Mr. Bray was assigned to do this work due to the fact that Mr. Gould was unable to get away at the time the survey in these towns was started. In Seattle the survey was set up by Mr. Ken Derby, Seattle manager for Ross Federal Research. Selection of the oil burner wholesale dealers and manufacturers was made by consulting the classified index of the telephone book and taking all of the names which appeared under the classification of oil burner wholesalers, dealers and manufacturers, and calling on them.

With the exception of Waterloo, Cedar Rapids, and Milwaukee, the areas selected were the metropolitan areas and included the important towns immediately adjacent to the cities concerned, and therefore, the districts used are designated as areas rather than as cities. This was done to afford as large a sample as possible and to give the best possible statistical stability to the report.

In selecting the persons on whom to call after the list was made up from the classified section of the telephone book in each area, in cases where there was a Minneapolis Honeywell district office in this area, Mr. Gould visited the district manager of Minneapolis Honeywell and requested that the salesmen's call books be turned over to him for examination, and these call books were checked against the telephone list to be sure that no names were missed. This check was made entirely without any assistance or suggestion from any employee or member of Minneapolis Honeywell Regulator Company.

1183 In all 535 calls were made upon domestic household oil burner manufacturers, wholesalers, dealers and installers. When the questionnaire had been returned to the Minneapolis office of Ross Federal from the various districts surveyed, these were compiled into a preliminary report, under direction of Mr. Gould, listing the complete information obtained in the interviews and this was examined by Mr. Gould before the compilation of the final report.

The preliminary examination of these results showed that in numerous cases the wholesalers and dealers had

given information on domestic household oil burners other than the 2½ gallon per hour capacity burner for which the questionnaire was designed, and due to the fact that inquiry was made on prices which prevailed two years prior (1941) to the making of these calls and in a number of cases, records had been destroyed, prices were quoted from memory, and it was felt that obviously some of these prices were not to be accepted without further checking and verification.

Therefore, Mr. Gould wrote to the eighty-three manufacturers of domestic household oil burners whose outlets had been contacted by the Ross Federal representatives in the study, asking for verification of the wholesale prices given by the wholesalers and dealers. He explained to the manufacturers that this survey had been made and that prices, some of which had been quoted from memory or from inadequate records, were not to be accepted without verification, and asked that these manufacturers verify these prices or give the correct price to which the dealers and wholesalers concerned were sold in 1941. Sixty-four of the eighty-three manufacturers cooperated and returned the price schedules either corrected or verified. All of the figures used in the compiled report setting high or low limits within the various brackets are verified figures from the manufacturers, and are, therefore, reliable and acceptable data.

An examination of the data obtained showed that a chaotic price condition existed throughout the industry in 1941 and that the prices given varied from one geographic section to another, and likewise varied within the geographic section itself, and that there was no definite pattern of either wholesaler or dealer oil burner prices.

The data from which our report has been compiled is a part of our records and available for checking at any time.

The following results are a true compilation of a summary of the findings in this survey without outside assistance or suggestion from any source.

Respectfully submitted,

Ross Federal Research Corporation,

Donald J. Gould,

Minneapolis Research Manager.

Subscribed and sworn to before me this 21st day of February, 1944.

Donald E. Cameron,

(Seal) *Notary Public, County of Hennepin, State of Minnesota.*

My Commission Expires June 8th, 1948.

BURNER PRICE COMPARISON BY MINNEAPOLIS HONEYWELL PRICE BRACKETS.

	Jobber Difference		Dealer Difference	
	Low	High	Low	High
Bracket #1	50.00	111.00	50.00	111.00
Bracket #2	45.00	96.20	49.00	100.00
Difference	—5.00	—14.80	—1.00	—11.00
Bracket #2	45.00	96.20	49.00	100.00
Bracket #3	47.50	102.00	47.50	102.00
Difference	#2.50	#5.80	—1.50	#2.00
Bracket #3	47.50	102.00	47.50	102.00
Bracket #3A	52.50	89.00	52.50	91.25
Difference	#5.00	—13.00	#5.00	—10.75
Bracket 3A	52.50	89.00	52.50	91.25
Bracket #4	61.70	100.00	49.50	100.00
Difference	#9.20	#11.00	—3.00	#8.75
Bracket #4	61.70	100.00	49.50	100.00
Bracket #4A	55.00	101.25	67.13	101.25
Difference	—6.70	#1.25	#17.63	#1.25
Bracket #4A	55.00	101.25	67.13	101.25
Bracket #5	45.00	110.00	45.00	120.40
Difference	—10.00	#9.75	—22.13	#19.15

OIL BURNER JOBBERS AND DEALERS PURCHASING FOR THE VARIOUS MINNEAPOLIS HONEYWELL BRACKETS.

		Area Surveyed	Number Jobber Outlets	Jobber Purchase Price Low	Jobber Purchase Price High	Number Dealer Outlets	Dealer Purchase Price Low	Dealer Purchase Price High
Manufacturer Bracket #1:								
Manufacturers Involved	11	Baltimore	1		82.00			
Burner Brands Involved	11	Boston	1	65.00	72.50	1	65.00	72.50
Burner Outlets	33	Chicago	1	79.50	84.50	2	79.50	84.50
Areas Surveyed	11	Milwaukee	1	75.00	—	1	75.00	—
		Minneapolis	3	80.00	111.00	2	87.50	111.00
Low Jobber Purchase Price	50.00	New Jersey	—	—	—	1	86.51	106.80
High Jobber Purchase Price	111.00	New York	—	—	—	2	82.00	
		Philadelphia	3	50.00	75.00	5	50.00	75.00
Low Dealer Purchase Price	50.00	Providence	2	80.00	82.00	5	60.00	82.00
High Dealer Purchase Price	111.00	Utica	—	—	—	1	82.00	—
		Waterloo	—	—	—	1	82.00	—
			12	50.00	111.00	21	50.00	111.00
Manufacturer Bracket #2:								
Manufacturers Involved	9	Baltimore	2	65.00	79.20	—	—	—
Burner Brands Involved	10	Cedar Rapids	2	62.50	76.65	1	70.85	72.97
Burner Outlets	27	Minneapolis	1	85.40	96.20	2	85.40	100.00
Areas Surveyed	7	New Jersey	1	66.68	—	1	66.68	—
		New York	4	45.00	59.00	1	49.00	59.00
Low Jobber Purchase Price	45.00	Providence	5	55.00	69.75	4	55.00	65.00
High Jobber Purchase Price	96.20	Seattle	—	—	—	3	60.00	84.98
Low Dealer Purchase Price	49.00							
High Dealer Purchase Price	100.00							
			15	45.00	96.20	12	49.00	100.00

OIL BURNER JOBBERS AND DEALERS PURCHASING IN THE VARIOUS MINNEAPOLIS HONEYWELL BRACKETS.

		Area Surveyed	Number Jobber Outlets	Jobber Purchase Price Low	Jobber Purchase Price High	Number Dealer Outlets	Dealer Purchase Price Low	Dealer Purchase Price High
Manufacturer Bracket #3:								
Manufacturers Involved	16	Baltimore	2	50.00	73.00	2	50.00	73.00
Burner Brands Involved	18	Boston	6	47.50	102.00	8	47.50	102.00
Burner Outlets	56	Chicago	1	70.80	92.40	1	70.80	92.40
Areas Surveyed	11	Detroit	—	—	—	1	75.00	—
		Milwaukee	1	—	67.00	2	61.53	67.67
Low Jobber Purchase Price	47.50	New Jersey	2	59.50	100.00	2	59.50	100.00
High Jobber Purchase Price	102.00	New York	8	52.50	80.00	6	52.50	80.00
		Philadelphia	4	60.00	90.00	3	60.00	90.00
Low Dealer Purchase Price	47.50	Providence	2	75.00	87.00	3	75.00	87.00
High Dealer Purchase Price	102.00	Seattle	1	73.00	—	—	—	—
		Waterloo	—	—	—	1	80.00	—
			27	47.50	102.00	29	47.50	102.00
Manufacturer Bracket #3A:								
Manufacturers Involved	8	Baltimore	—	—	—	2	54.00	91.25
Burner Brands Involved	10	Boston	—	—	—	1	70.78	91.25
Burner Outlets	37	Cedar Rapids	—	—	—	1	75.00	—
Areas Surveyed	12	Chicago	1	72.00	82.00	2	72.00	91.25
		Detroit	—	—	—	3	53.00	82.00
Low Jobber Purchase Price	52.50	Milwaukee	—	—	—	1	70.78	91.25
High Jobber Purchase Price	89.00	Minneapolis	1	72.00	—	1	72.00	—
		New York	2	54.50	59.00	5	54.50	82.00
Low Dealer Purchase Price	52.50	Philadelphia	1	—	89.00	3	78.13	89.00
High Dealer Purchase Price	91.25	Providence	5	64.50	75.00	5	54.00	82.00
		Seattle	1	52.50	—	1	52.50	—
		Utica	—	—	—	1	72.00	82.00
			11	52.50	89.00	26	52.50	91.25

OIL BURNER JOBBERS AND DEALERS PURCHASING IN THE VARIOUS MINNEAPOLIS HONEYWELL BRACKETS.

		Area Surveyed	Number Jobber Outlets	Jobber Purchase Price Low	Jobber Purchase Price High	Number Dealer Outlets	Dealer Purchase Price Low	Dealer Purchase Price High
Manufacturer Bracket #4:								
Manufacturers Involved	9	Baltimore	—	—	—	1	75.00	85.00
Burner Brands Involved	11	Chicago	3	89.00	100.00	5	65.00	100.00
Burner Outlets	36	Indianapolis	—	—	—	1	75.00	85.00
Areas Surveyed	10	Milwaukee	1	80.50	—	1	80.50	—
		Minneapolis	2	77.00	80.50	1	49.50	—
Low Jobber Purchase Price	61.70	New Jersey	1	75.00	—	1	75.00	—
High Jobber Purchase Price	100.00	New York	2	75.00	79.00	5	75.00	80 30
		Philadelphia	2	70.00	80.50	3	70.00	99.00
Low Dealer Purchase Price	49.50	Providence	2	61.70	80.50	4	54.00	80.50
High Dealer Purchase Price	100.00	Utica	—	—	—	1	—	79.20
			13	61.70	100.00	23	49.50	100.00
Manufacturer Bracket #4A:								
Manufacturers Involved	3	Baltimore	1	67.13		1	67.13	
Burner Brands Involved	3	Chicago	—	—		1		71.60
Burner Outlets	10	Milwaukee	1		101.25	—		—
Areas Surveyed	7	Minneapolis	—	—		2		101.25
		New Jersey	1	76.00		1		76.00
Low Jobber Purchase Price	55.00	Philadelphia	—	—		1		89.50
High Jobber Purchase Price	101.25	Seattle	1	55.00				
			4	55.00	101.25	6	67.13	101.25
Low Dealer Purchase Price	67.13							
High Dealer Purchase Price	101.25							

Respondent's Exhibit No. 471.

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OIL BURNER JOBBERS AND DEALERS PURCHASING IN THE VARIOUS MINNE

	Baltimore		Boston		Cedar Rapids		Chicago		Detroit		Indianapolis		Milwaukee		Minneapolis	
	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High
Bracket #5:																
Jobber Purchase Price	48.00	90.00	45.00	110.00	—	85.00	53.00	99.00	—	—	72.80	80.00	50.00	80.00	72.00	87.7
Dealer Purchase Price	48.00	120.40	45.00	114.50	62.75	114.50	49.00	114.50	61.50	120.40	63.25	114.50	50.00	87.75	51.00	114.5
Bracket 4A:																
Jobber Purchase Price	67.13		—		—		—		—		—			101.25	—	
Dealer Purchase Price	67.13		—		—			71.60	—		—		—			101.2
Bracket #4:																
Jobber Purchase Price	—		—		—		80.00	100.00	—		—		80.50		77.00	80.5
Dealer Purchase Price	75.00	85.00	—		—		65.00	100.00	—		75.00	85.00	80.50		49.50	
Bracket 3A:																
Jobber Purchase Price	—		—		—		72.00	82.00	—		—		—		72.00	
Dealer Purchase Price	54.00	91.25	70.78	91.25	75.00		72.00	91.25	53.00	82.00	—		70.78	91.25	72.00	
Bracket 3:																
Jobber Purchase Price	50.00	73.00	47.50	102.00	—		70.80	92.40	—		—		—	67.00	—	
Dealer Purchase Price	50.00	73.00	47.50	102.00	—		70.80	114.40	75.00		—		61.53	67.67	—	
Bracket 2:																
Jobber Purchase Price	65.00	79.20	—		62.50	76.65	—		—		—		—		85.40	96.2
Dealer Purchase Price	—		—		70.85	72.97	—		—		77.50	100.00	—		85.40	100.0
Bracket 1:																
Jobber Purchase Price	82.00		65.00	72.50	—		79.50	84.50	—		—		75.00		80.00	111.0
Dealer Purchase Price	—		65.00	72.50	—		79.50	84.50	—		—		75.00		87.50	111.0

SUMMARY

	Baltimore		Boston		Cedar Rapids		Chicago		Detroit		Indianapolis		Milwaukee		Minneapolis	
	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High
Low Jobber Purchase Price	48.00		45.00		62.50		53.00		—		72.80		50.00		72.00	
Bracket	5		5		2		5				2		5		3A	
High Jobber Purchase Price		90.00		110.00		85.00		100.00		—		80.00		101.25		111.0
Bracket		5		3		2		3				5		4A		1
Low Dealer Purchase Price	48.00		45.00		62.75		49.00		53.00		63.25		50.00		49.50	
Bracket	5		5		5		5		3A		5		5		5	
High Dealer Purchase Price		120.40		114.50		114.50		114.50		120.40		114.50		91.25		114.5
Bracket		5		5		5		5		5		5		3A		5

HASING IN THE VARIOUS MINNEAPOLIS HONEYWELL PRICE BRACKETS.

olis	Milwaukee		Minneapolis		New Jersey		New York		Philadelphia		Providence		Seattle		Utica		Waterloo	
High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High
80.00	50.00	80.00	72.00	87.75	45.00	90.00	49.00	90.00	48.00	87.75	48.00	100.00	60.75	72.50	—	79.50	62.50	114.50
14.50	50.00	87.75	51.00	114.50	45.00	99.00	58.00	114.50	48.00	87.75	48.00	114.50	47.80	72.50		114.50	62.50	114.50
		101.25	—		76.00		—		—		—		55.00		—		—	
	—			101.25	76.00		—			89.50	—		—		—		—	
	80.50		77.00	80.50	75.00		75.00	79.00	70.00	80.50	61.70	80.50	—		—		—	
85.00	80.50		49.50		75.00		75.00	80.30	70.00	99.00	54.00	80.50	—		79.20		—	
	—		72.00		—		—	59.00	—	89.00	64.50	75.00	52.50		—		—	
	70.78	91.25	72.00		—		54.50	82.00	78.13	89.00	54.00	82.00	52.50		72.00	82.00	—	
	—	67.00	—		59.50	100.00	52.50	80.00	60.00	90.00	75.00	87.00	73.00		—		—	
	61.53	67.67	—		59.50	100.00	52.50	80.00	60.00	90.00	75.00	87.00	—		—		—	80.00
	—		85.40	96.20	66.68		45.00	59.00	—	—	55.00	69.75			—		—	
00.00	—		85.40	100.00	66.68		49.00	59.00	50.00		55.00	65.00	60.00	84.98	—		—	
	75.00		80.00	111.00			—	—	50.00	75.00	80.00	82.00	—		82.00		—	
	75.00		87.50	111.00	86.51		82.00		50.00	75.00	60.00	82.00	—		82.00		82.00	

SUMMARY

olis	Milwaukee		Minneapolis		New Jersey		New York		Philadelphia		Providence		Seattle		Utica		Waterloo	
High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High
	50.00		72.00		45.00		45.00		48.00		48.00		52.50		82.00		52.50	
	5		3A		5		2		5		5-2		5					
80.00		101.25		111.00		100.00		90.00		90.00		100.00		72.50		79.50		114.50
5		4A		1		5		1		3		5		5				5
	50.00		49.50		45.00		49.00		48.00		48.00		47.80		72.00		62.50	
	5		5		5		2		5		3A		5		4		5	
114.50		91.25		114.50		100.00		114.50		99.00		114.50		84.98		114.50		114.50
5		3A		5		1		5		3		5		2		5		5

OIL BURNER JOBBERS AND DEALERS PURCHASING IN THE VARIOUS MINNEAPOLIS HONEYWELL BRACKETS.

		Area Surveyed	Number Jobber Outlets	Jobber Purchase Price Low	Jobber Purchase Price High	Number Dealer Outlets	Dealer Purchase Price Low	Dealer Purchase Price High
Manufacturer Bracket #5:								
Manufacturers Involved	15	Baltimore	11	48.00	90.00	13	48.00	120.40
Burner Brands Involved	23	Boston	6	45.00	110.00	12	45.00	114.50
Burner Outlets	242	Cedar Rapids	1	—	85.00	4	62.75	114.50
Areas Surveyed	15	Chicago	7	53.00	99.00	12	49.00	114.50
		Detroit	—	—	—	14	61.50	120.40
Low Jobber Purchase Price	45.00	Indianapolis	1	72.80	80.00	4	63.25	114.50
High Jobber Purchase Price	110.00	Milwaukee	2	50.00	80.00	5	50.00	87.75
		Minneapolis	3	72.00	87.75	7	51.00	114.50
Low Dealer Purchase Price	45.00	New Jersey	7	45.00	90.00	9	45.00	99.00
High Dealer Purchase Price	120.40	New York	14	49.00	90.00	14	58.00	114.50
		Philadelphia	19	48.00	87.45	29	48.00	87.75
		Providence	15	48.00	100.00	22	48.00	114.50
		Seattle	1	60.75	72.50	2	47.80	72.50
		Utica	1	—	79.50	1	—	114.50
		Waterloo	2	62.50	114.50	4	62.50	114.50
			90	45.00	114.50	152	45.00	120.40

RESPONDENT'S EXHIBIT NO. 172.

ROSS FEDERAL
18 E. 48th St.,
New York, New York

QUESTIONNAIRE.

Type of Contact: Manufacturer: Wholesale..... Retailer..... Dealer: Wholesale..... Retailer.....

1. (a) What do you think are the prospects of the domestic oil burner sales after the war? Good..... Bad..... About same as before war.....

1. (b) What is the reason for your opinion?.....

2. What makes of oil burners did you sell in 1941. What models of each?

Make	Models (2½ gallons or less per hour)	Single or Two Stage Pump	Controls Used (Make)	Wholesale Price—Complete with controls but without accessories	Installed Price—Complete with Usual size tank (.....gallons)	Manufacturers List Price—Discount Given—

3. (a) If different controls were used than those specified above, was there a difference in price? Yes..... No.....

3. (b) If "Yes" ask: How much difference? $.....

4. In selling against competition it is sometimes necessary to cut the price. What was the lowest selling price you would give on the above burners to meet competition?

Make and Model	Price	Comments:

5. Do you consider you are in active, or direct competition in the domestic househeating oil burner field with dealers handling distillate oil burners, or oil burning furnaces of the shell or bowl type such as illustrated on this page? Yes..... No.....

6. Do you have any old 1941 price lists giving manufacturers prices, or your installed prices that we can have for study? Yes..... No.....

7. (a) What burner(s) (make) is sold for the lowest price in your community? ..... Price $.....

7. (b) Who handles it (them)?.....

Person Interviewed ..... Firm Name ..... Address ..... City .....

Ross Representative ..... Inspected by .....

Respondent's Exhibit No. 172.

1192 RESPONDENT'S EXHIBIT NO. 173.

Ross Federal
18 East 48th St.,
New York, New York.

Job #23-18

Instructions to Field Representatives

Purpose of the Survey:

The purpose of this survey is to obtain information for a manufacturer for use in making post-war plans.

All information in this study is to be on the basis of prices in the industry as they were in 1941, before there were any war restrictions on this equipment.

Household oil burners with a capacity from one gallon to 2½ gallons per hour are to be studied in this survey. Be sure to see that the information you get is on installations of this size and not larger.

How the Information Is to Be Obtained:

Information in this is to be obtained by the personal interview method.

Where the Information Is to Be Obtained:

Information in this study is to be obtained at offices of firms manufacturing, selling at wholesale, or installing domestic heating oil burners as described above.

When the Information Is to Be Obtained:

Information in this study is to be obtained during business hours.

Who Is a Qualified Respondent:

The manager or responsible employee of the firm called on is a qualified respondent in this study.

Introduction:

In introducing yourself to the respondent use the following approach: "Mr. ..... I am with the Ross Federal Research Corporation. We are making a National survey of the domestic oil burner dealer and manufacturer market for the Minneapolis Honeywell Regulator Co. of Minneapolis, to determine information for them with which

to build up a nation-wide chart of dealer, wholesaler, and installed burner and heating equipment prices as they were in 1941. I would like to have you read this letter from Minneapolis Honeywell with regard to it."

Specific Instructions Covering Each Question on the Questionnaire:

Type of Contract: This information will be obtained from the dealer by talking to him about the type of business he does. He will fall into one of the following classifications:

Manufacturer:

a. The manufacturer who sells at wholesale only, either through wholesalers, who in turn sell to dealers or who eliminate the wholesaler and sells to the dealer. This type of manufacturer does no retail installed business of his own. This manufacturer should be designated by a check mark as a "manufacturer: wholesale".

1193 b. The manufacturer who sells the majority of his output on a retail installed basis, but also has a wholesale price which he uses to sell burners to dealers usually not in the same town but in the outlying territory. This should be designated by checking both "manufacturer: wholesale and retail, showing a check after each classification.

c. The manufacturer who sells all of his output on a retail installed basis, and does no wholesale business. There will probably be only a few of those. Merely check "manufacturer-retail".

Wholesaler:

There are two types of wholesaler:

a. The wholesaler who sells at wholesale only to dealers.

b. The wholesaler, usually called a distributor, who has his own installation department and sells installed directly to the user, usually in the city in which he is located, and sells at wholesale to dealers, usually within a certain territory such as the majority of a State or possibly two or three states. This for the purposes of filling out the questionnaire should be marked under "dealer wholesale" for both classifications of wholesaler.

Dealer:

The dealer sells directly installed to the home owner or user. This type of merchandiser should be marked under "dealer retail."

Question #1 (a) "What do you think are the prospects of the domestic oil burner sales after the war?" Merely check which classification respondents answer falls into.

Question #1 (b) "What is the reason for your opinion?" Write a full narrative answer as to just why the respondent has this opinion.

Question #2. "What makes of oil burners did you sell in 1941. What models of each?" Impress the respondent that we are interested only in the small domestic burner which uses from one to 2½ gallons per hour and no other models. They will be familiar with the terms used as they use them daily in their business.

Under "single or two stage pump" merely write the words "single" or "two stage."

On controls we want the make or brand of controls with which the burner is regularly equipped.

"Wholesale price—Complete with controls but without accessories", means as they sell it to the retailer without pipe or tank.

"Installed price—complete with usual size tank (..... gallons). As there are different sized tanks used by installing dealers and in different localities size used is different fill in the size of tank regularly used. Information wanted is for installed price of burner only and should not include cost of furnace, but merely burner installation only.

"Manufacturers List Price—Discount Given—%". Please have the respondent give you the list price and if any quantity discount is given specify that percent. If more than one for different quantities get them all.

Question #3. (a) "If different controls were used than those specified above, was there a difference in price?" The information wanted on this questions is was the cost of the dealer different, if he used controls other than the ones he usually put on the burners, did they cost him more, and how much more or less.

1194 Question #3. (b) If "Yes" ask: How much difference? We want to know the difference more or less it cost the dealer or manufacturer to use controls other than those regularly furnished with the burner.

Question #4. "In selling against competition it is sometimes necessary to cut the price. What was the lowest-selling price you would give on the above burners to most competition?" Generally in this business they had an asking and a selling price, if they were up against competition. What we want here is the price they would stop at if they were up against a situation of this kind.

Question #5. "Do you consider you are in active, or direct competition in the domestic househeating oil burner field with dealers handling distillate oil burners, or oil burning furnaces of the shell or bowl type such as illustrated on this page?" The two pages of photostats furnished are for the purpose of illustrating just what is meant by this type of burner. In asking the question you might for purposes of clarification add, such burners as made by Motor Wheel Co. and Perfection Stove.

Question #6. "Do you have any old 1941 price lists giving manufacturers prices, or your installed prices which we can have to study?" We wish to pick up as many of those as possible. Please staple them to the questionnaire so that they will not become lost.

Question # 7. (a) "What company or dealer in your territory, sets the competition from a price standpoint?" Usually in a community there is some dealer or wholesaler who sells at a low price and it is necessary for other dealers in the market to meet or come near those prices. These prices may be set by the mail order houses, small manufacturers, wholesalers or dealers. Get the name of the firm or party they consider sets the competitive prices.

Question #7. (b) "What burner(s) do they handle?" Merely record the name of the burner, or burners this firm handles.

Any remarks which the respondent may have in addition to the answers to the questions should be recorded on the reverse side of the blank as quite often valuable information is contained in those comments.

If there is any doubt in the mind of any one you interview as to our authority to obtain this information for Minneapolis-Honeywell ask him to call up the local manager of this company, as the managers have been informed of this survey and will tell the inquiring party that it is o'k to give you the information.

Before you turn in your questionnaire look it over to be sure you have not missed anything.

If you have a few interviews on which there is a lot of difficulty finding the party in skip those and turn in the study without them. On the basis of the price of this survey the average time has to be considerably less than two hours per interview. If however there are a number of such calls in your territory write Air Mail to Donald J. Gould, Ross Federal Research Corp., 460 Rand Tower, Minneapolis and state the number of calls that have been made, how many hours have been consumed, the number to be made and how long you think it will take to complete the job.

When you have finished your portion of the survey, sent it by first class Mail to Donald J. Gould, Ross Federal Research Corp., 460 Rand Tower, Minneapolis. Confirmation and job time sheet will be sent from New York to be returned to them.

1206 RESPONDENT'S EXHIBIT NO. 180.

1939 OIL BURNER MANUFACTURERS' NET PRICES

Specifications	List Price	Total Rider	Bracket Quantities B-11 1000 100	B-22 3000 250	B-33 7500 500	B-44 15000 1000
PRIMARY CONTROLS						
Type KMW Pyratherm	$19.00		$ 9.00	$ 8.50	$ 8.25	$ 8.00
Type KMI "	22.00		10.25	9.75	9.50	9.20
Type RMI "	22.00		10.25	9.75	9.50	9.20
THERMOSTATS						
Type H Sensatherm	6.00		3.00	3.00	2.85	2.70
Type DNH "	17.00		8.50	8.50	8.50	8.50
" HH "	12.50		5.00	5.00	4.85	4.75
" T-41 Timer. & Trans.	20.00		10.00	10.00	9.85	9.75
" HBH 2-Stage Sens.	11.00		5.50	5.35	5.20	5.10
" HBR 2-Stage Sens.	11.00		5.50	5.35	5.20	5.10
Type HA Sensatherm	6.50		3.30	3.30	3.15	3.00
No. 855 Thermostat with Ther.	10.00		5.00	4.50	4.50	4.50
No. 855 " without "	9.00		4.50	4.00	4.00	4.00
TRANSFORMER-RELAYS						
Type V2-3A, SPST	8.05		4.20	4.15	4.10	4.05
" V2-105-590 w. Summer Sw.	13.00		6.75	6.50	6.25	6.00
LIMIT CONTROLS						
Type DA-31, 0-14#	6.00		3.00	2.85	2.85	2.75
10" vac.-12#	8.00		4.50	4.40	4.30	4.20
0 to 35#	8.50		4.75	4.65	4.55	4.45
0 to 60#	8.50		4.75	4.65	4.55	4.45
0 to 100#	9.00		5.05	4.90	4.75	4.60
0 to 150#	9.50		5.35	5.20	5.00	4.85
Fig. 35 Risertherm	6.00		3.00	2.85	2.85	2.75
Fig. 34 "	7.00		3.50	3.35	3.35	3.25
Type 115W Immersatherm	7.00		*3.75	*3.75	*3.75	*3.50
" 115W-3 "	7.00		*3.75	*3.75	*3.75	*3.50
" DA-36 Immersion	10.00		5.00	5.00	5.00	4.75
" DA-37 "	10.00		5.00	5.00	5.00	4.75
" M-51 Limit Control	8.00		4.00	3.85	3.85	3.75
" M-53 Fan "	8.00		4.00	3.85	3.85	3.75
" M-53 SW Fan "	8.50		4.25	4.05	4.05	4.00
" *M-80 or M-80B Comb.	11.00		5.75	5.60	5.45	5.35
" *M-82 or M-82B "	12.00		6.25	6.10	5.95	5.85
" *M-84 or M-84B "	12.00		6.25	6.10	5.95	5.85
" 116 Ductatherm, 50-0°	7.00		3.75	3.75	3.75	3.50
*Standard with Summer Switch						
LOW WATER CONTROLS						
Type DA-121 Press. & L. W., 0-14#	20.00		11.25	10.75	10.50	10.25
" DA-121 w. Quick Hook-Up	23.00		12.75	12.25	12.00	11.75
" 123 Low Water, 30# Max.	14.00		7.75	7.50	7.25	7.00
" 123 " " Quick H-U	17.00		9.25	9.00	8.75	8.50

* 10/11/39 JWO 3.25.

Other Standard or Odd Model Controls at List Price Less Prevailing Manufacturers' Discounts. Net Price Control Listed Above May Be Included in Single Shipment Orders to Obtain Quantity Discounts on the List Price Items Specified.

Prices Relating to All Controls Are for Standard Ranges as Listed in Catalog, and for 115 Volt, 60 Cycle Specifications Only, Unless Otherwise Specified.

1207 RESPONDENT'S EXHIBIT NO. 181-A.

Manufacturers' Purchase Contract

The Mercoid Corporation
4201 Belmont Ave. Chicago, Ill.

Date Submitted Feb. 18, 1939

This Agreement, entered into between The Mercoid Corporation, a Delaware corporation, hereinafter called the "Company," and Cleveland Steel Products Co. of Madison at W. 74th Street, Cleveland, Ohio, hereinafter called the "Purchaser,"

Witnesseth:

Whereas the Company is engaged in manufacturing automatic electric controls for heating, refrigerating, air conditioning and other apparatus, machinery and equipment, and

Whereas the Purchaser is desirous of purchasing such controls for use in connection with products of the Purchaser's own manufacture,

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter set forth the parties hereto agree as follows:

Quantity

Subject to the terms and provisions hereinafter contained, the Company agrees to sell and the Purchaser agrees to purchase, during the term of this agreement, their requirements of the Company's automatic controls. The special net prices extended herewith by the Company are based on the Purchaser's 1939 control requirements estimated to be 15,000 units.

Miscellaneous Controls and Control Equipment

Miscellaneous automatic controls and control equipment of the Company's manufacture, not listed herein but shown in the Company's catalogue attached hereto, will be furnished at the catalogue list prices less the discounts shown on the manufacturers' discount sheet attached hereto. The list prices and discounts shall be subject to change at any time and from time to time, without notice.

All orders for such miscellaneous controls and control equipment shall be subject to acceptance and approval by the Company.

Term of Agreement

This agreement shall become effective on the date of acceptance by the Company and shall continue to and including December 31, 1939, unless sooner terminated as herein provided.

Terms of Payment

All shipments shall be made f. o. b. the point of shipment with Factory Sight Draft attached to the Bill of Lading, the Company to have the right to designate the point of shipment. If the draft is paid within 10 days from the date of the invoice a special cash discount of two per cent (2%) will be allowed. If Purchaser desires open account credit accommodation arrangements therefor should be made with the Company's credit department. If such arrangements are made invoices will be due net thirty days after the date of the invoice and a cash discount of two per cent. (2%) will be allowed if payment is made within 10 days from the invoice date. Credit terms and delivery of all equipment are subject to the Company's approval and the Company shall have the right at all times to change or alter the terms of payment and to fix, change or alter such credit accommodations as may be extended to Purchaser. Sales, excise and other taxes will be added to all prices and the amount of such taxes shall not be subject to discount. Invoices covering emergency shipments from a Branch Office of the Company shall be subject to such discounts as are in effect at such Branch Office at the time of shipment, anything herein contained to the contrary notwithstanding.

Use of Controls by Purchaser

This agreement is made upon the understanding and condition that Purchaser, who is a manufacturer, will not use or sell the controls or appliances purchased pursuant hereto except as a part of or in conjunction with machinery or equipment of Purchaser's own manufacture. If Purchaser shall use or sell such controls or appliances otherwise than as above specified the Company shall have the right to immediately terminate this agreement without notice.

Impossibility of Performance

The Company agrees that it will, in good faith and to the best of its ability, promptly fill all orders received from Purchaser and deliver the same to the carrier for shipment; provided, however, that the Company shall not be obliged to fill orders in the event and to the extent that it may become impossible to do so because of war conditions, governmental regulations, strikes, labor disturbances, fires, floods, tornados, acts of God, mechanical breakdowns, shortages of raw materials, delays in receipt of raw materials and any other causes or conditions beyond the control of the Company.

Assignment of Contract

The Purchaser shall not assign this contract or any interest therein without the written consent of the Company.

Price Revisions

The Company reserves the right to change and revise the prices listed herein upon thirty (30) days' written notice to Purchaser. Revised prices shall apply to all orders received by the Company after the expiration of the thirty (30) day notice period and also to all unfilled orders, including blanket orders, in the Company's possession at the expiration of such period. If the revised prices are not satisfactory to Purchaser the Purchaser may terminate this agreement by written notice received by the Company within fifteen (15) days from the expiration of the aforesaid thirty (30) day period; provided, however, that such termination shall not affect completion of any orders received by the Company prior to the Company's receipt of the Purchaser's notice of termination. During the aforesaid thirty (30) day price change notice period the Purchaser may not order more than one-twelfth of the number of control units herein agreed to be purchased, or, at the Company's option, more than an equivalent number of control units shipped to Purchaser during the same period of the previous year.

Control Units and Prices

	List Price	Net Price
Primary Controls		
Type KMW Pyratherm—Constant Ignition Type	$19.00	$ 8.00
Type KMI Pyratherm—Intermittent Ignition Type	22.00	9.20
Type RMI Pyratherm—Int. Ign., Recycling Type	22.00	9.20
Thermostats		
Low Voltage Types		
Type H Sensatherm (Standard) 55-85°,		2.50
with Thermometer	6.00	2.70
Type DNH Day-Night Sensatherm, with Thermometer	17.00	8.50
Type HH Dual Sensatherm, with Thermometer	12.50	4.75
Type T-41 Timercoid and Transformer, 110-24V., 60 Cyc.	20.00	9.75
Type HBH Two-Stage Sensatherm, with Thermometer	11.00	5.10
Type HBR Two-Stage Sensatherm, with Thermometer	11.00	5.10
Line Voltage Types		
Type HA Sensatherm, with Thermometer, Max. 20 Watts	6.50	3.00
No 855 Thermostat, with Thermometer, 10 Amp.-115 Volt	10.00	4.50
No. 855 Thermostat, without Thermometer, 10 Amp.-115 Volt	9.00	4.00
Transformer—Relays		
Type V2-3A, S. P. S. T. 10 Amp.-115 Volt	8.00	4.05
Type V2-105-590 with Built-in Summer Switch	13.00	6.00

	List Price	Net Price
Limit Controls		
Steam		
Type DA-31, 0 to 14 lb.	6.00	2.75
Type DA-31, Vapor-Vacuum, 10" vac. to 12 lb.	8.00	4.20
Type DA-31, 0 to 35 lb.	8.50	4.45
Type DA-31, 0 to 60 lb.	8.50	4.45
Type DA-31, 0 to 100 lb.	9.00	4.60
Type DA-31, 0 to 150 lb.	9.50	4.85
Hot Water		
Fig. 35 Risertherm (Clamp-On Type), 110 to 200° F.	6.00	2.75
Fig. 34 Risertherm, 140-230° F. (closes on rise in temp.)	7.00	3.25
Type 115W Immersatherm, 50 to 250° (opens on rise in temp.)	7.00	3.50
Type 115W-3 Immersatherm, 50 to 250° (closes on rise in temp.)	7.00	3.50
Type DA-36 Straight Stem Immersion, 110 to 200° or 135 to 235°	10.00	4.75
Type DA-37 Back Angle Stem Immersion, 110 to 200° or 135 to 235°	10.00	4.75
Warm Air		
Type M-51 Limit Control	8.00	3.75
Type M-53 Fan Control	8.00	3.75
Type M-53 SW Fan Control with Summer Switch	8.50	4.00
*Type M-80 or M-80B Combination Fan and Limit Control	11.00	5.35
*Type M-82 or M-82B Combination Fan and Limit Control	12.00	5.85
*Type M-84 or M-84B Combination Fan and Limit Control	12.00	5.85
Type 116 Ductatherm, 50 to 300°	7.00	3.50

*Furnished Standard With Built-In Summer Switch

1208 Control Units and Prices (Cont'd)

	List Price	Net Price
Low Water Controls		
Type DA-121 Combination Pressure and Low Water, 0 to 14 lb.	$20.00	$10.25
Type DA-121 Combination Pressure and Low Water, Range 0 to 14 lb., Complete with Quick Hook-Up	23.00	11.75
Type 123 Low Water Cut-Out, 30 lb. Max.	14.00	7.00
Type 123 Low Water Cut-Out, 30 lb. Max., Complete with Quick Hook-Up Attachments	17.00	8.50

Other Standard or Odd Model Controls at List Price Less Prevailing Manufacturers Discounts. Net Price Controls Listed Above May Be Included in Single Shipment Orders to Obtain Quantity Discounts on the List Price Items Specified.

Prices Relating to all Controls Are for Standard Ranges as Listed in Catalog, and for 115 Volt, 60 Cycle Specifications only, unless otherwise specified.

RESPONDENT'S EXHIBIT NO. 181-B

The special quantity net prices extended on contract to which this rider is attached are based on reasonable quantity releases against the Purchaser's estimated total 1939 control requirements. In consideration of the special net prices extended, the Purchaser agrees to place with the Company, prior to June 1st, 1939, orders in an amount of not less than 1,000 Mercoid Control units. Unless orders are placed as specified, contract becomes null and void.

This rider becomes part of contract dated February 18, 1939.

Guarantee and Returns

The Company guarantees all control units and equipment manufactured by it and bearing its name or mark to be free from defects in workmanship and material. The

Company will, without charge, replace or repair within one year from date of shipment from the Company's factory any control unit or equipment that may be found to be defective upon inspection at the Company's factory. This guarantee does not obligate the Company in any manner in cases where control units or equipment have been subjected to careless handling, improper application or faulty installation. In all cases the Company's liability on the guarantee herein expressed shall be limited to the repair or replacement of the defective control or equipment and in no event shall its liability extend to indirect or consequential damages. The guarantee herein expressed is made in lieu of all other warranties, guaranties, obligations, or liabilities expressed or implied by the Company or its representatives. All statutory or implied warranties, other than of title, are hereby expressly negatived and excluded.

Returns must not be made without the Company's consent and in all cases the returned controls or equipment must be carefully handled, properly packed and shipped prepaid. If credit is allowed for returns the Company will deduct ten per cent. (10%) to cover handling and inspection charges and a further deduction will be made where recalibrating or refinishing is necessary. Specially made controls may not be returned for credit except at what the Company determines is a fair value for the same.

Patent Warranty

The Company agrees that it will, at its own expense, defend any suit or proceeding that may be instituted against the Purchaser based upon a claim that any apparatus of the Company's manufacture furnished by the Company to the Purchaser constitute an infringement of any Letters Patent of the United States, provided, that the Purchaser shall not be in default hereunder and shall cause the Company to be promptly notified in writing of such suit and shall give the Company authority to defend such suit through the Company's counsel and shall furnish to the Company all needed information and assistance for the defense of such suit. The Company will pay all damages and costs awarded against Purchaser in any suit defended by the Company, provided notice of such suit and authority, information and assistance shall have been given to the Company as aforesaid, and in the event the device or apparatus furnished by the Company, or any

part thereof, is held to constitute infringement and its use is enjoined the Company will, at its own expense and at the Company's option, either: procure for the Purchaser the right to continue using the infringing devices or apparatus; or replace the same with non-infringing devices or apparatus; or modify the infringing devices or apparatus so that they become non-infringing; or accept the return of the infringing devices or apparatus and refund the purchase price thereof. The foregoing constitutes the Company's only liability in connection with patent infringement by devices or apparatus furnished by the Company.

Whenever the Company deems it necessary for any reason whatsoever to discontinue the sale of any of the products of the Company, the Company agrees to give written notice to the Purchaser to discontinue the sale of such products, and the Purchaser agrees, upon receipt of such notice, to make no further sales or installations of any such products unless or until authorized so to do in writing by the Company.

Termination

In addition to any and all other provisions herein contained relating to termination or cancellation of this agreement, the following circumstances are hereby agreed to be and shall be deemed to be conclusive evidence of the breach of this agreement by either of the parties hereto, and in any of these events the other party hereto may, at its election, without prejudice to any other remedy it may have, terminate all further obligations on the part of such non-defaulting party made and to be performed under this agreement:

(a) The breach of or the failure to comply with any or all of the terms, covenants, conditions and provisions of this agreement, and a continuance of such breach for thirty or more days after receipt by the defaulting party of written notice thereof.

(b) The adjudicated bankruptcy, either voluntary or involuntary or the adjudicated insolvency of either party hereto, or the making of an assignment for the benefit of creditors or the appointment of a trustee or receiver for either of the parties hereto.

(c) The repudiation of this agreement, in whole or in part, by either party hereto.

Field Service

The Company will welcome the opportunity of cooperating with the Purchaser in educating the Purchaser's factory personnel in the servicing and the proper installation of the Company's controls but the Company does not agree or bind itself to render any such service.

The foregoing constitutes the entire agreement between the parties hereto and no change, alteration or modification of this agreement shall be binding unless reduced to writing and signed by the respective parties hereto. The validity, enforceability and interpretation of this agreement shall be determined and governed by the laws of the State of Illinois.

..... Purchaser

By .....

.....Title

The Mercoid Corporation

By .....

.....Title

Date Accepted: .....

1209 RESPONDENT'S EXHIBIT NO. 182.

PRICES QUOTED OR SOLD BY PENN ELECTRIC SWITCH CO.

	1937	1938	1939	1940	1941
Automatic Burner Corp.	$17.25	$16.85		$15.15	$14.90
Brown Oil Burner Equip. Co.					17.30
Century Engineering Co. (Constant Ignition)		15.50	14.70	14.40	13.90
Electrol, Inc.	17.25		14.65		15.55
Electromatic Oil Burner Co.	19.74	19.25			
Fairfield Oil Heating Co.				15.80	
Gar Wood Industries, Inc.	17.25	16.85	15.85	15.80	15.55
Goodrich Oil Burner Mfg. Corp.	21.08				
Harrison Sales Co.		16.85	16.55		17.30
Harvey-Whipple, Inc.					14.90
Heil Company	17.25	16.85		15.15	14.90
Hoben Mfg. Co.			16.55		16.35
Holtum Mfg. Co.	21.08				
Kelly Oil Sales Corp.				15.80	
Malleable Iron Fittings Co.			15.85		
Master Oil Burner Co.	21.08	18.25	17.30	17.30	17.30
Micro-Westco, Inc.		15.15	19.25	17.30	14.30
Montag Stove & Furnace Works.		19.25	17.30	15.80	15.80
Pan-American Engineering Corp.	17.25	19.25			
Reliable Oil Burner Corp.	19.74				
Rossoe Mfg. Co.			16.55	16.35	16.35
Scott-Newcomb, Inc.	21.08			15.15	
Standard Products Co.					17.30
Volcano Burner Corp.	21.08				
Wayne Oil Burner Corp.			17.30		
Williams Oil-O-Matic	15.73	14.53	14.65	14.30	13.30
Wisconsin Oil Burner Co.				17.30	15.55
York Oil Burner Co., Inc.	17.25	18.25			

1211 RESPONDENT'S EXHIBIT NO. 185-A.

Price Brackets Extended Certain Customers By Minneapolis-Honeywell Regulator Co. 1937-41

	1937	1938	1939	1940	1941
Acme Tool & Gauge Co. Pawtucket, R. I.	2	2	2	3	3
Alida Manufacturing Co. Brooklyn, New York	1*	1*	No	No	No
Arcweld Manufacturing Co. Seattle, Washington	1	1	Dis.	Dis.	No
Automatic Burner Corp. Chicago, Illinois	5	4	4	5	5
Bedard & Johnson Co. Minneapolis, Minn.	1*	1	1	1	1
Berggren Engineering Co. Brooklyn, N. Y.	1*	1	No	No	No
Bock Corporation Madison, Wisconsin	1	1	1	1	1
Braden Engineering, Inc. Providence, R. I. (Weatherall in 1938)	3	2	3	3	3
Brown Oil Burner Equipment Co. Cambridge, Mass.	1	1	1	1	1
Buck Engineering Co., Inc. Freehold, New Jersey	1	1	1	1	1
Burner Parts & Service Corp. Lancaster, Pa. (now Penn Boiler & Burner Co.)	1*	1	1	Dis.	Dis.
Campbell Machine Co. Minneapolis, Minn.	2	1	2	2	2
Century Engineering Co. Cedar Rapids, Iowa	5	4	4	4	4
Cleveland Steel Products Corp. Cleveland, Ohio	3	3	4	5	5

1212 RESPONDENT'S EXHIBIT NO. 185-B.

	1937	1938	1939	1940	1941
Citro Oil Burner Corp. Pompton Lakes, New Jersey	1	1	1	1	1
Concord Oil Corp. Brooklyn, N. Y.	3	2	3	3	3
D'Elia Oil Burner Co. Bridgeport, Conn.	3	2	3	3A	3A
Desoto Oil Burner Corp. York, Pa.	No	1	2	2	3
Diesel Burners, Inc. Moosup, Conn.	2	1	1	1	1
David Duff & Sons, New Bedford, Massachusetts	1	1	1	1	1
Eisler Engineering Co. Newark, N. J.	2	1	Dis.	No	No
Electrol, Inc. Clifton, N. J.	3	2	2	3	3
Electromatic Oil Burner Co. Malverne, N. Y.	1*	No	No	No	No
Enterprise Oil Burner Corp. San Francisco, Calif.	1*	1	2	2	3
Fairfield Oil Heating Co. Greenwich, Conn.	2	1	2	2	2
Fargo Foundry Co. Fargo, N. D.	2	1	1	1	1
Gar Wood Industries, Inc. Detroit, Michigan	4	3	4	4	4
General Oil Burner Corp. Baltimore, Md.	3	2	2	2	2
General Oil Heating Corp. West New York, N. Y.	2	1	2	2	2
Capitol Oil Burner Co. Hartford, Conn.	1	1	No*	No	No

1213 RESPONDENT'S EXHIBIT NO. 185-C.

	1937	1938	1939	1940	1941
Carlson Bros. Tool & Machine Co. Boston, Mass.	1	1	1	1	1
Carter-Korth Oil Burner Co. Roselle Park, N. J.	3	2	3	3A	4A
Gold Star Oil Burner Mfg. Co. Yonkers, N. Y.	3	2	3	3	3
Goodrich Oil Burner Mfg. Corp. New Haven, Conn.	1	1	1	2	1
Greenwood Engineering Co. Glenarm, Md.	Dis.	1	Dis.	Dis.	1
Hall-Neal Furnace Co. Indianapolis, Ind.	No	No	No	2	2
Harrison Sales Co. Seattle, Wash.	1	1	1	1	1
Hart Oil Burner Corp. Peoria, Ill.	4	3	3	3	3
Harvey-Whipple, Inc. Springfield, Mass.	4	4	4	4	4
Hayward Manufacturing Co., Inc. Brooklyn, N. Y.	3	2	3	3	3
The Heil Co. Milwaukee, Wis.	3	2	3	3A	3A
Herco Oil Burner Corp. Lancaster, Pa.	3	1	3	3	3
Hi-Point Corp. Bellefontaine, Ohio	2	1	2	2	2
Hoben Manufacturing Co. Waltham, Mass.	2	2	1	1	1
Holtum Manufacturing Co. Freeport, Ill.	1	1	1	Dis.	No
Homestead Engineering Corp. Brooklyn, N. Y.	No	No	No	No	No

1214 RESPONDENT'S EXHIBIT NO. 185-D.

	1937	1938	1939	1940	1941
Hubbard Oil Burner Co. Minneapolis, Minn.	2	2	2	2	1
Hupp Oil Burner Co. Brooklyn, N. Y.	2	1	2	2	2
Hyle Oil Burner Co. Baltimore, Md.	1	1	1	1	1
Jacobson Manufacturing Co. Racine, Wis.	1	1	1	No	No
Kelly Oil Sales Corp. Arlington, Mass: (changed to Sunray Burners, Inc. June, 1941)	4	3	3	3	3
LaGace Oil Burner Co. Woonsocket, R. I.	2	1	No	No	No
Liberty Research Lab., Inc. Farmingdale, N. Y.	1	1	1	No	No
Lynn Products, Inc. Lynn, Mass.	3	2	3	3	3
Malleable Iron Fittings Co. Branford, Conn.	3	2	2	3	3
Master Oil Burner Co. Seattle, Wash.	1	1	Dis.	Dis.	No
Messer Company Newark, N. J.	2	1	1	1	1
Micro-Westco., Inc. Bettendorf, Iowa	4	2	3	4	5
Mohawk Oil Burner Mfg. Co. New York, N. Y. (Joseph Toker Co. in 1939)	2	1	2	3A	3A
Montag Stove & Furnace Works Portland, Ore.	3	2	2	2	3
G. T. Muehlbach Co. Minneapolis, Minn.	1	1	1	No	No

1215 RESPONDENT'S EXHIBIT NO. 185-E.

	1937	1938	1939	1940	1941
National Devices Co. Bellmore, N. Y. (changed to Liberty Airflo Burner, Inc. in July, 1939.)	1	1	1	1	No
Neis & Brechtl West Allis, Wis. (changed to blower controls)	1	1	No	No	No
Oil Equipment Laboratories Elizabeth, N. J.	2	1	2	2	2
Old Colony Machine Works Co. Fall River, Mass.	2	1	1	1	1
Osher & Reiss, Inc. Brooklyn, N. Y.	2	1	1	1	1
Packard Oil Burner Mfg. Co. Bridgeport, Conn.	2	1	1	No	No
Pan-American Engineering Corp. Berkeley, Calif.	2	1	1	1	1
Penn Petroleum Products Co. Providence, R. I.	2	1	1	1	1
Petroleum Heat & Power Co. Stamford, Conn.	5	4	5	5	5
Quiet Heet Mfg. Corp. Newark, N. J.	5	4	5	5	5
Quiet Heat Oil Burner Co. Brooklyn, N. Y.	1	1	1	1	1
Reliable Oil Burner Corp. Madison, Wis.	1	1	1	1	Dis.
Reif-Rexoil, Inc. Buffalo, N. Y.	3	3	3	4	4
Rossoe Manufacturing Co. Seattle, Wash.	2	1	1	2	3

1216 RESPONDENT'S EXHIBIT NO. 185-F.

	1937	1938	1939	1940	1941
Silent Flash Oil Burner Corp. Brooklyn, N. Y.	1	1	1	1	1
S-K Company Camden, N. J.	3	2	2	2	2
Simplex Oil Heating Corp. New York, N. Y.	2	1	1	1	1
Standard Products Co. Clinton, Mass.	3	3	2	No	No
Scott-Newcomb, Inc. St. Louis, Mo.	2	1	4	4	4
Sunray Oil Burner Corp. Rockaway Park, N. Y. (changed to Independent Oil Burner Corp. in March, 1937.)	3	2	3	3A	3
Todd Combustion Equipment, Inc. New York, N. Y.	1	1	1	2	2
Timken-Detroit Axle Co. Detroit, Michigan	6	5	5	5	5
Volcano Burner Corp. New York, N. Y.	3	2	3	3	3
Wayne Oil Burner Corp. Ft. Wayne, Ind.	3	2	3	4	4
Harry C. Weiskittel Co., Inc. Baltimore, Md.	2	1	1	1	1
Westchester Home Equipment Co. Mt. Vernon, N. Y.	2	1	2	2	2
Williams Oil-O-Matic Bloomington, Ill.	3	5	5	5	5
Wisconsin Oil Burner Co. Madison, Wis.	2	2	2	2	3
York Oil Burner Co., Inc. York, Pa.	3	3	3	3	3

*Some of records for the earlier years have been misfiled—and the brackets shown were arrived at from the customer's quantity purchases for the year in question.

1224 UNITED STATES OF AMERICA.

Before Federal Trade Commission.

* * (Caption—4920) * *

TRIAL EXAMINER'S REPORT, FINDINGS, CONCLUSIONS AND RECOMMENDATIONS.

The Federal Trade Commission, stating its reason to believe that Minneapolis-Honeywell Regulator Company, the respondent herein, has violated the provisions of Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, and the said Commission, stating its reason to believe that said respondent had violated Section 3 of the Clayton Act as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13), and had violated Section 2 of the Act last named and cited, issued its complaint against said respondent on the 23rd day of February, 1943, alleging in Count I, Count II and Count III, as of the said date and prior thereto, substantially as follows:

Synopsis of Complaint.

Count I (Sec. 5, F. T. C. Act.)

I (a) Respondent Minneapolis-Honeywell Regulator Company (Honeywell) is a Delaware Corporation with principal office at 2747 Fourth Avenue, South, Minneapolis, Minnesota.

I (b) Respondent manufactures automatic temperature controls for oil, gas and coal heating plants, and sells the same to oil burner manufacturers, jobbers, wholesalers and dealers in oil burner equipment throughout the United States. It sells more than 60% of said controls re-
1225 quired by burner manufacturers, contractors and dealers in domestic automatic heating equipment, and sells under annual contracts, to a majority of the manufacturers of oil burners for domestic heating plants, automatic temperature controls equal approximately to their annual requirements.

I (c) Respondent sells and ships the aforesaid products from its places of manufacture in Minnesota, Indi-

ana, Pennsylvania and through distribution points in other states, to the said purchasers located in various states other than the states of manufacture, maintaining a constant current of trade and commerce between said states and the District of Columbia.

I (d) Respondent, in the sale of automatic temperature controls in commerce, as aforesaid, is in substantial competition with approximately six other concerns likewise engaged.

II (a) Three types of controls are used in automatic burners, to-wit:

(1) A thermostat placed in the space to be heated;

(2) A limit control on the heating plant to control temperature or pressure therein; and

(3) A primary control to prevent explosions, which is sometimes augmented by a fan control.

Many manufacturers purchase thermostats and primary controls for use as zone controls in the heating of large spaces. The primary control, sometimes called a combustion control, a master control, or a safety control, is an essential element in every domestic oil burner.

II (b) Respondent owns most of the patents on said primary controls (Protectorelay), but there are many thermostats and limit controls made or sold by its competitors which are satisfactory and safe to use and 1226 are interchangeable with the thermostats and limit controls made and sold by respondent.

III In 1936 and prior thereto, respondent agreed, or attempted to agree, in writing with all its domestic oil burner manufacturer-customers that they would purchase their requirements of automatic temperature controls from it in sets of one thermostat, one limit control, and one primary control at a combination price per set, and that at least 95% of the customers' requirements would be so purchased from it; but the 95% provision was omitted from these contracts from January, 1937.

In all its said agreements the customer must buy in sets, taking 90% as many room thermostats and 100% as many limit controls as primary controls (patented), and it was agreed that it was unsatisfactory and often dangerous to mix controls made by different manufacturers, and that respondent would not assure satisfaction or assume any service responsibility if its controls were used with other makes.

IV The foregoing practices have induced a substantial number of manufacturers to purchase all or the larger part of their automatic temperature controls from respondent and have prevented its competitors from selling substantial quantities of thermostats and limit controls to said manufacturers.

V Respondent acquired a system patent covering "furnace control" under which was made and sold a combination furnace control system consisting of the limit control, a fan control, and a thermostat, none of which were covered by patent, but all were operated under the said system patent. It granted or attempted to grant, under threat of infringement suit, non-exclusive licenses to certain competitors to make and sell this combination furnace control on payment of a royalty of 50¢ per unit and on the further consideration that the sets were not to be sold at prices and on terms more favorable to the customer than those contained in respondent's price schedules issued from time to time. The price schedule also contained minimum prices to be observed by jobbers, wholesalers, and dealers. Respondent's sales of said combination have increased substantially since 1930.

1227 VI Respondent made and sold combustion stoker switches to customers under so-called exclusive license agreements to use and sell it in combination with other devices manufactured under a system patent, and under respondent as exclusive licensee, which product was known by respondent not to be covered by said patent.

VII The aforesaid acts and practices are to the prejudice of the public and of respondent's competitors, and have the tendency and effect of hindering and preventing competition in commerce and of restraining trade, all in violation of Section 5 of the Federal Trade Commission Act.

Count II (Sec. 3, Clayton Act.)

I, II, III, IV adopt the corresponding paragraphs of Count I.

V Respondent in the conduct of its business as aforesaid has made sales and contracts for the sale of automatic temperature controls for heating plants on condition, agreement or understanding that the purchasers thereof should not deal in or use any automatic temperature controls for heating plants of its competitors, and the effect of said

contracts, sales, and agreements may be and has been to lessen competition substantially or tend to create monopoly in this line of commerce.

VI The aforesaid acts and practices constitute a violation of Section 3 of the Clayton Act.

Count III (Clayton: Robinson-Patman.)

I, II adopt the corresponding paragraphs of Count I.

III In the conduct of its business as alleged, respondent discriminates in price between different purchasers of automatic temperature controls of like grade and quality by selling the same to some customers at lower prices than to others competitively engaged with each other in the
1228 resale of said products within the United States, by the following practices and methods:

III (1) Classified customers as (a) oil burner manufacturers, (b) oil burner jobbers, (c) oil burner wholesalers, Class A, (d) oil burner wholesalers, Class B, and E dealers; and

III (2) Publishes price lists for its said products, giving different discounts, varying from 25 to 45 per cent to its customers according to the foregoing classification, the maximum discount of 45% being given on minimum quantities to oil burner manufacturers who purchase approximately 95% of its temperature controls;

III (3) Selling thermostats, primary controls, or limit controls in units and sets to manufacturers under contracts providing for annual discount arrangements for seven separate price brackets with net prices proportioned to quantity requirements;

III (4) Sells contract customers buying 50 sets annually at approximately 45% less than the list price in effect, and making discriminatory discounts according to quantity bracket quotations to those buying more than 50 sets per year, said discounts varying from 45% in 1938 to 30% in 1940.

IV The effect of said discriminations has been and may be substantially to lessen, injure, prevent and destroy competition between respondent's customers and to create monopoly in the line of commerce in which respondent and its competitors are engaged.

V The foregoing acts and practices are in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act as heretofore cited.

The Answer.

Count I.

Respondent, in its answer to the complaint admits certain allegations, while denying other allegations contained therein. Respondent filed its answer to the complaint 1229 on April 17, 1943, in which it admits the facts as to its corporate name, its location, business engaged in, and interstate commerce features, and that it is engaged in competition with numerous competitors.

Respondent admits Paragraph 1 of Count I except respondent is without knowledge as to certain averments set forth therein; respondent admits Paragraph 2 of Count I but denies there are many thermostats being manufactured and sold by competitors which could be safely or satisfactorily used interchangeably with thermostats sold by respondent; respondent admits Paragraph 3 of Count I that in January of 1937 it discontinued the provision at that time in some of its contracts with oil burner manufacturers with respect to the 95% customer-controlled requirements with its domestic oil burner manufacturer-customers, and since that time has not entered into contracts containing said provisions; respondent denies Paragraph 4 of Count I except respondent admits that a substantial number of oil burner manufacturers have purchased from respondent the majority of their requirements of automatic temperature controls; respondent made answer to Paragraphs 5 and 6 of Count I and reference thereto will be made hereafter in connection with a stipulation entered into between counsel in reference thereto; respondent denies the allegations of Paragraph 7 of Count I.

Answer to Count II.

Respondent denies the violation of Section 3 of the Clayton Act.

Answer to Count III.

Respondent admits certain allegations contained in Paragraphs 3 to 5 of Count III of the complaint, but denies that it has violated Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Appearances.

The Commission was represented in this proceeding by Attorney Everett F. Haycraft of the Chief Counsel's Staff, and the respondent was represented by the law firms
1230 of Cravath, Swaine & Moore, located at 15 Broad Street, New York, New York, and the firm of Bair & Freeman, located at 135 South La Salle Street, Chicago, Illinois, and at the trial appeared as counsel in person Will Freeman and R. L. Gilpatric. Pursuant to the order and designation of the Federal Trade Commission, the undersigned Trial Examiner of the Commission, heretofore duly appointed, proceeded to take testimony and receive evidence in the case beginning in Chicago, Illinois, August 10, 1943, followed by other hearings in New York City and other cities throughout the country. The taking of testimony was closed at Chicago, Illinois, after the termination of the respondent's case and rebuttal testimony on the part of the Commission on the 4th day of October 1945, and the case later closed by order of the Examiner dated the 14th day of February 1946. All the testimony and evidence and exhibits adduced at the several hearings held in the trial of the case were duly filed in the office of the Federal Trade Commission in Washington, D. C.

Under the Rules of Practice of the Commission, respondent's counsel and counsel for the Commission filed with the Examiner suggested findings which were duly considered by the Examiner in the preparation of his Report.

Foreword.

When used in this Report (a) "oil burners" means automatically operated and controlled oil burners of the pressure and rotary types for domestic heating plants, and does not include any other type of oil burner such as vaporizing, pot and distillage types, and industrial or commercial oil burners; (b) "automatic temperature controls" means automatic temperature controls for oil burners of the kind set forth above. (CX 1, pp. 2-3.)

Report Upon the Facts.

I.

(a) Respondent Minneapolis-Honeywell Regulator Company (hereinafter referred to as "M-H") is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, having its general offices and principal place of business at 2747 Fourth Avenue, South, in the City of Minneapolis, State of Minnesota. (CX 1—Answer.)

1231 (b) Respondent is now, and for more than three years last past has been engaged in the manufacture of automatic temperature controls for oil, gas and coal heating plants and industrial operations, and in the sale thereof to oil burner manufacturers, to jobbers, wholesalers and dealers in oil burner equipment located throughout the several States of the United States, the Territories thereof, and in the District of Columbia. Respondent is the principal manufacturer (Record 718) of automatic temperature controls in the United States, the total volume of its sales of controls annually during the years 1939, 1940 and 1941, constituting approximately 60% of the total number of automatic temperature controls sold annually in the United States to manufacturers of oil burners, and to wholesalers, contractors, and dealers in oil burners and automatic controls. Respondent, in the sale of automatic temperature controls, has entered into annual contracts or agreements with manufacturers of oil burners for domestic heating plants since prior to 1943, and the number of manufacturers of oil burners having such contracts with respondent during said years, constituted more than 50% of all the manufacturers of oil burners within the United States. (CX 1, Par. 3.)

(c) When sales of respondent's automatic temperature controls are made respondent causes such products to be transported from the place of manufacture in the States of Minnesota and Indiana, and through distributing points in other States of the United States, to the purchasers thereof located in states other than the state of manufacture, and there is now a constant current of trade and commerce in such products within and between the various States of the United States, the Territories thereof, and in the District of Columbia. (CX—Answer.)

(d) Respondent, in the sale of automatic temperature

controls from 1935 through 1941, had a number of competitors, among whom were (1) The Penn-Electric Switch Company, hereafter referred to as "Penn", located at Goshen, Indiana; (2) Mercoid Corporation, hereafter referred to as "Mercoid", located in Chicago, Illinois; (3) Perfex Corporation, hereafter referred to as "Perfex", located at Milwaukee, Wisconsin; (4) General Electric Company, hereafter referred to as "General Electric", which company manufactures thermostats, limit and primary controls used on oil burners, which said company manufactures, and which compete with respondent's controls (Record 43). The General Electric Company [per se] did not solicit the oil burner manufacturing trade (Record 44-45). Competitors of respondent from 1936 1232 through 1941, in the case of temperature controls (individual devices) were as follows: (a) White-Rogers Company of St. Louis, Missouri which sold thermostats and limit controls and fan controls but did not sell primary controls (Record 46); (b) General Control of Los Angeles, California, which manufactured thermostats and limit controls but made no attempt to sell the controls in the oil heating field (Record 46); (c) Detroit Lubricator Company of Detroit, Michigan, which makes thermostats but purchases its primary controls from "Penn"; (d) The Spencer Thermostat Company of Atterbury, Massachusetts, which sells thermostats and limit controls; (e) and several others, such as the Newark Boiler Regulator Company of Newark, New Jersey, The Bendix Warwick Company of Detroit, and The Donlor-Milton Company of Chicago. Respondent's principal competitors are in the order of their size, first, Perfex and Penn, and second Mercoid and Detroit Lubricator (Record 43 to 53; 197-198; 376-377; 381; 720). All of said competitors of respondent manufacture controls for use on oil burners, some of which controls, made by each are comparable to controls made by respondent and other companies. (Record 232; 858-862; 1454-1456.)

(e) The Record discloses that all manufacturers of temperature controls such as Mercoid, Perfex, Penn and Detroit Lubricator, and respondent "M-H" are all in competition with each other in the sale of such temperature controls, and the Record shows that during the years stated there has existed a very keen competitive situation in the sale of temperature controls between the manufacturers thereof, throughout the entire country. (Record

2226-2228; 355; 671-674; 1284). During the years from 1936 to 1941 there was a general era of prosperity among all the manufacturers of automatic temperature controls except during the year 1938 when there was a general let-up in the industry, in the sale of controls, the effect of which was felt by nearly all the manufacturers thereof. (Record 1457.)

(f) Respondent "M-H" was organized in the year 1927 and was an amalgamation or consolidation of two predecessor companies (a) the Minneapolis Regulator Company which had been organized in 1885, and (b) the Honeywell Heating Specialties Company, which company had been organized about 1906, and both companies had been engaged in the same line of business (Record 1463-1464). After the consolidation of the two companies and in 1931, they acquired the assets of Time-O-Stat Controls
1233 Company of Elkhart, Indiana. This company was operated for a short period after the purchase and was later sold. A number of years ago before the oil burner was introduced, temperature controls were very simple and few in number. Respondent, "M-H", at that time manufactured two basic types of room thermostats, three basic types of limit controls, and three types of primary controls (Record 1919-1920), all multi-operated devices. After the oil burner came into use controls changed greatly, becoming more complex and complicated. (Record 1473.) The first concern to manufacture oil burner controls were the American Nokol Company, The Williams Oilomatic and Kleen-Heat, back in 1920. The Doble Car Company made a burner back in 1917 but this company was absorbed by American-Nokol Company (Record 1513). The Record contains a description of some of the earlier types of controls and those which have followed in due course of development up to the present time (Record 1515-1548; RX 107-108-109).

(g) Harold W. Sweatt and Charles B. Sweatt, now President and Vice-President respectively of respondent "M-H" are sons of William R. Sweatt, who was one of the officers of respondent company back in 1899 (Record 1496-1497). Respondent "M-H" had outstanding in 1939 in round numbers 622,000 shares of common stock of no par value (Record 1496). About 80% of respondent's business is devoted to the manufacture of automatic temperature controls (Record 1497).

(h) Respondent "M-H", and its predecessor companies have been extensive advertisers of their line of controls and have, for many years, utilized in their advertising of controls the nationally known magazines published in the United States, and since the formation of the respondent corporation in 1927, and through 1941, respondent has spent on national advertising the sum of, $3,948,000.; in the year 1931, respondent spent approximately $277,000. in advertising its products (Record 1467). Respondent has always, throughout the years, been a leader in the field of controls manufactured, and in the development and betterment of new and better controls, and respondent, throughout the years has spent extensive sums of money in engineering and development work, not only creative engineering of new devices, but in the constant redesigning and improving of its products, and in the lowering of costs. It is shown that respondent spent almost as much in research and engineering work as in advertising its controls (Record 1469). Respondent, since 1935, has 1234 maintained branches throughout the United States in the major centers of population (Record 19-21; Exhibit 104); at each branch respondent has a branch manager, a sales manager, and a number of salesmen. Respondent maintains in its business 39 branch and district offices throughout the United States, 5 such located in Canada, and respondent maintains a foreign subsidiary in both England and Sweden. (Record 1471-1472.) Respondent operates two major plants for the manufacture of its products, one located at Philadelphia, Pennsylvania, and the other in Minneapolis, Minnesota. Respondent's branch offices have three main functions: (1) they carry a complete line of respondent's controls; (2) they are the headquarters for respondent's sales groups who cover the surrounding territory selling to manufacturers, jobbers, dealers, architects, heating engineers, and home owners; (3) there is maintained at branch offices a complete service set-up of specializing service engineers (Record 1474-1475). Respondent maintains service schools for the training of its personnel in contacting customers and in performing all the duties of salesmen and the maintaining of service (Record 1475).

II.

(a) The term "Automatic Temperature Control" means automatic temperature control for use on domestic oil burners of the gun or pressure type and rotary type of oil burner. Respondent has manufactured, for many years, automatic temperature controls which it sells to oil burner manufacturers, equipment manufacturers and to the trade in oil burners. Respondent's business in the sale of its controls to oil burner manufacturers and equipment manufacturers, since 1928, has been larger than in the gas and stoker field (Record 12). Respondent has always stressed its sales to manufacturers of oil burners and endeavors to sell said manufacturers first (Record 1487-1488). The main types of oil burners involved in this case and with which respondent's controls are used, are of two types, principally, (a) the gun type or pressure type (the words "pressure" and "gun" in this type are used interchangeably), and (b) the rotary type of burner. In the operation of oil burners there are three types of temperature controls required, (a) the room thermostat, (b) the limit control, and (c) the primary control (Record 13-14). The thermostat controls the temperature within the enclosure in which it is located (the room in which it is placed); the limit control is a device used on the heating plant whether it be steam, hot water, or warm air, and it performs a safety function. It is set to keep
1235 the heating plant at a certain temperature or pressure limit. The limit controls which are used with warm air furnaces are called aerostats; that used with the hot water heating system is called an aquastat and that used with a steam boiler is called a pressuretrol; this is referred to as a vaporstat, when a vapor heating system is involved (Record 14). The primary control is an actuating device which starts and stops the oil burner at the direction of the room thermostat. It stops the oil burner in the event the limit control misses its setting, and it also performs the duty of controlling the abnormal discharge of oil within the furnace or heating plant (Record 15); this control is called a protectorelay (Record 15). Illustrations of these devices are shown in the Record (CX 1; Record 15). In addition to the controls described above some oil burners have an installation employing a fan control, used for driving warm air to the space to be

heated, and operates to prevent the fan from starting until the right temperature has been reached (Record 15-16).

The primary control, referred to above, was sometimes called a master control or combustion control, or a safety control, and it is an essential element in every oil burner installation (CX-1; p. 17).

(b) It is shown that respondent owns most of the patents on primary controls (protectorelays), (CX-1; RX 72-103-169-183-185). For many years manufacturers of automatic temperature controls have been selling their makes of standard controls in sets (Record 31, 225; 1261-1262; 1376; 2143). It is shown, however, that some of the thermostats manufactured and sold by the respondent may be used with limit controls and primary controls manufactured and sold by competitors of respondent (CX-1, p. 8); further, that some of the primary controls manufactured and sold by respondent may be used with limit controls and thermostats manufactured and sold by competitors of respondent (CX-1, p. 8). The Record shows that thermostats and primary controls manufactured by respondent for use with oil burners, give greater satisfaction, and more efficient performance in the ordinary installation than when controls of similar kinds, manufactured by other manufacturers, are mixed in the same installation. The evidence shows that it is not a good practice to use controls of respondent "M-H" with controls of different makes; that the thermostat of respondent "M-H" has a special co-ordinating and cooperating function with primary controls, and for safety and to keep down costs and field troubles, to mix controls of different manufacturers, in the same installation is not a good practice (Record 818-820; 1265-1266).

1236 (c) The Record shows that because of the extensive national advertising of respondent "M-H", for many years, of its automatic temperature controls, and the reputation for such controls as to good performance and efficiency in operation in installments, there has developed a large customer demand for and public acceptance of respondent's line of automatic temperature controls (Record 1247-1248; 1711-1713; 1800); that respondent's controls now and for a number of years past have been sold at higher prices than controls of other makes (Record 1150; 1492; 1690; 1787; 1868; 1963; 1979). The evidence shows that the demand for respondent's automatic tem-

perature controls gives dealers an opportunity to charge more and obtain a higher price for burners equipped with respondent's controls than when controls of competitors are used (Record 1247), and that there are some dealers who would not purchase burners without "M-H" controls (Record 1247).

III.

(a) Respondent "M-H" during the years from 1936 to 1941 inclusive, made sales of its automatic temperature controls to approximately 150 to 200 oil burner manufacturers throughout the United States (Record 1948); the Record contains a list of oil burner manufacturers, customers of respondent, showing purchases from 1937 to 1939 (Record 494; CX-84-A,D). It has been the policy of respondent from 1936 to 1941 to enter into individual sales agreements. (contracts) with oil burner manufacturer-customers. These agreements are usually written on a calendar year basis. The agreements are prepared in early December of the previous year in Minneapolis, Minnesota, for submittal of the following year's business (Record 25). Respondent's sales agreements are also at the branch offices of respondent throughout the United States, where meetings are held of the various personnel involved and where current problems of the various oil burner manufacturers are discussed. Sales agreements are given after preparation and discussion, to the salesmen who interview said manufacturers of oil burner equipment and secure the manufacturers' signatures to said agreements. They are then submitted to the home office in Minneapolis (or branch office manager in the field) for approval and signature (Record 27). Managers are authorized to sign agreements on behalf of the respondent; however, sales agreements are usually signed at the home office of respondent by one of its Vice-Presidents (Record 28-29). Respondent, in December 1936, entered into, or attempted to enter into written agreements for the year 1939, with

1237 certain of its oil burner manufacturer-customers, under the terms of which the customer was obligated to purchase his requirements of controls from respondent, such controls to be purchased in sets consisting of a thermostat, a limit control and a primary control at a combination price per set. Said sales agreements contained the following language:

"It is specifically agreed that other control equipment is not to be considered as part of a set within the terms of this contract because the Company's costs are figured to cover a complete set of controls and the following breakdown prices are purely for enforcing purposes. It is agreed that the purchasers' yearly purchases will consist of at least 90% as many thermostats and 100% (but at the company's option not more than 125%) as many limit controls as primary controls. * * * The Purchaser agrees that at least 95% of his control requirements consisting of thermostats, primary controls and limiting devices will be purchased from the Company."

(CX-1; 11-A to B; 17-A tl B; 18-A,B; 19A,B; 21,22; 23-A to B; 24-A to B; 25-A to B; 66-A to B; 87; 132; Record 25, 27-29; 98-99; 110-111; 115; 142-147; 248-249; 572-577; 608; 863-864.)

On January 28, 1937, respondent eliminated the 95% clause from its existing contracts with its oil burner manufacturer-customers and released said manufacturer customers therefrom. (CX 1, p. 14; 21-23; Record 110-111-115.) The 95% provision in respondent's 1936 sales agreement never became operative and no customer was required to comply therewith (Record 109-111).

In respondent's 1937 sales agreement with 79 of the 165 manufacturers of oil burners with whom respondent entered into contracts for the year 1937 were the following provisions:

"The Purchaser agrees that at least ninety-five (95) percent of his control requirements consisting of Thermostats, Primary Controls and Limit Devices, will be purchased from the Company." (CX-1, pp. 10-13.)

1238 Respondent's sales agreements entered into with its oil burner manufacturer-customers for the year 1939 and subsequent thereto, contain the following language:

"The Company agrees to sell, and the purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of satisfactory operation nor assume any service responsibility

if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and, 100% as many Limit Controls as Primary Controls at the following Prices." (CX-1, 14-16, 145-149-151; 200; Record 906, 909-911, 903-916, 1162-1164, 1245-1246.)

In the above sales agreement, between the words "contract" and "sets" respondent's customers for 1937 were to give the number of sets to be purchased, but with certain of respondent's customers the words "season requirements", or the words "estimated requirements" were inserted.

(b) The evidence shows that the three largest manufacturers of automatic temperature controls competing with respondent "M-H" in the sale of said controls to purchasers thereof are (1) Perfex; (2) Penn, and (3) Mercoid; all three of said companies compete in the sale of controls with each other and with respondent "M-H". The Perfex Company began its controls business in 1935, starting from scratch, and has increased its position in the controls field until now it occupies the position of second in the sale of controls (Record 342; 349). One of the reasons assigned for the growth of Perfex, as stated by a witness, is the fact that this company endeavored to sell its controls to large, nationally known companies; and to approach their customers with the idea of putting the customer's name on their burners, instead of the manufacturer's name (Record 381). It is shown that each year from the beginning of the Perfex Company, its business has shown an increase in volume up to 1941 (Record 431). The Mercoid Corporation began manufacturing automatic temperature controls in 1920, selling the same to oil burner manufacturers; Mercoid prior to 1928, was known as The Federal Gauge Company (Record 223). This company manufactures primary controls, limit controls and thermostats. The majority of the controls of Mercoid are sold in sets. However, there are occasions when sales of thermostats and primary controls, and not limit controls, are made; such is the case where a customer furnishes only two controls with the burner, allowing the dealer to furnish his limit control (Record 225-226). Penn started to manufacture and sell automatic controls for domestic oil burners in 1932 (Record 1368), and thereafter

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was in active competition with other controls manufacturers such as respondent "M-H", "Mercoid", and later with "Perfex" (Record 1417); the testimony shows that by 1941 Penn was considered by some to be the second largest controls manufacturer in the industry (Record 1370; 1417-18; CX 207-A, B). Another competitor engaged in the manufacture of automatic controls which it sells to oil burner manufacturers is the Detroit Lubricator Company which began business about 1933 (Record 643); this company did not make and sell a complete line of controls until 1939 (Record 648); it did not develop its limit control until 1939, however, it made sales up to that time of its thermostat, its customers buying limit controls on the open market, and this company purchased its primary controls from respondent "M-H" (Record 649).

(c) It is shown that all manufacturers of automatic temperature controls such as "Perfex", "Mercoid", "Penn-Electric" and "Detroit-Lubricator" followed in the main, the same procedure and practices in the sale of thermostats, limit and primary controls to oil burner manufacturer-customers; (a) they all travel salesmen calling on prospective customers; (b) they all maintain branch offices and distributing points at various places throughout the United States; (c) they all have bracket prices and recognize different trade channels such as manufacturers, jobbers and dealers (CX 55; RX 78; Record 1361); (d) they all sold controls in sets and quoted varying price brackets (Record 225; 704; 1362-63; 2139-40).

(d) The term "oil burners" in this proceeding, means automatically operated and controlled oil burners for domestic heating plants, and in this case those specially involved are the gun or pressure type and rotary type although there are other types of oil burners such as vaporizing and pot types (CX-1, pp. 203). Respondent's automatic temperature controls are used mainly on the gun or pressure type burner and the rotary type burner (CX-1, p. 6; Record 116-117). Some of respondent's controls however, are sold for use on vaporizing and pot type burners (Record 1736). The Record contains an explanation of the rotary and gun type oil burners and how said burners operate mechanically (Record 728-736). The pressure or gun type burner (in brief) operates by delivering the oil under pressure through an atomizing

nozzle which breaks the oil down to a fine spray, 1240 which is then ignited (Record 728; RX 106). The rotary type burner sprays oil across the hearth so that it burns at the wall of the heater with a gaseous flame; the oil is thrown with centrifugal force (Record 727-728; RX 106-E, F).

(e) There are many oil burner manufacturers doing business in the United States, numbering approximately 300 in 1941 (CX-1, p. 5; Record 1658); some of these have been in business for many years (Record 1899-1900); others did not begin business until latter years (Record 850). The large majority of oil burner manufacturers "assemble" rather than "fabricate" the burners they sell. Such oil burner manufacturers purchase in the open market the elements that go to make up an oil burner, such as pumps, motors, transformers, blower wheels, and automatic temperature controls, and assemble these in the plant of the manufacturer into the completed oil burner (Record 995-96). However, there are other oil burner manufacturers who themselves manufacture some of the parts that go into the completed oil burner. Certain furnace manufacturers sell complete boiler burner units, and such manufacturers usually buy the burner units from oil burner manufacturers and the automatic temperature controls for both the burners and the furnaces, direct from manufacturers of automatic temperature controls.

There are only a few manufacturers who make the rotary type of burner. These are Timken, Cleveland Steel Products, Silent Glow, Petroleum Heat & Power Co., Anchor Post Fence Co., ABC Automatic Burner Corporation (Record 116). All others are gun type burners (Record 117).

IV.

(a) Respondent "M-H", during the period from 1936 to 1941 inclusive, attempted, through its sales force, and negotiations with everyone of its oil burner manufacturer-customers, to have said customers standardized on respondent's automatic temperature control (Record 69; 71 to 78; 176-179; CX 26-27). When an oil burner manufacturer standardizes on a particular type of automatic temperature control, it means that such oil burner manufacturer will buy, use and sell such controls as standard equipment on its own oil burner (Record 71-72). During

the time mentioned a substantial number of oil burner manufacturers, prospective customers of respondent, have been induced to purchase from respondent either all 1241 or the larger part of their annual requirements of automatic temperature controls (CX-1, pp. 13 to 17). During the time mentioned 50% of the manufacturers of oil burners in the United States had contracts or sales agreements with respondent "M-H" for the purchase of their automatic temperature controls (CX-1, p. 3). It is shown that some oil burner manufacturer-customers of respondent are reluctant to sign contracts or sales agreements for temperature controls but wish to be free to buy controls from whatever source they see fit (Record 1393). It is shown that there are other oil burner manufacturers who have signed sales agreements or contracts for designated numbers of sets of automatic temperature controls with respondent "M-H" who testified that, notwithstanding their said agreement, they feel free to purchase controls from whomsoever they please, and in fact did purchase from whatever controls manufacturer they wished (Record 1394; 1612; 1684; 1695; 1714; RX 118; Record 1838-40; 1967; 1963; 1979-80); however, respondent "M-H" solicited the controls business of the Timken Silent Automatic Company (hereafter referred to as "Timken") for its 1936 controls business. Timken first engaged in the manufacture of oil burners in 1927 or 1928, making a gun type burner; later this company made a rotary type burner (Record 556); Timken had been purchasing its automatic temperature controls from two different controls manufacturers and mixing said controls in the same set (Record 51; 444). Timken refused to enter into a sales agreement with respondent at the time mentioned, until a qualifying clause was placed in the contract, which clause left Timken free to purchase other controls from other sources as the Timken Company required (CX 66; Record 575-577). An official of Timken's stated that the company did not wish to sign a contract the company did not intend to live up to and the qualifying clause (CX 66) was placed in the contract so that Timken could purchase from other controls manufacturers; that Timken had no intention of buying all of their controls from respondent and purchased controls from both Perfex and Penn-Electric (Record 582-583). It was shown by the evidence that Timken wanted more than one source of supply in purchasing controls so that if their

dealers wished controls of another type than respondent's ("M-H"), Timken would be free to supply this demand (Record 1650). The Record discloses that Timken purchased controls from respondent to 1937, by a letter order but had no signed contract (CX 11-D; 12-A, B, C; CX 87; Record 579; 1650). There were no sales agreements 1242 or confracts between Timken and respondent in the years 1938 to 1941 (Record 579). The Malleable Iron Fittings Company of Stamford, Connecticut, an oil burner customer of respondent, understood the words "Season's Requirements" contained in the contract this company had with respondent, to mean that its requirements of controls were to be purchased from respondent exclusively, and for several years fulfilled the terms of its contract in accordance with such understanding. It was shown that up until 1939 the Malleable Iron Fittings Company bought controls from respondent only (Record 896), and that the provisions of the sales agreement with respect to the number of thermostats and limit controls to be purchased were adhered to during the life of the agreement (Record 893-896; CX 132; 133; 142; Record 993-4). There is testimony that certain of competitors of respondent experienced difficulty in making sales of their limit controls to oil burner manufacturers who had entered into sales agreements or contracts with "M-H" and which manufacturers questioned their moral or legal right to buy automatic temperature controls from another source after such oil burner manufacturers had entered into written contracts with respondent (Record 346); the effect of respondent's contract, with its oil burner manufacturer-customers, was, in the words of a witness: "Temporarily it sort of tied up our contracts with such manufacturers who had signed such an agreement." (Record 348.) (CX 2-12, 31-35, 31, 33-C, 34, 66-A to D, 67-68, 74-A, 75-A and B, 76-78, 81, 84-A to D, 86-87, 105-06, 107-B and C, 108, 109-B, 110-B and C, 111, 113, 116-A, 118-A, 132, 139, 140-A to C; Record 806-07, 831, 864-65, 895-98; 906-07, 910-12, 928-29, 941, 1094-95, 1127, 1140-41, 1156, 1162-64, 1230, 1245-46.)

V-VI.

(a) Respondent is the owner of the Freeman and Cross patents under which patents respondent manufactures its primary controls and thermostats involved and referred to as charged in Paragraphs 5 and 6 of the complaint in this case (RX 183; Record 2277-2279).

The Record discloses that at the time respondent made answer to the complaint in this case, respondent had a favorable decision with respect to respondent's practices in reference to the Freeman and Cross patents, from the United States Circuit Court of Appeals for the 7th Judicial Circuit. Subsequently, however, two cases involving said patents went before the United States Supreme Court, in December 1943, and were decided by the Court on January 3, 1944, the Supreme Court reversing respondent's favorable decision from the 7th Circuit, 1243 above referred to. Later, on February 7, 1944, the Supreme Court denied a petition for re-hearing (*Mercoid Corporation* v. *Mid-Continental Investment Co., et al.*, 320 U. S. 661 (1944) and *Mercoid Corporation* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944) reversing 133 F. (2d) 802 (1942) and 133 F. (2d) 811 (1942). (Record 2278-2279.)

Promptly upon the denial of the petition for re-hearing the Record discloses, respondent in this proceeding, (Docket No. 4920) terminated all its agreements of every kind involving either the Freeman patent or the Cross patent; all of respondent's practices condemned by the United States Supreme Court, had been eliminated and respondent's counsel stated that all of the practices complained of in connection with the Cross patent and the Freeman patent had now been ended, and are not now being carried on in any way by respondent Minneapolis-Honeywell Regulator Company (Record 2279).

VII.

The allegations of Paragraph VII as to prejudice to competitors and to the public, having a dangerous tendency to hinder and prevent competition in the sale of automatic temperature controls, and other allegations set forth in said Paragraph, as violations of Section 5 of the Federal Trade Commission Act, will be considered hereafter under Conclusions.

Count II.

I, II, III, IV adopt the corresponding paragraphs of Count I.

V.

(a) Respondent in the course of its business from December 1936 to 1941, inclusive, entered into sales agreements or contracts with a substantial number of oil burner manufacturer-customers for either all or a majority of their annual requirements of automatic temperature controls, in sets consisting of thermostats, limit controls and primary controls (CX-1). Such contracts contained the following language:

1244 "The Purchaser agrees that at least ninety-five (95) percent of his control requirements consisting of Thermostats, Primary Controls and Limit Devices, will be purchased from the Company." (CX-1, pp. 10-13.)

Some of respondent's oil burner manufacturer-customers entering into such contracts, did so with the understanding that they would use respondent's ("M-H") controls exclusively (Record 344-349; 894-898; 906; CX 107B, C). Other oil burner manufacturer-customers of respondent agreed to use respondent's automatic temperature controls as standard equipment on their oil burners, but some of said customers refused to sign sales agreements with respondent unless said agreements contained a qualifying clause placed in the contract to allow said oil burner manufacturer to be free to purchase competitive controls if such were requested by oil burner manufacturer-customers. In the contract (CX 66) entered into by Timken with respondent "M-H", such qualifying clause which was added to said contract by the officials of Timken was as follows:

"In view of the special price listed in this agreement it is understood that the Purchaser will standardize on and use Company's products exclusively, except for field tests or when other makes are specified by dealers." (CX-66; CX 11-A to C; CX 18-A, B; CX 19-A, B; Record 71 to 76; 96-99.)

Respondent entered into a sales agreement with the Cleveland Steel Products Company of Cleveland, Ohio, on December 2, 1936 (for 1937 business), under the terms of which respondent agreed to sell and the purchaser agreed to purchase, 1000 sets (3000 units) of respondent's

automatic temperature controls, each set consisting of one thermostat, one limit control, and one primary control; and it was agreed (in said contract) that the purchaser's yearly purchases "will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls."

Under the terms of said contract entered into by the Cleveland Company with respondent, it was provided that the purchaser should take at least as many limit controls as primary controls; in this case respondent was obligated to purchase 1000 limit controls and 1000 primary controls, and was required to buy 900 ther-
1245 mostats in order to fulfill the requirements of the contract (CX-1; CX 23-A, B), there remaining for the competitive market 10% of room thermostat sales, and no opportunity for sales by competitors of respondent of either limit or primary controls (CX-A, B).

The Record discloses that the contract made by the Cleveland Company with respondent, referred to above (CX 23-A, B), was cancelled by the respondent January 15, 1937. The Record further shows that on January 28, 1937, all of respondent's contracts which contained the 95% clause were cancelled by the respondent, and oil burner manufacturer-customers who had entered into such sales agreements or contracts with the respondent were released from the terms and requirements of said sales agreements; that excepting a short period in early January of 1937, the provisions of said sales agreements were not required by respondent to be fulfilled by those who had signed such agreements (CX-1, pp. 10-15; Record 109-111).

VI.

The allegations as to the effect of respondent's sales and contracts for sale as charged in Paragraph V will be considered hereafter under Conclusions.

Count III.

Paragraphs I, II adopt the corresponding paragraphs of Count I.

III.

(a) Respondent admits that in the course of its business prior to 1936 and through 1941, it has made sales of its automatic temperature controls of like grade and quality to some of its oil burner manufacturer-customers, at lower prices than respondent sold its automatic temperature controls of like grade and quality to others of its oil burner manufacturer-customers, many of whom are competitively engaged, one with another, in the resale of such products (controls) within the United States (CX-1, p. 18). Respondent denies, however, (Answer) that its practices, in the sale of its automatic temperature controls to oil burner manufacturers has lessened competition between respondent and its competitors or between respondent's cus-
1240 tomers and their competitors. The practices and methods followed by the respondent during the time mentioned, are:

(1) Respondent recognized three channels of trade and distribution in selling its automatic temperature controls, and respondent has classified its customers accordingly, as follows: (a) oil burner manufacturers, (b) wholesalers and jobbers (Class A and Class B), and (c) dealers. For the purposes of its business, respondent defines an oil burner manufacturer as a concern which manufactures and fabricates heating equipment, and includes in this classification (1) oil burner manufacturers; (2) furnace manufacturers; (3) boiler manufacturers; (4) stoker manufacturers, and (5) gas burner manufacturers. Respondent makes an investigation to determine whether or not a manufacturer is really a legitimate manufacturer or a fabricator of a product. There are numerous concerns throughout the United States that buy a completely packaged outfit in their own name, and, in turn, resell it with their name on it; respondent has never regarded such concerns as manufacturers, unless they have manufacturing facilities and actually do manufacture oil burners or some closely allied product such as boilers or furnaces (Record 23-24; 54 to 59; 200; 206-209; 1179-1180; 1486).

(2) Respondent publishes list prices for its automatic temperature controls with discounts or net prices regularly allowed to oil burner manufacturers, wholesalers or jobbers, and to dealers. Respondent's prices to dealers and to wholesalers or jobbers vary from 25% to 43.75%

(25% and 25%) varying with the trade channels in which the purchasers are engaged (CX-1, p. 18). Wholesalers or jobbers are located generally throughout the country, and their places of business are equipped with stock consisting of electrical wire, copper tubing, tanks, and automatic temperature controls. They do a general business with dealers in their locality (Record 59); they sell oil burners complete, and carry stock of respondent's controls and competing controls (Record 60); respondent's salesmen in the course of their field duty selling respondent's automatic temperature controls call on manufacturers, jobbers, and dealers, and send in reports as to their activities (Record 64); in these reports they report on competitive conditions in their territory (Record 65). Respondent's salesmen, in calling on oil burner manufacturers, prospective customers, stress sales to manufacturers (Rec-
1247 ord 1487-1488). A dealer is defined by respondent as a concern which sells to the ultimate consumer and makes complete installations (Record 1487). Respondent allows a base discount to dealers in its automatic temperature controls and when respondent makes sales of its said controls to wholesalers, who in turn sell to dealers, a margin of profit is provided to cover the wholesaler's service (Record 1575).

(3) Oil burner manufacturers, who purchase the great majority of automatic temperature controls, are sold said controls by respondent at net prices, which in turn allow a margin of profit to said manufacturers, and such prices vary as between the quantity brackets into which the annual volume of their purchases brings them (CX-1, p. 19; Record 1575). Respondent's manufacturers' price brackets for the year 1941 were as follows (CX-1, Table No. 1):

"Bracket	Annual Volume	Sets	Net Price Per Set
1	50—	349	$17.35
2	350—	999	16.45
3	1,000—	2,499	15.90
3A	2,500—	4,999	15.35
4	5,000—	7,499	14.90
4A	7,500—	9,999	14.25
5	10,000 up		13.65"

Respondent's prices (above) are based on quantity of controls purchased by a customer in a year (Record 30). The

table above shows the annual volume in sets according to the bracket and the net price per set used by respondent during the year 1941. Respondent's schedule of price brackets is determined by respondent's officials at the home office of respondent at Minneapolis, Minnesota, for respondent's three controls, thermostats, limit controls and primary controls. Respondent's prices are set up on each model (control), and that model carries its price in respondent's various price brackets. The instrument is priced the same according to quantity, to any oil burner manufacturer, and respondent allows to furnace manufacturers the same discount that it gives to furnace manufacturers who have burners manufactured for them (Record 204-205). Respondent, during the years from 1937 to 1941, had six price brackets (Record 1750). The evidence shows that slight changes in the number of said brackets have taken place according to competitive conditions. Changes in brackets and prices are sometimes made to meet a particular competitive situation, a condition in the 1248 trade which is fluctuating all the time. (Record 1763; 1773-1774). To illustrate: In 1940 respondent instituted a couple of new brackets (3-A and 4-A) making eight brackets, which change was caused by a competitive situation which was causing respondent to lose business, and changing the bracket and adjusting the price was an effort by respondent to try to recapture such lost business (Record 1653 to 1658; 1774-1775). Respondent's General Manager, in speaking of the arrangement of bracket prices stated that competition is the principal cause of the changing of bracket prices from time to time in accordance with the competitive situation as it developes (Record 1774-1775; RX 124; 125; Record 1777-1778). The evidence discloses that the quantity bracket method of pricing controls begun as early as 1924 by the predecessor company of respondent, had been continued by the respondent since said time (Record 1752-1753). The operation of respondent's price brackets was as follows: Respondent's practice was to reduce its price as a customer increased his purchases of automatic temperature controls, thus going from one quantity bracket (price) into the next higher bracket, which amounted to a reduction in price. Therefore, the more temperature controls a customer purchased from respondent, the lower was the price for the controls. If a customer failed to purchase a sufficient quantity of

controls to carry such a customer from one bracket to another, such a customer did not get the reduction in price (Record 1694). Competitive prices have also been an important factor when respondent came to arrange its price brackets for any given year. It has always been the custom of respondent to collect and correlate all competitor prices for automatic temperature controls that it was possible to obtain. Respondent's salesmen are instructed to collect all the competitor information they can find in the field bearing on the competitive situation and the prices at which competitors are selling their controls, and by correlating this information respondent arrives at some indication of what its competitors' prices are (Record 1576; 1759-1776; 2579-2580). The evidence shows that respondent places its oil burner manufacturer-customers in the particular quantity bracket to which the volume of automatic temperature controls actually purchased by them from respondent entitles them (Record 1600-1602). However, there was a significant difference between the pricing practices of respondent and its competitors in the sale of automatic temperature controls in brackets, in that respondent's competitors quoted on the basis of the oil burner manufacturers' over-all controls "potential", or total controls purchased rather than on the basis of an oil burner manufacturer's actual purchases from the particular
1249 controls manufacturer placing the contract or quoting the price (Record 1296-1298; 1363; 1415; 2136-2137).

(4) Respondent does not recognize as an oil burner manufacturer any purchaser who will not agree to buy at least 50 sets or 150 units of automatic temperature controls annually, although respondent sells a few automatic temperature controls to purchasers not belonging in any of the aforementioned trade channels, such customers, who buy less than 50 units anually receive a discount of 25% and 15% from list, and such customers who agree to purchase at least 50 units annually receive a discount of 25% and 25% from list (CX-1, pp. 18, 19).

(b) It has been the practice of respondent and the controls industry generally, to enter into sales agreements with oil burner manufacturer-customers for a particular year, either during December of said year, or early in January of the following year, for said year's business. It is necessary for oil burner manufacturers to know what prices they are to pay for oil burner parts before said oil

burner manufacturers begin to figure their costs and put out their own price lists (Record 2569); Thus, controls manufacturers have to be able to inform their oil burner customers what they will have to pay for controls (Record 2569). Respondent, in making its sales agreements (contracts) with its oil burner manufacturer-customers has always taken into consideration the quantity of controls each customer purchased in the previous year, which gave an indication, or measuring rod of the needs of each customer for the current year (Record 41; 1660; 1759). These matters were, on occasion, discussed with prospective purchasers by salesmen and officials of respondent, some of whose customers were of long standing, and others had been, or were, at the time, using competitive controls (Record 42); other cases were those where a customer used some of respondent's controls, and controls of a competitor of respondent. If an oil burner manufacturer-customer of respondent exceeds his contract quantity of controls in the course of a year and earns a better price, respondent's General Manager testifies that in all fairness to such customer respondent gives such customer the benefit of his larger volume through what is called a "retroactive credit", and such customer is placed in the next price bracket which gives him the benefit of a lower price bracket which gives him the benefit of a lower price (Record 1596; 1616; 2570). It has also been the practice of respondent to give an oil burner manufacturer quantity or volume credit, refererd to as a "dual transaction" on controls which are sold direct to a furnace manu-
1250 facturer, provided such controls are used in conjunction with the burners manufactured by the oil furnace manufacturer (Record 1600; 1670-1671). An illustration of a "dual transaction" is given in the Record when the Cleveland Steel Products Corporation received volume credit for automatic temperature controls shipped by respondent directly to the Fox Furnace Company to whom the Cleveland Steel Products Corporation sold its burners without controls (Record 1602).

IV.

(a) Respondent is the oldest and largest of the controls manufacturers, its principal competitors, Penn, Perfex, Mercoid and Detroit Lubricator entering the controls field at various dates during the 1930s. The evidence shows

that each controls manufacturer made and sold automatic temperature controls at different prices, and the keenest type of competition, especially for the large volume buyers of controls, existed between respondent and its competitors, in the effort of each to sell its controls, performing in the main the same functions, to the large number of oil burner manufacturers throughout the country (CX-1, Table 1; RX-182; 23; 43; 70; 73; 78; 149-C; 152-A-E; 153; 155; 166), (Record 93; 1284-1285; 1375-1376). The evidence shows that automatic temperature controls manufactured by respondent are sold and offered for sale at a higher price than comparable controls manufactured and sold by competitors of respondent (Record 615; 742; 747; 1111; 1127; 1150-1151; 1240; 1660; 1577; 1713; 1725); that oil burners equipped with respondent's automatic temperature controls, in many instances are sold by oil burner customers of respondent, as well as customers of competitors of respondent, at higher prices than oil burners equipped with controls manufactured by the competitors of respondent (Record 742; 1111; 1150-1151; 1677; 1725). Respondent's bracket prices (Paragraph 4) for any given contract year were set up according to information respondent had at the time in reference to the general business situation, trends in the market, information as to prices of competitors gathered by respondent from its salesmen, and in other ways, and the general competitive situation existing at the time (Record 1757-1759; 2671; 3689). Respondent's practice was to keep records year after year of its oil burner customers, and this knowledge is used in
1251 making up the sales agreements of its oil burner customers; also taking into consideration the quantity of controls each customer purchased in the previous year (Record 41; 1660; 1759; 2702-2703). From this information respondent classified each customer on a basis of the volume or quantity of controls purchased by said oil burner customer during the year (Record 2689).

(b) The Record discloses from a study made by respondent in 1941, which respondent gathered for its own information and the information of its sales force, that respondent, in a number of instances during the years prior to 1941, had lost the accounts of a number of oil burner manufacturers who had standardized on respondent's controls or given to respondent the larger part of their controls business, and thereafter purchased substantial quantities of competitive automatic temperature controls (Record 1654-

1658; 2733). Among such former accounts of respondent, as shown by evidence, are the following: Respondent "M-H" lost 95% of the business of Braden Ever-Ready to Mercoid; 80% of the Chalmers Oil Burner Company to Perfex; 40% of Easton Oil Company to Mercoid; 25% of National Airol to Perfex; 10% of Pan-American to Mercoid; 25% of Sundstrand Engineering Company to Mercoid; 5% of Vortex to Penn-Electric; 20% of Gold Star to Perfex; 75% of Herco to Mercoid; 10% of Lynn Products to Perfex and a number of other customers of respondent appeared in the record, amounting to 31 oil burner accounts (Record 1654 to 1658); the records of respondent pertaining to said 31 accounts lost by respondent to its competitors in the years prior to 1941 gave to said competitors, in full or in part, 53% of their business, as stated by respondent's General Manager, according to the estimated figures compiled by respondent (Record 1658-1659).

The evidence is that respondent "M-H", during the years 1938, 1939, 1940 and 1941, gave the Williams Automatic Company a large volume purchaser of automatic temperature controls, its best prices, as testified to by respondent's General Manager, because "we had to give them our best prices to come close to the competitive controls prices that we encountered at Williams's" (Record 1666); it is shown that the competitive controls prices for the business of the Williams Automatic Company were from Mercoid and Penn (Record 1666); it is further shown that respondent's prices made to the Williams Automatic Company never did actually go down to the prices charged said company by respondent's competitors (Record 1666).

It is shown (Paragraph II) that respondent's automatic temperature controls were well and favorably known because of respondent's reputation in the controls
1252 field, and many oil burner manufacturers, customers of respondent, preferred respondent's controls notwithstanding respondent's controls were higher in price, and often commanded premium prices (Record 1247-1248; 1711-1713; 1800). However, there were other oil burner manufacturers who were attracted by the lower prices offered by manufacturers of competing controls (Record 2733; 2744), and the Record shows that in 1941 and prior thereto, 126 oil burner manufacturers who at one time had standardized on respondent's controls were purchasing controls of competitors of respondent, and at lower prices

than respondent's controls were sold at (Record 1658; 2737; 2744).

(c) Samuel Peters, during 1936, began the manufacture of oil burners under the name "Quiet Heet". His places of business were at Newark, New Jersey, and Baltimore, Maryland. He purchased his pumps, motors and other equipment from others, assembling his oil burner, and purchasing automatic temperature controls from respondent and Mercoid, but did not standardize on either (Record 852). By practicing certain economies, such as traveling only one salesman, selling C.O.D., and having no charge accounts, and advertising by mailing out thousands of postcards, "Quiet Heet" enjoyed a large volume business in the sale of its oil burners, and in 1939 was in respondent's Bracket No. 5, receiving respondent's lowest bracket price for the controls purchased (Record 866-888; 976-980; CXs 126 to 131). The oil-burners assembled and sold by "Quiet Heet", with automatic temperature controls, was the lowest priced burner on the market (Record 950-951). "Quiet Heet", while receiving respondent's lowest bracket price, was able to drop the price on its oil burners from a high of $70.00 to a low of $40.00 (Record 871; 956), and thereby caused a considerable competitive situation in the oil burner field (Record 1005-1008; 1129-1131). Other oil burner manufacturer-customers of respondent who could not purchase respondent's controls at as low a price as "Quiet Heet" stated that their business had suffered from such competition (Record 634; 924; 1154; 1158); however, it is shown that it was the cutting of its oil burner price, and not the price paid for controls by "Quiet Heet", that was the cause of the competitvie situation referred to at that time (Record 1007; 1009; 1021; 1128-1129). Many oil burner manufacturers buy competitive controls because they are lower in price than respondent's (Record 2737; 2740), but buy respondent's controls in addition to competitive controls because their dealer-customers often specify respondent's controls on the oil burners they purchase (Record 2740). Automatic temperature controls are only one item in an oil burner assembly amounting to approximately one-third of the cost of the oil burner (Record 1087); the manufacturing cost of oil burners is affected

by the prices of other items entering into the manu-1253 facturing or assembling of oil burners, such as motors, transformers, pumps, and fans, the price of which items, varies according to quantity of such items purchased

by oil burner manufacturers (Record 1618; 1619; 1865; 2013-2015). The testimony of a number of oil burner manufacturers was to the effect that although they knew that "Quiet Heet" enjoyed a lower price for its controls purchased from the respondent because of "Quiet Heet's" volume purchases, that this did not affect their business (Record 1634-1636; 1719; 1871; 1965; 1981).

(d) The cost accounting report prepared and submitted by Ernst & Ernst (CX 170; 186) shows that on the basis of the manufacturing cost of respondent's controls, sold at the various bracket prices, about 45% of respondent's controls business falls within the five brackets beginning with the discount bracket and extending through Bracket 3-A, and appear to be justified by said report. (Record 2798; 2568 to 2663; 2664 to 2787; 2169). The remaining 55% of respondent's business falling in the three higher brackets (4-4A-5), respondent does not claim cost justification (Record 2796). Comparison of cost between Bracket 3 and Bracket 3-A shows an excess of price differential over cost differential of two cents per set (Record 2798; RX 186). In Bracket 3-A there are included manufacturing costs of $236,476.68, which is about 20% of the total business of respondent (RX 186).

Respondent's General Manager gave a detailed description and analysis of the 77 (one erroneously included) (Record 2660) off-scale accounts as reported in the Record (RX 170), and gave a picture of the competitive situation in reference to each account, and respondent's actions in meeting each competitive situation as such developed, and it was shown that in each of said accounts respondent's price had been always and consistently higher than any of its competitors (Record 2568-2663; 2664-2787). Of the 76 off-scale accounts mentioned, 22 were sold on a competitive basis, that is, the difference in respondent's prices and its competitors' prices in each case was based upon competition (Record 2665), respondent shifting its bracket prices in its higher brackets (4-4A-5) to meet the lower prices of competitors. Respondent's prices often came within a narrow margin of less than $2.00 per set in meeting its competitors' prices, and in several instances within 50¢ per set, and in one case respondent's price was within 20¢ a set of its competitor's price (Record 2620; 2745-2747; 2759-2762). It often happened that respondent had several customers located in the same locality, such a case being the Quiet Heet Company of Brooklyn, New York.

Respondent gave this company a Bracket 1 price in 1254 1940 because said company purchased 679 instruments; another customer in Brooklyn was also given a Bracket 1 price although said customer purchased only 187 instruments (Record 2688; 2592). Both of these accounts, it is shown, had purchased the required number of controls under Bracket 1, and both received the same price from respondent, though one customer purchased substantially more controls than the other (Record 2689).

It is shown that in the 22 competitive accounts referred to (RX 186), respondent extended better prices to such customers by placing said customers in higher price brackets (giving a lower price) than the quantity controls actually purchased by said customers during 1940 or 1941 justified. By lowering its prices to said 22 oil burner manufacturer-customers respondent attempted to meet the lower price competition offered by its competitors, but in no case does the Record show that respondent's price ever equalled the lower price paid by the competitor, and oil burner manufacturers were always able, if they desired, to purchase controls from respondent's competitors at lower prices than respondent's price (Record 2662-2765-2766). In some cases respondent had knowledge of its competitors' prices which respondent had learned from its salesmen or through some trade channels (Record 2684); in other cases, respondent may not have known which competitor was quoting or the competitive price offered (Record 2668; 2670; 2680; 2681, 2687; 2743). The Record discloses, however, that respondent's prices for its automatic controls were, to all of its customers, always and consistently above its competitors' prices, and that in each of the cases where respondent shifted its bracket prices, it was to approach the lower price made by one or more of its competitors (Record 2765; 2568; 2663; 2664 to 2787).

V.

The allegations as to the acts and practices of respondent, as charged under Sec. 2 of the Clayton Act, will be considered under Conclusions.

1255

VI.

Conclusions of Fact and Law.

As To Count I:

1. Respondent "M-H" is a Delaware corporation having its principal place of business in Minneapolis, Minnesota. Respondent manufactures automatic temperature controls for oil, gas and coal heating plants, and sells the same to oil burner manufacturers, jobbers, wholesalers and dealers in oil burner equipment throughout the United States; respondent is the principal manufacturer of temperature controls in the United States, and the total volume of its sales of controls, annually, during the years from 1939 to 1941, constituted approximately 60% of the total amount of automatic temperature controls sold annually throughout the United States to manufacturers of oil burners, and to wholesalers, contractors, and dealers in oil burners and automatic controls. Respondent, in the sale of its controls, has entered into annual contracts or agreements with manufacturers of oil burners, since prior to 1936, and the number of such manufacturers having such contracts with respondent constitute more than 50% of all the manufacturers of oil burners within the United States. When sales of respondent's automatic temperature controls are made respondent causes such products to be shipped from the place of manufacture in the States of Minnesota and Indiana, to the purchasers thereof located in states other than the state of manufacture, and there is now and has been a constant current of trade and commerce in such products between the various states of the United States, and in the District of Columbia. Respondent has numerous competitors in the manufacture and sale of automatic temperature controls, its principal competitors being The Perfex Company, Penn-Electric, Mercoid, and Detroit-Lubricator, and it is shown that from 1936 to 1941, in the sale of temperature controls by respondent and its competitors there has existed an exceedingly keen competitive situation throughout the United States. (Par. I-a, b, c, d.)

Respondent was organized in the year 1927 and is an amalgamation or consolidation of two predecessor companies, the first company having been organized in 1885 and the Honeywell Company in 1906; both respondent

"M-H" and its predecessor companies have been
1256 extensive advertisers of their lines of controls for many years, and large sum have been spent on national advertising; it is shown that respondent has always, throughout the years, been a leader in the field of controls manufacture, and in the development and betterment of new and better controls; respondent has spent large sums of money in engineering and development work and in the redesigning and improvement of its product (Par. I, e to h).

2. There are three types of controls used in oil burners, principally of the gun pressure type, and the rotary type; they are (a) thermostats; (b) limit controls, and (c) primary controls. The thermostat controls the temperature within the enclosure within which it is located; the limit control is a device used on the heating plant, whether it be steam, hot water, or warm air, and it performs a safety function. The primary control is an actuating device which starts and stops the oil burner at the direction of the room thermostat. The primary control is sometimes called a "Master" control or "Combustion" control, or "Safety" control, and it is an essential element in every oil burner installation. It is shown that respondent owns most of the patents on primary controls (protectorelay). However, some of the thermostats manufactured and sold by respondent may be used with limit and primary controls manufactured and sold by competitors of respondent, and further that some of the primary controls manufactured and sold by respondent may be used with limit controls and thermostats manufactured and sold by competitors of respondent. The evidence shows that thermostats and primary controls manufactured by respondent give more efficient performance in the ordinary installation than when controls of similar kind manufactured by other manufacturers are mixed in the same installation. The thermostat of respondent has a special co-ordinating and co-operating function with primary controls, and for safety, to mix controls of different manufacturers in the same installation is not a good practice. It is shown that because of the extensive national advertising of respondent for many years, of its automatic temperature controls, there has developed a large customer demand for, and public acceptance of respondent's line of automatic temperature controls (Par. II a, b, c).

3. Respondent, during the years prior to 1936, made

sales of its automatic temperature controls to approximately 150 to 200 oil burner manufacturers throughout the United States; during said time respondent agreed, or attempted to agree, in writing, with all of its domestic oil burner manufacturers-customers, that they would
1257 purchase their requirements of automatic temperature controls in sets of one thermostat, one limit control, and one primary control, at a combination price per set, and that at least 95% of the customer's requirements would be so purchased from respondent. In all of respondent's said agreements, the oil burner manufacturer-customer was required to buy in sets, taking 90% as many room thermostats, and 100% as many limit controls as primary controls, and it was agreed that it was unsatisfactory, and often dangerous, to mix controls made by different manufacturers, and that respondent would not assure satisfaction or assume any service responsibility as to controls when used with other makes. On January 23, 1937, respondent eliminated the 95% clause from its existing contracts with its oil burner manufacturer-customers and released said manufacturer-customers therefrom. The 95% provision in respondent's 1936 sales agreement never became operative and no customer was required to comply therewith. (Par. III, a, b, c, d, e).

4. As a result of the acts and practices of respondent set forth above (Par. 3), a substantial number of manufacturers of domestic oil burners have been induced to purchase from respondent either all, or a majority of their requirements of domestic temperature controls and competitors of respondent have thereby been prevented from selling thermostats and limit controls in substantial quantities to such customers purchasing primary controls from respondent (Par. IV, a).

5-6. (a) It is shown that respondent is the owner of the Freeman and Cross primary controls and thermostats involved and referred to as charged in Paragraph 5 and 6 of the complaint in this case. The Record discloses in reference to the charges contained in the complaint (Par. V-VI) that at the time respondent made answer to the complaint in this case, respondent had a favorable decision with respect to respondent's practices in reference to the Freeman and Cross patents, from the United States Circuit Court of Appeals for the 7th Judicial Circuit. Subsequently, however, two cases involving said patents went before the United States Supreme Court, in December

1943, and were decided by the Court on January 3, 1944, the Supreme Court reversing respondent's favorable decision from the 7th Circuit, above referred to. Later, on February 7, 1944, the Supreme Court denied a petition for re-hearing. Promptly upon the denial of the petition for re-hearing, respondent in this proceeding, (Docket No. 4929) terminated all its agreements of every
1258 kind involving either the Freeman patent or the Cross patent, and all of respondent's practices, condemned by the United States Supreme Court, complained of in connection with the Cross patent and the Freeman patent have now been ended, and are not now being carried on in any way by respondent. (Pars. V-VI, a.) (*Mercoid Corporation* v. *Mid-Continental Investment Co., et al.*, 320 U. S. 661 (1944) and *Mercoid Corporation* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944) reversing 133 F. (2d) 802 (1942) and 133 F. (2d) 811 (1942).

7. The aforesaid acts and practices of the respondent are to the prejudice of the public and of respondent's competitors, and have the tendency and effect of hindering and preventing competition in commerce, and of restraining trade, all in violation of Section 5 of the Federal Trade Commission Act.

As To Count II:

(Pars. 1, 2, 3, 4 of Conclusions (Count I) adopted.)

5. Respondent, from prior to 1936 to 1941 inclusive, in the course of its business in the production and the sale and distribution of automatic temperature controls, in commerce, has made sales, and contracts for sale, of such products, on the condition, or with the agreement or understanding, that the purchaser thereof shall not use, or deal in, similar products of competitors of respondent; the effect of such sales, or contracts for sale, or such condition, agreement or understanding has been, or may be to substantially lessen competition, or tend to create a monopoly in the sale and distribution in commerce of automatic temperature controls. (Par. V-a.)

6. The aforesaid acts and practices constitute a violation of Section 3 of the Clayton Act.

As To Count III:

(Pars. 1, 2 of Conclusions (Count I) adopted.)

3. Respondent, in the course of its business prior to 1936 and through 1941, has made sales of its temperature

controls of like grade and quality to some of its oil burner manufacturer-customers at lower prices than respondent sold its automatic temperature controls of like grade and quality to others of its oil burner manufacturer-
1259 customers, many of whom are competitively engaged one with another in the resale of such products within the United States, by the following practices and methods: (1) Respondent recognizes three channels of trade and distribution in selling its automatic temperature controls, and respondent has classified its customers accordingly, as: (a) oil burner manufacturers, (b) wholesalers and jobbers (Class A and Class B), and (c) dealers; (2) respondent publishes list prices for its automatic temperature controls with discount or net prices regularly allowed to oil burner manufacturers, wholesalers or jobbers, and to dealers. Respondent's prices to dealers and to wholesalers or jobbers vary from 25% to 43.75% (25% and 25%), varying with the trade channels in which the purchasers are engaged; (3) respondent has sold its automatic temperature controls, thermostats, limit controls and primary controls in units, and in sets, to oil burner manufacturers under contracts providing for annual discount arrangements, including separate and distinct price brackets varying in number from 6 to 8, and with net prices fixed in accordance with the quantity requirements of the customer under contract; (4) respondent does not recognize as an oil burner manufacturer any purchaser who will not agree to buy at least 50 sets or 150 units of automatic temperature controls annually, although respondent sells a few automatic temperature controls to purchasers not belonging to any of the aforesaid trade channels; such customers who buy less than 50 units annually receive a discount of 25 and 15 from list, and such customers as agreed to purchase at least 50 units, received a discount of 25% and 25% from list. (Par. III-a, b.)

4. It is shown from the evidence that respondent's selling of its automatic temperature controls, of like grade and quality, to certain of its oil burner manufacturer-customers at lower prices than respondent sells its automatic temperature controls of like grade and quality to others of its oil burner manufacturer-customers, has not tended to substantially lessen, injure, prevent or destroy competition between respondent's customers, or create a monopoly in the line of commerce in which respondent and its competitors are engaged. It appears from the evidence that respondent's problem was to sell its automatic tem-

perature controls in a competitive field where controls of competitors of respondent were sold at lower prices than controls manufactured and sold by respondent; respondent found by canvassing its business that prior to 1941 it was losing a large percentage of 31 of its oil burner accounts, and that 126 of its customers who had standardized 1260 on respondent's controls were purchasing controls of competitors of respondent. The Record discloses that respondent's bracket prices as represented by the first five brackets from the discount bracket to and including Bracket 3-A were found to be justified by a cost accounting survey. In respondent's higher brackets (4-4A-5) respondent has lowered its prices in making sales of its controls to 22 of its oil burner customers, to meet the lower price competition of competitors; however, it is shown that competitors' prices have always and consistently remained under the prices of respondent, and oil burner manufacturers were always able, if they desired, to purchase controls from respondent's competitors at prices lower than respondent's prices. (Par. IV-a, b, c, d)

Conclusions of Law.

5. From the circumstances of this case (as charged in Count III), it does not appear that respondent has violated Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Recommendations for Appropriate Action by the Commission.

It is recommended (A) that an order issue and be served upon respondent requiring said respondent to cease and desist from the acts and practices charged under Count I and Count II of the Complaint; it is recommended further (B) that the charges of the Complaint as set forth in Count III be dismissed without prejudice.

Respectfully submitted,

W. W. Sheppard,
Trial Examiner.

Dated: February 21, 1946.

Note: "The Trial Examiner's Report is not a Report or Finding of the Commission. Such Report is advisory only and is not binding upon the Commission."

WWS/ML

1261 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—4920) * *

RESPONDENT'S EXCEPTIONS TO TRIAL EXAMINER'S REPORT.

In accordance with Rule XXI of the Commission's Rules of Practice and the order of the Commission dated March 1, 1946, whereby the time within which to file exceptions to the Report of the Trial Examiner herein was extended to April 8, 1946, the respondent, Minneapolis-Honeywell Regulator Company (hereinafter sometimes called M-H), states the following as its exceptions to the Trial Examiner's Report in the above-entitled proceeding:

Synopsis of Complaint and Answer.

1. Exception is taken to the statements on pages 1-6 of the Trial Examiner's Report under the above heading
in which the Trial Examiner purports to summarize
1262 the allegations of the Complaint and the contention
in the Answer thereto filed by M-H, and the Commission is referred to the Complaint and the Answer for a complete and correct statement of said allegations and contentions.

Report Upon the Facts.

As to Count I

2. Exception is taken to the failure of the Trial Examiner, in connection with the statements in the second sentence in paragraph I(b) of his Report upon the Facts as to Count I, to find that the total volume of M-H's sales of automatic temperature controls, including the controls sold to manufacturers of pot type burners—in installations of which primary controls other than of M-H design are an essential element (R. 694*) and which in turn are sold in direct competition with both the gun and rotary type burners (R. 692)—constitute approximately 25% of the total number of automatic temperature control devices sold annually in the United States to manufacturers of all types of burners (CX 1, par. Two).

* "R" refers to page in stenographic transcript; "CX" refers to Commission's Exhibit; "RX" refers to Respondent's Exhibit.

3. Exception is taken to the statement in the last sentence of paragraph I(b) of the Trial Examiner's Report upon the Facts as to Count I in that the reference
1263 to "prior to 1943" should be to "during the years 1936 to 1941, inclusive" (CX 1, par. Three).

4. Exception is taken to the statement in the third sentence of paragraph I(d) of the Trial Examiner's Report upon the Facts as to Count I that Detroit Lubricator Company purchased its primary controls from "Penn", on the ground that such statement is not supported by evidence and none is cited therefor.

5. Exception is taken to the statement in the sixth sentence of paragraph I(f) of the Trial Examiner's Report upon the Facts as to Count I that American Nokol Company was the first concern to manufacture oil burner controls on the ground that the evidence shows that such Company was the first concern to manufacture automatic oil burners (R. 1900-1).

6. Exception is taken to the statement in the first sentence of paragraph II(b) of the Trial Examiner's Report upon the Facts as to Count I that M-H "owns most of the patents on primary controls" on the ground that such statement is unsupported by and contrary to the evidence which is to the effect that M-H owns but 18 patents relating to primary controls while its principal competitors in the control industry and others own altogether approximately 100 patents relating to primary controls (CX 1, par. Seven; RX 72, 103, 137, 169, 183).

7. Exception is taken to the failure of the Trial
1264 Examiner, in connection with the statement in the first sentence of paragraph II(b) of his Report upon the Facts as to Count I, to find that it has not been necessary for M-H's competitors to obtain licenses under any of M-H's patents in order to compete with M-H in the manufacture and sale of primary controls (R. 327, 443, 720).

8. Exception is taken to the failure of the Trial Examiner, in connection with the statement in the second sentence of paragraph II(b) of his Report upon the Facts as to Count I, to find that the practice of control manufacturers in selling their makes of standard controls in sets was originated in 1926 by an oil burner manufacturer, American Nokol Company, which started to include limit controls along with primary controls and thermostats as part of the original equipment on the oil burner in order

to get the profit markup on the limit controls which had previously gone to the dealers (R. 1908-9).

9. Exception is taken to the failure of the Trial Examiner, in connection with the statement in the second sentence of paragraph II(b) of his Report upon the Facts as to Count I, to find that, when M-H controls are sold in sets, its set price is equal to the prices of the three individual control units (R. 31-32), whereas at least two of M-H's competitors sometimes sell sets of their controls at a price less than the prices of the individual con-
1265 trol units comprising the sets (R. 1262; 2143).

10. Exception is taken to the failure of the Trial Examiner, in connection with the statements in the third, fourth and fifth sentences of paragraph II(b) of his Report upon the Facts as to Count I, to find that control manufacturers other than M-H also recognized the risk of "mixing" different makes of primary controls and thermostats (R. 369-71; 704-5).

11. Exception is taken to the failure of the Trial Examiner, in connection with the statements in paragraph II(c) of his Report upon the Facts as to Count I, to find that the cost to a large volume oil burner manufacturer of a set of M-H's controls was reduced from $39.00 in 1929 to $13.75 in 1941, or a decrease of 66% (R. 1564-6), as compared to a 64% decrease in price of oil burners over the same period (R. 1568-70).

12. Exception is taken to the statement in the ninth sentence of paragraph III(a) of the Trial Examiner's Report upon the Facts as to Count I to the effect that under the terms of M-H's contracts with certain of its oil burner manufacturer customers for the year 1937, the customer was obligated to purchase its requirements of controls from M-H, on the ground that, as the evidence cited in support thereof shows, the customer's obligation was limited to the purchase from M-H of 95% of its control requirements (CX 1, pp. 10-12) and that
1266 such 95% clause was eliminated from M-H's contracts and never became operative and no customer was required to comply therewith (R. 109-11).

13. Exception is taken to the first quotation from M-H's contracts with oil burner manufacturers contained in paragraph III(a) of the Trial Examiner's Report upon the Facts as to Count I, viz.:

"It is specifically agreed that other control equipment is not to be considered as part of a set within the terms

of this contract because the Company's costs are figured to cover a complete set of controls and the following breakdown prices are purely for enforcing purposes. It is agreed that the purchasers' yearly purchases will consist of at least 90% as many thermostats and 100% (but at the company's option not more than 125%) as many limit controls as primary controls. * * *"

on the ground that, as the evidence cited therefor shows, such quotation should read as follows:

"It is specifically agreed that other control equipment is not to be considered as part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls and the following breakdown prices are purely for invoicing purposes, it is agreed that the purchasers' yearly purchases will consist of at least 90% as many thermostats and 100% (but at the company's option not more than 125%) as many limit controls as primary controls. * * *"

14. Exception is taken to the statement in the third paragraph of paragraph III(a) of the Trial Examiner's Report upon the Facts as to Count I with reference to the so-called 95% clause, on the ground that the Trial
1267 Examiner fails to state in that connection, as he did in the earlier part of said paragraph III(a), that the 95% clause was eliminated from M-H's sales agreements for 1937 and never became operative (see Exception 12, *supra*).

15. Exception is taken to the statement in the next to last paragraph of paragraph III(a) of the Trial Examiner's Report upon the Facts as to Count I to the effect that the language quoted therein was contained in M-H's sales agreements with its oil burner manufacturer customers for the years 1939 and subsequent thereto, whereas such language was only contained in M-H's contracts for the years 1940 and 1941 (CX 1, pp. 15-16).

16. Exception is taken to the failure of the Trial Examiner to find (i) that none of the contract provisions mentioned in paragraph III(a) of his Report upon the Facts as to Count I was shown to have been interpreted either by M-H or the oil burner manufacturers who signed contracts containing such provisions as prohibiting the latter from purchasing controls from competitors of M-H or has in fact had any such effect; (ii) that M-H's contracts with oil burner manufacturers have always been voluntarily entered into by the purchasers (R. 1594) and

do not, by their terms, limit or in any way, directly or indirectly, preclude such customers from dealing in or using such controls made by M-H's competitors
1268 (CX 13-16); and (iii) that M-H's customers regularly purchase from its competitors and very often have similar contracts with one or more of such competitors at the same time, and none of them was ever prevented by its contract with M-H from buying other makes of controls. (Acme Oil Burner Co.—RX 158, R. 1610; Aldrich Co.—R. 1838-39; Automatic Burner Corp.—RX 25, 118, 119, 161, R. 1683; Cleveland Steel Products Corp.—RX 7, 8, 27, 114, 150, 151, 181A, R. 1806-9; Goodrich Oil Burner Mfg. Co.—R. 1244-45; Harvey-Whipple, Inc.—RX 31, 45, 55, 63, R. 1126; Herco Oil Burner Corp.—R. 1159; Korth Oil Burner Corp.—R. 2011; Malleable Iron Fittings Co.—RX 10, 11; Mercoid Corporation—R. 2151; Penn Boiler & Burner Mfg. Co.—RX 53, R. 1713-14; Penn Electric Switch Co.—R. 1395; Perfex Corporation—R. 375; Petroleum Heat & Power Co.—R. 1909-10, 1927; Quiet Heet Mfg. Co.—RX 12, 13, 154, R. 863; Timken Silent Automatic Co.—RX 21, 149A-C; Joseph Toker Co.—R. 1952; Wayne Oil Burner Co.—RX 40, 51, 60, 68, 134, 135, 136, R. 1867; Williams Oil-O-Matic Heating Corp.—RX 126, 176A, R. 177-78; Wisconsin Oil Burner Co.—RX 22, 42, R. 1713-14; York Oil Burner Co.—R. 1979-80).

17. Exception is taken to the statement in the last sentence of paragraph III(b) of the Trial Examiner's Report upon the Facts as to Count I that Defroit Lubricator Company purchased its primary controls from
1269 M-H, on the ground that such statement is contrary to the evidence cited therefor (R. 649) and the statement on the same subject in paragraph I(d) of his Report. (See Exception 4, *supra.*)

18. Exception is taken to the statement in the third sentence of paragraph IV(a) of the Trial Examiner's Report upon the Facts as to Count I to the effect that a substantial number of oil burner manufacturers, prospective customers of M-H, has been induced to purchase from it either all or the larger part of their annual requirements of automatic temperature controls, on the ground that such statement is not supported by the evidence cited therefor, or any other evidence.

19. Exception is taken to the statement in the fifth sentence of paragraph IV(a) of the Trial Examiner's

Report upon the Facts as to Count I to the effect that some oil burner manufacturer customers of M-H are reluctant to sign contracts or sales agreements for temperature controls but wish to be free to buy controls from whatever source they see fit, on the ground that the evidence cited for such statement shows that the statement refers to Penn Electric Switch Company and not to M-H (R. 1393).

20. Exception is taken to the failure of the Trial Examiner to find, in connection with the statements with reference to M-H's sales agreement with Timken
1270 Silent Automatic Company mentioned in paragraph IV(a) of the Trial Examiner's Report upon the Facts as to Count I, that the clause requiring Timken to standardize on M-H's products was suggested by M-H in order to insure that Timken would purchase its contract quantity from M-H and hence be entitled to M-H's best price (R. 1647-8).

21. Exception is taken to the statement at the end of paragraph IV(a) of the Trial Examiner's Report upon the Facts as to Count I regarding the effect of M-H's contract with its oil burner manufacturer customers, on the ground that the testimony cited in support of such statement related specifically to the so-called 95% clause inserted for a short period in M-H's control contracts for the year 1937 and not to the contract as a whole (R. 348).

As to Count II

22. Exception is taken to the statement in the first sentence of paragraph V(a) of the Trial Examiner's Report upon the Facts as to Count II that M-H in the course of its business from December 1939 to 1941, inclusive, entered into sales agreements or contracts with a substantial number of oil burner manufacturer customers for either all or a majority of their annual requirements of automatic temperature controls, on the ground that, as shown by the evidence cited in support there-
1271 of, such contracts related solely to automatic temperature controls manufactured by M-H, except for the short period ending January 28, 1937, when certain of M-H's contracts contained the so-called 95% clause.

23. Exception is taken to the statement in the third sentence of paragraph V(a) of the Trial Examiner's Report upon the Facts as to Count II that "some" of M-H's oil burner manufacturer customers entered into

contracts with it on the understanding that they would use M-H's controls exclusively, on the ground that, as shown by the evidence cited in support thereof, such statement is only true with respect to one particular customer of M-H, namely Malleable Iron Fittings Company.

24. Exception is taken to the statements in the penultimate paragraph of paragraph V(a) of the Trial Examiner's Report upon the Facts as to Count II to the effect that M-H's contract with Cleveland Steel Products Company was to leave for the competitive market only 10% of Cleveland Steel's requirements of room thermostats and no opportunity for sales to Cleveland Steel by competitors of M-H of either limit or primary controls, on the ground that such conclusion is unsupported by and contrary to the evidence.

1272 Conclusions of Fact and Law.

As to Count I

25. Exception is taken to the statement in the fifth sentence of paragraph 2 of the Trial Examiner's Conclusions of Fact and Law as to Count I that the respondent owns most of the patents on primary controls, on the ground that such statement is not supported by and is contrary to the evidence. (See Exception 6, *supra.*)

26. Exception is taken to the statement in the first sentence of paragraph 3 of the Trial Examiner's Conclusions of Fact and Law as to Count I to the effect that, during the years prior to 1936, the respondent agreed, or attempted to agree, in writing, with all of its domestic oil burner manufacturer customers, that at least 95% of the customers' requirements of automatic temperature controls would be purchased from the respondent, on the ground that such statement is not supported by evidence and is contrary to the evidence which is to the effect that said so-called 95% clause was only in effect for a short period in January of 1937 and was stricken out of the respondent's contracts with its customers on January 28, 1937. (See Exception 12, *supra.*)

27. Exception is taken to the statements in paragraph 4 of the Trial Examiner's Conclusions of Fact and
1273 Law as to Count I on the ground that such statements are unsupported and are contrary to the evidence. (See Exceptions 2-21, inclusive.)

28. Exception is taken to the statements in paragraph 7 of the Trial Examiner's Conclusions of Fact and Law as to Count I, on the ground that such statements are not supported by the facts or the law except with respect to the following practices of the respondent

(a) the practice, referred to in the first sentence of paragraph 3 of the Trial Examiner's Conclusions of Fact and Law as to Count I, whereby, for a short period in 1937 but discontinued within 30 days, the respondent required certain of its oil burner manufacturer customers to contract with it that at least 95% of their control requirements would be purchased from the respondent;

(b) the practice, referred to in the second sentence of paragraph 3 of the Trial Examiner's Conclusions of Fact and Law as to Count I, of providing that the yearly purchases of respondent's controls by oil burner manufacturers would consist of at least 100% as many limit controls as primary controls; and

(c) the practice, referred to in paragraphs 5-6 1274 of the Trial Examiner's Conclusions of Fact and Law as to Count I, engaged in by the respondent with respect to the Freeman and Cross patents which were eliminated by the respondent after the inception of this proceeding.

29. Exception is taken to the failure of the Trial Examiner to state as a conclusion of law that, except for the practices mentioned above under (a), (b) and (c) of Exception 28, none of the acts and practices referred to in the Trial Examiner's Report as to Count I constituted unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

As to Count II

30. Exception is taken to the statement in paragraph 5 of the Trial Examiner's Conclusions of Fact and Law as to Count II, on the ground that such statements are unsupported by and are contrary to the evidence. (See Exceptions 22-24, inclusive.)

31. Exception is taken to the statement in paragraph 6 of the Trial Examiner's Conclusions of Fact and Law as to Count II on the ground that such statement is not supported by the facts or the law except with respect

to the practice of the respondent mentioned above under (h) of Exception 28, *supra.*

1275 32. Exception is taken to the failure of the Trial Examiner to state as a conclusion of law that, except for the practice mentioned above in Exception 31, none of the acts and practices of the respondent set forth in the Trial Examiner's Report as to Count II constituted violations of Section 3 of the Clayton Act.

Dated, April 5, 1946.

Respectfully submitted,
Craveth, Swaine & Moore,
Bair & Freeman,
Attorneys for Minneapolis-Honeywell Regulator Company.

1277 UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

(Caption—4920)

EXCEPTIONS OF COUNSEL FOR THE COMMISSION TO THE TRIAL EXAMINER'S REPORT.

Now Comes Counsel for the Commission to take exception to the Trial Examiner's report upon the evidence as follows:

Exception is specifically taken to the following statements and conclusions of fact contained in said report.

I.

Statement of Fact, page 8, paragraph (d), lines 8-12:

"(4) General Electric Company, hereafter referred to as 'General Electric', which company manufactures thermostats, limit and primary controls used on oil burners, which said company manufactures, and which compete with respondent's controls (Record 43)."

The last clause of this finding should have been omitted for the reason that General Electric did not solicit the business of oil burner manufacturers and was not in competition with respondent in the sale of controls, but competed with oil burner manufacturers, customers of respondent in the sale of completed burners. (R. 45.)

II.

Statement of Fact, page 9, lines 7-9:

"(c) Detroit Lubricator Company of Detroit, Michigan, which makes thermostats but purchases its primary controls from 'Penn';"

The above finding should have been substantially as follows:

"The Detroit Lubricator Company of Detroit, 1278 Michigan, which manufactured thermostats, and in 1939 began production of competitive limit controls, but did not manufacture primary controls. This Company sold the majority of its controls to its parent company, the American Radiator Company, which was its only customer for primary controls (R. 53, 645, 648, 673, 677-689, 1363)."

III.

Statement of fact, page 10, lines 10-13:

"The first concerns to manufacture oil burner controls were the American Nokol Company, the Williams Oilmatic and Kleen Heat, back in 1920."

These companies did not manufacture controls, but were producers of oil burners and the above finding should have been so modified. (R. 1513.)

IV.

Statement of fact page 12, paragraph (b), lines 12-24:

"The Record shows that thermostats and primary controls manufactured by respondent for use with oil burners, give greater satisfaction, and more efficient performance in the ordinary installation than when controls of similar kinds, manufactured by other manufacturers, are mixed in the same installation. The evidence shows that it is not a good practice to use controls of respondent 'M-H' with controls of different makes; that the thermostat of respondent 'M-H' has a special co-ordinating and cooperating function with primary controls, and for safety and to keep down costs and field troubles, to mix controls of different manufacturers, in the same installation is not a good practice (R. 818-820; 1265-1266)."

It is submitted that the foregoing statement of fact is

not in accord with the evidence and that the Trial Examiner should have found in substance as follows:

"Many thermostats and limit controls manufactured by competitors of respondent could be and are used interchangeably with respondent's thermostats and limit controls and operate safely and satisfactorily (CX 1)."

1279 V.

Statement of fact, page 13, paragraph (a), last 3 lines:

"Respondent, in December 1936, entered into, or attempted to enter into, written agreements for the year 1939, * * *."

The year "1939" referred to in the above finding should have been "1937" since respondent usually contracted with its customers near the end of a given calendar year for the succeeding years business.

VI.

Statement of Fact, page 14, first paragraph following first quotation:

"On January 28, 1937, respondent eliminated the 95% clause from its existing contracts with its oil burner manufacturer-customers and released said manufacturer-customers therefrom. (CX 1, p. 14; 21-23; Record 110-111-115.) The 95% provision in respondent's 1936 sales agreement never became operative and no customer was required to comply therewith (R. 109-111)."

It is submitted that the aforesaid finding of fact does not in our opinion entirely reflect an accurate description of the subject matter to which it purports to relate and we feel that the said finding should have been substantially as follows:

"Respondent eliminated the 95% clause from its existing contracts with oil burner manufacturers on January 28, 1937. Prior to this date, however, several of such customers had objected to the said clause being in their contracts (CX 21, 23 A-D; 66 A-D; R. 96-99, 109-115, 374)."

VII.

Statement of Fact bottom page 14:

"In respondent's 1937 sales agreement with 79 of the 165 manufacturers of oil burners with whom respondent

entered into contracts for the year 1937, were the following provisions:

'The Purchaser agrees that at least ninety-five (95) percent of his control requirements consisting of Thermostats, Primary Controls and Limit Devices, will be purchased from the Company.' (CX-1, pp. 10-13.)"

Commission's Exhibit 1 supports the above mentioned finding of fact but it is submitted that the statement should also include the following quotation from the said agreements:

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured so as to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchasers yearly purchases will consist of at least 90% as many Room Thermostats and 100% (But at the Company's option not more than 125%) as many Limit Controls as Primary Controls". (CX-1.)

VIII.

Statement of Fact, page 15, paragraph (b), lines 6-9:

"The Perfex Company began its controls business in 1935, starting from scratch, and has increased its position in the controls field until it now occupies the position of second in the sale of controls (R. 342; 349)."

In lieu of the above statement of fact, it is submitted that the Trial Examiner should have found substantially as follows:

"The Perfex Company began the sale of controls in 1935 or 1936 and its position in the business has increased until it is now considered to be second in volume in the industry (R. 342, 376-377). However, the Perfex Company, when it first began the production and sale of controls, was a producer of limit controls only and did not manufacture thermostats or primary controls (R. 344)."

IX.

Statement of Fact, page 15, paragraph (b), lines 10-14:

1281 "One of the reasons assigned for the growth of Perfex, as stated by a witness, is the fact that this Company endeavored to sell its controls to large, nationally known companies, and to approach their customers with the idea of putting the customer's name on their burners, instead of the manufacturer's name (R. 381)."

It is submitted that the aforesaid finding of fact is in accord with the evidence with the exception of the last six words thereof, which should be changed and extended as follows:

"accessories, instead of the accessory manufacturer's name. Perfex, therefore, took the burner manufacturer's name in such instances, and affixed that name to Perfex controls (R. 372, 381)."

X.

Statement of Fact, page 16, lines 13-22:

"Another competitor engaged in the manufacture of automatic controls which it sells to oil burner manufacturers is the Detroit Lubricator Company which began business about 1933 (Record 643); this company did not make and sell a complete line of controls until 1939 (Record 648); it did not develop its limit control until 1939, however, it made sales up to that time of its thermostat, its customers buying limit controls on the open market, and this Company purchased its primary controls from respondent 'M-H' (Record 649)."

It is submitted that the aforesaid finding should be eliminated from the report for the reason that evidence does not show the Detroit Lubricator Company to have been in competition with respondent in the production and sale of a complete line of controls to oil burner manufacturers in general (R. 53, 645, 648-49, 671). Automatic temperature controls, represented only 25 or 30% of Detroit Lubricator's total business (R. 715-716). It did not sell primary controls to anyone other than its parent company, the American Radiator Company (R. 1363). Furthermore, during the years 1939 through 1941, Detroit Lubricator did not enter into any contracts for the sale of controls with any oil burner manufacturers, and did not sell

any controls to any of the oil burner manufacturers named by Counsel for the Commission as having had con-
1282 tracts for the purchase of respondent's controls (R. 1359-60, 1363-64).

XI.

Statement of Fact, page 16, paragraph (c), lines 1 through 5:

"It is shown that all manufacturers of automatic temperature controls such as 'Perfex,' 'Mercoid,' 'Penn-Electric' and 'Detroit Lubricator' followed in the main, the same procedure and practices in the sale of thermostats, limit and primary controls to oil burner manufacturer-customers; * * *."

We think that the Detroit Lubricator Company should not have been included as a competitor for reasons heretofore stated on Page 5 of this report of exceptions, and that the foregoing finding is otherwise inconsistent with the evidence and should have been substantially as follows:

"It is shown that all manufacturers of automatic temperature controls, such as, 'Perfex,' 'Mercoid,' 'Penn-Electric' and the respondent, who were selling a complete line of controls to the oil burner manufacturing trade, followed the same general pattern in the sale of such controls (R. 222-223, 225-226, 228-229, 370, 1261, 1285, 1375, 1376, 1378, 1393, 2255)."

XII.

Statement of Fact, paragraph (c), page 16, lines 11 and 12:

"They all sold controls in sets and quoted varying price brackets (Record 225; 704; 1362-63; 2139-40)."

The Trial Examiner, we think, should have found instead of the statement quoted above, substantially as follows:

"and since 1936 they all sold, or endeavored to sell, their controls in sets of three units (R. 225, 370, 1376)."

XIII.

Statement of Fact, page 18, lines 2-4:

"During the time mentioned 50% of the manufacturers of oil burners in the United States had contracts or sales agreements with respondent 'M-H' * * *."

1283 In conformity with the evidence on the point the Trial Examiner should have inserted after the word "mentioned" in the above finding, the words "more than" (CX 1, page 5).

XIV.

Statements of Fact on page 20 incorporated by reference to corresponding paragraphs of Count I:

The above referred to Statements of Fact to which exception is taken at this point, have been the subject of exceptions previously set forth on pages 1 to 7 of this memorandum of exceptions, and are applicable here with equal force.

XV.

Statement of Fact, quotation at top, page 21:

"'The Producer agrees that at least ninety-five (95) percent of his Control requirements consisting of Thermostats, Primary Controls and Limit Devices, will be purchased from the Company' (CX 1, pp. 10-13)."

The foregoing quotation did not appear in respondent's contracts during the entire period from December '36 to 1941 inclusive, but was abandoned by respondent in January, 1937 as the Trial Examiner so found on page 14 of his report. It is submitted that either the aforementioned quotation should be deleted or the time period set forth at the bottom of page 20 of the Trial Examiner's report should be changed to read "December 1936 to January 1937" instead of "December, 1936, to 1941, inclusive" as it now appears.

XVI.

Statement of Fact, page 21, Lines 17 to 26:

"In the contract (CX 66) entered into by Timken with respondent 'M-H', such qualifying clause which was added to said contract by the officials of Timken was as follows:

'In view of the special price listed in this agreement it is understood that the Producer will standardize on, and use Company's products exclusively, except for field tests or when other makes are specified by dealers.' (CX-66, CX 11-A to C; CX 18-A, B; CX 19-A, B; Record 71 to 76; 96-99.)"

The record discloses that the qualifying language added to the Timken contract (CX 66) by Timken officials did not

embrace the entire quotation set forth above but be-
1284 gan with the word "except" and included the remainder of the last clause. That part of the quotation preceding the word "except" was placed by officials of respondent in the contract prior to its presentation to Timken for acceptance (R. 1646, 1649).

XVII.

Statement of Fact, page 22, first complete paragraph:

"The Record discloses that the contract made by the Cleveland Company with respondent, referred to above (CX 23-A, B), was cancelled by the respondent on January 15, 1937. The Record further shows that on January 28, 1937, all of respondent's contracts which contained the 95% clause, were cancelled by the respondent, and oil burner-manufacturer customers who had entered into such sales agreements or contracts with the respondent were released from the terms and requirements of said sales agreements; that excepting a short period in early January of 1937, the provisions of said sales agreements were not required by respondent to be fulfilled by those who had signed such agreements (CX-1, pp. 10-15; Record 109-111)."

It is submitted that the foregoing finding of fact is not in accord with the evidence, since the contracts were not cancelled but only the 95% clause, which was but one provision of the contracts, was cancelled in January, 1937. The Trial Examiner should have found therefore as follows:

"The record discloses that the 95% clause, included in respondent's contract with the Cleveland Company, (CX 23-A-B) was cancelled by the respondent on January 15, 1937. The record further shows that on January 28, 1937, all of respondent's contracts, which contained said 95% clause, were modified to the extent of the exclusion of such clause and oil burner manufacturer customers, who had entered into such contracts with respondent, were released from the requirements of said clause; and with the exception of that short period of time in January, 1937, respondent did not require its contract customers to adhere to the provisions of such clause (CX-1; R. 109-110)."

XVIII.

Statements of Fact, on page 22, incorporated by reference to corresponding paragraphs of Count I:

1285 Those findings of the Trial Examiner as to paragraphs I and II of Count I and to which exception has heretofore been specifically taken at pages 1 and 2 of this memorandum of exceptions, are subject to the same exceptions at this point and for the same reasons already shown.

XIX.

Reference to the record pages in the Trial Examiner's report at page 23 (paragraph 1) should include in addition to page 1486, the following pages: 1483 through 1485.

XX.

Statement of Fact, page 23, paragraph (2), lines 18 to 20:

"* * * Respondent's salesmen, in calling on oil burner manufacturers, prospective customers, stress sales to manufacturers. (Record 1487-1488.) * * *"

The above statement of fact does not, in our opinion, conform to the record and we feel that the finding should have been as follows; citing the record pages used by the Trial Examiner in support thereof:

"* * * Respondent, in the sale and distribution of its controls, stresses its sales to oil burner manufacturers and endeavors to sell such manufacturers in the first instance, because it tends to simplify the job of selling to a certain extent."

XXI.

Statement of Fact, page 24, paragraph (3), lines 3 and 4:

"* * *, which in turn allow a margin of profit to said manufacturers, * * *."

In our view, the foregoing finding is not a precise restatement of the record on the point and the Trial Examiner should have found in substance as follows:

"* * * which were designed to provide a margin of profit to such manufacturers who resold to wholesalers, * * * (R. 1575)."

XXII.

Statement of Fact, page 24, paragraph (3), line 6, the word "purchases" should be preceded by the word
1286 "estimated" for the reason that respondent extended its price to any given contract customer at the beginning of the contract period. Therefore, the quantity of controls which such customer ultimately purchased from respondent during the ensuing year could not be definitely ascertained until the contract period had actually expired (CX-1).

XXIII.

Statement of Fact, page 24, tabulation; the word "(sets)" appearing in said table should have been placed under the words "Annual Volume", which words should have been extended to relate to both columns 2 and 3. The price applicable to bracket 5 should have been "13.75" instead of "13.65" and furthermore, the Trial Examiner should have included in the table similar information relative to respondent's highest price bracket as follows:

"Discount 1-49 $20.25" (RX 186).

XXIV.

Statement of Fact, page 24, lines 24 and 25:

"Respondent's prices (above) are based on quantity of controls purchased by a customer in a year (Record 30) * * *."

We are opposed to this finding for the reason that because of the nature of respondent's contractural relationship with its customers, it could not have been known until the expiration of the contract year, exactly how many controls a given customer would purchase from respondent. Therefore, we submit that the Trial Examiner should have made the following statement in lieu of the aforementioned:

"Respondent's prices were usually based upon quantity of controls which each customer agreed to purchase during the ensuing contract year, such prices in some instances being based upon each customer's previous year's performance." (CX 75-A; R. 41, 925, 929, 1622-1623.)

XXV.

Statement of Fact, page 24, lines 35 to 38:

"* * *, and respondent allows to furnace manufacturers the same discount that it gives to furnace manufacturers who have burners manufactured for them (Record 204-205). Respondent, during the years from 1937 to 1941, had six price brackets (Record 1750)."

1287 We take the position that the above finding is somewhat inaccurate and misleading and that the Trial Examiner should have made the following finding in lieu thereof:

"* * *, and respondent allowed furnace manufacturers, who had burners manufactured for them, discounts equivalent to those granted to burner manufacturers (R. 204-205). Respondent, during the years 1937 to 1941 established price brackets varying in numbers from 6 to 8 (CX-1, 73, 76; R. 39-41, 212, 753, 924-926, 1086, 1159)."

XXVI.

Statement of Fact, page 25, lines 22-25:

"* * *. If a customer failed to purchase a sufficient quantity of controls to carry such a customer from one bracket to another, such a customer did not get the reduction in price (Record 1694) * * *."

We submit that the foregoing finding is not in accord with the evidence for the reason that many of respondent's customers received the benefit of a lower price, although they were not buying in quantities which corresponded to the minimum established for such lower price by respondent. (R. 2366-2387). The Trial Examiner's finding, therefore, merely states what respondent contends, but we submit that the record failed to prove such contention and therefore the entire statement of the Trial Examiner should be stricken from the report.

XXVII.

Statement of Fact, page 25, lines 36 to 39:

"* * *. The evidence shows that respondent places its oil burner manufacturer-customers in the particular quantity bracket to which the volume of automatic temperature controls actually purchased by them from respondent entitles them. (Record 1600-1602)."

It is submitted that the above statement is not consistent with the evidence on the point and that the Trial Examiner should have made the following finding:

"The evidence shows that respondent usually placed its oil burner manufacturer customers in the particular quantity bracket corresponding to the number of controls which such customers agreed to subsequently purchase from respondent. (CX 75-A; R. 1622-1623)."

XXVIII.

Statement of Fact, page 25, lines 40 to 46; page 26, lines 1 and 2:

"However, there was a significant difference between the pricing policies of respondent and its competitors in the sale of automatic temperature controls in brackets, in that respondent's competitors quoted on the basis of the oil burner manufacurers' over-all controls 'potential', or total controls purchased rather than on the basis of oil burner manufacturer's actual purchases from the particular controls manufacturer placing the contract or quoted the price (Record 1296-1298; 1363; 1415; 2136-2137)."

It is submitted that the above finding is not consistent with the evidence for the reason that many of respondent's contracts with its oil burner manufacturer customers included the words "seasons requirements" or "total requirements" or some other similar term connoting the customer's over-all potential; furthermore such language does not disclose any definite quantity of actual purchases and as pointed out in the exception last taken the actual purchases of any given customer were not known until the end of the contract year (CX-1). Also, the evidence as to practices of competitors of respondent is irrelevant and immaterial to the issues in this case and was received over the objection of counsel for the Commission. For these reasons we contend that the foregoing statement of the Trial Examiner should have been eliminated.

XXIX.

Statement of Fact, page 26, paragraph (b), lines 11 to 14:

"* * * Respondent, in making its sales agreements (contracts) with its oil burner manufacturer-customers has always taken into consideration the quantity of controls

each customer purchased in the previous year, * * *."

1289 The above finding implies that respondent consistently placed its contract customers in the quantity bracket corresponding to the purchases of such customers in previous years but the record discloses that such practice was not uniformly so (R. 2573-2574, 2577-2578, 2582, 2585-2588). We therefore take exception to the above finding and suggest that the Trial Examiner should have found as follows:

"Respondent considered, among other things, in entering into sales contracts with oil burner manufacturers for a particular year, the quantity of controls purchased by the customer during the previous year, * * * (CX-75-A)."

XXX.

Statement of Fact, page 27, line 2; the word "furnace" should be replaced by the word "burner" (R. 1600).

XXXI.

Statement of Fact, page 27, paragraph (a), lines 1 to 4:

"Respondent is the oldest and largest of the controls manufacturers, its principal competitors, Penn, Perfex, Mercoid and Detroit Lubricator entering the controls field at various dates during the 1930s."

We are in accord with the above finding insofar as it relates to the first three competitors named therein, but as to Detroit Lubricator the record does not show that this company was a competitor of the respondent in regards to all types of controls. Furthermore, the record shows that the Detroit Lubricator sold a large volume of its production of controls to its parent company, the American Radiator Company and to the etxent of such sales it was clearly not in competition with respondent. Detroit Lubricator Company also at times purchased primary controls from other manufacturers and did not offer for sale any primary controls to any other customer than its parent company (R. 51-53, 645, 1363). For these reasons we feel that the Trial Examiner should have excluded the Detroit Lubricator as a competitor of respondent.

1290 XXXII.

Statement of Fact, page 27, paragraph (a), lines 29 to 31; page 28, lines 1 to 6:

"Respondent's practice was to keep records year after year of its oil burner customers, and this knowledge is used in making up the sales agreements of its oil burner customers; also taking into consideration the quantity of controls each customer purchased in the previous year (Record 41; 1660; 1759; 2702-2703). From this information respondent classified each customer on a basis of the volume or quantity of controls purchased by said oil burner customer during the year (Record 2689)."

It is submitted that the above finding is not entirely supported by the evidence and that the Trial Examiner should have found in substance as follows:

"Respondent maintained records of its sales in previous years to its oil burner manufacturer customers and its policy with respect to its contracts with such customers was said to be in effect that respondent extended a contract for the quantity of controls purchased by the customer in the previous year. If a customer due to developments, circumstances, etc. desired to contract for a larger quantity of controls than his previous performance indicated then respondent required a bona fide order for 1/3 of the minimum quantity of controls specified in the contract to be shipped within a period of sixty days from the acceptance of such contract (CX-75-A)."

XXXIII.

Statement of Fact, page 28, paragraph (b) lines 1 to 24:

"(b) The Record discloses from a study made by respondent in 1941, which respondent gathered for its own information and the information of its sales force, that respondent, in a number of instances during the years prior to 1941, had lost the accounts of a number of oil burner manufacturers who had standardized on respondent's controls or given to respondent the larger part of their controls business and thereafter purchased sub-
1291 stantial quantities of competitive automatic temperature controls (Record 1654-1658; 2733). Among such former accounts of respondent, as shown by evidence, are

the following: Respondent 'M-H' lost 95% of the business of Braden Ever Ready to Mercoid; 80% of the Chalmers Oil Burner Company to Perfex; 40% of Easton Oil Company to Mercoid; 25% of National Airoil to Perfex; 10% of Pan-American to Mercoid; 25% of Sunstrand Engineering Company to Mercoid; 5% of Vortex to Penn-Electric; 20% of Gold Star to Perfex; 75% of Herco to Mercoid; 10% of Lynn Products to Perfex and a number of other customers of respondent appeared in the record amounting to 31 oil burner accounts (Record 1654 to 1658); the records of respondent pertaining to said 31 accounts lost by respondent to its competitors in the years prior to 1941 gave to said competitors, in full or in part, 53% of their business as stated by respondent's General Manager, according to the estimated figures compiled by respondent (Record 1658-1659).

We object to the above Statement of Facts since the study referred to was shown to have been made in the year 1943 and relating to business transactions occurring in the year 1941. There is nothing in the record other than the unsubstantiated statements of respondent's Sales Manager to support the estimated percentages of the quantity of business said to have been lost by respondent in each instance. In addition references to years prior to 1941 were not supported by any study but merely the testimony of respondent's sales manager. The entire statement should be eliminated as being merely a series of unsupported statements of respondent's sales manager to which objections were interposed. In our opinion this line of testimony represents nothing more than pure conjecture and is of no consequence to the real issues involved. There is nothing to show the volume of business of the particular customers referred to in the finding and in the circumstances we feel that the entire statement is wholly incompetent, irrelevant and immaterial and not the basis for a proper finding of fact.

1292 XXXIV.

Statement of Fact, page 28, lines 32, 38 and 40; the word "Automatic" should be "Oilomatic".

XXXV.

Statement of Fact, page 28, line 42; the reference to the record should be page "1787" instead of "1666".

XXXVI.

Statement of Fact, page 29, lines 7 to 11;

"* * *, and the Record shows that in 1941 and prior thereto, 126 oil burner manufacturers who at one time had standardized on respondent's controls were purchasing controls of competitors of respondent and at lower prices than respondent's controls were sold at (Record 1658; 2737; 2744)."

There is no sound basis in fact for the above statement and we submit that it should be completely eliminated. The apparent basis for the statement concerning the 126 oil burner manufacturers is the testimony of respondent's sales manager, who referred to such manufacturers as also using competitive equipment in addition to that of respondent. There was no indication as to the identity of such oil burner manufacturers, no reference to the volume of their purchases from either the respondent or its competitors, and no information pertaining to price (R. 1658).

XXXVII.

Statement of Fact, page 29, paragraph (c), lines 2 and 3:

"His places of business were in Newark, New Jersey, and Baltimore, Maryland."

It is submitted that the above-mentioned statement of fact is somewhat misleading and should be as follows:

"His place of business since in or about 1934 has been located at Newark, New Jersey and, for approximately 4 years prior to that time, at Baltimore, Maryland. (R. 851)."

1293 XXXVIII.

Statement of Fact, page 29, paragraph (c), lines 24 to 28:

"* * * however, it is shown that it was the cut of its oil burner price, and not the price paid for controls by 'Quiet Heet', that was the cause of the competitive situation referred to at that time (Record 1007; 1009; 1021; 1128-1129)."

We submit that the above finding is not in accord with the evidence, which in our view shows that the low prices extended to Quiet Heet Company by respondent had a

very definite effect upon the business of oil burner manufacturers who were competing with Quiet Heet and unable to obtain the low prices which were extended to Quiet Heet (R. 918-919, 921, 924-925, 1154-1155, 1166-1169). The said finding therefore should be eliminated from the Trial Examiner's report.

XXXIX.

Statement of Fact, bottom of page 29, top of page 30.

"Automatic temperature controls are only one item in an oil burner assembly amounting to approximately one-third of the cost of the oil burner (Record 1087); the manufacturing cost of oil burners is affected by the prices of other items entering into the manufacturing or assembling of oil burners, such as motors, transformers, pumps, and fans, the price of which items, varies according to quantity of such items purchased by oil burner manufacturers (Record 1618; 1619; 1865; 2013-2015)."

In our opinion the foregoing finding of the Trial Examiner does not accurately reflect the situation as disclosed by the record and we contend that the following statement of fact should be substituted in lieu thereof;

"A set of automatic temperature controls represent the largest single item of material cost (in some cases as much as 40% of the total material cost) among the various parts of a completed oil burner (R. 1617-1623, 1721-1725). Changes in the price of controls to oil burner manufacturers resulted in many instances in corresponding changes in the price of completed burners (CX-19-A-B, 26, 35-B-C, 72; R. 916, 1150, 1169, 1166-1169, 1232, 1241, 1661-1294 1665, 1704, 1782-1789, 1800-1801, 1828-1834, 1868-1869, 1953-1954, 1979, 2005, 2656, 2715, 2780)."

XL.

Statement of Fact, page 30, lines 4 to 9:

"The testimony of a number of oil burner manufacturers was to the effect that although they knew that 'Quiet Heet' enjoyed a lower price for its controls purchased from the respondent because of 'Quiet Heet's' volume purchases, that this did not affect their business (Record 1634-1636; 1719; 1871; 1965; 1981)."

We submit that the above finding of the Trial Examiner is incomplete and immaterial and does not accurately reflect the relevant and material testimony to the contrary.

Based upon testimony of competent witnesses he should have found as follows:

"Oil burner manufacturer customers of respondent testified to the effect that the question of price was important in the purchase of automatic temperature controls and that they had lost business to certain competitors included Quiet Heet, who received lower control prices from respondent, although the exact volume of such lost business could not be calculated (R. 918-919, 921, 927, 1154-1155, 1158-1159, 1166-1169, 1170-1180)."

XLI.

Statement of Fact, page 30, paragraph (d), lines 1 to 15:

"The cost accounting report prepared and submitted by Ernest & Ernest (CX-170; 186) shows that on the basis of the manufacturing cost of respondent's controls, sold at the various bracket prices, about 45% of respondent's controls business falls within the five brackets beginning with the discount bracket and extending through Bracket 3-A, and appear to be justified by said report, (Record 2798; 2568 to 2663; 2664 to 2787; 2169). The remaining 55% of respondent's business falling in the three higher brackets (4-4A-5), respondent does not claim cost justification (Record 2796). * * * In Bracket 3-A there are included manufacturing cost of $236,476.68, which is about 20% of the total business of respondent (RX 186)."

1295 We submit that the foregoing finding is not in accord with the evidence and the Trial Examiner should have rejected the study as being incompetent to prove justification on the basis of differences in cost of distribution for the reason that it was prepared several years after the transactions, to which it relates, had occurred. Respondent did not maintain any current analysis of distribution costs for the year 1941, and the measuring factors employed in determining and allocating costs necessarily were the result of unusual conjecture (R. 2305, 2339, 2410, 2445, 2468-2470). However, in the event cost study is allowed to stand, we feel that the Trial Examiner should have found in substance, as follows:

"Respondent's cost study shows that the price differentials applicable to its sales to customers within the four highest price brackets, representing about 25% of the total

volume of business, appears to have been justified on the basis of differences in distribution costs (RX 186; R. 2464-2465, 2796). This result however, depends upon respondent's adherence to the bracket prices applicable to the first four brackets which was not the case (R. 2366-2381). The remaining volume of respondent's business to which costs were allocated in the study, came within the four largest quantity brackets namely, 3-A, 4, 4-A, and 5. Respondent made no effort to allocate the cost differentials between and among brackets 4, 4-A, and 5, and therefore, does not contend that its price differentials, applicable to those brackets were justified by differences in cost of distribution (R. 2796). The result, from respondent's study, is that between 70% and 75% of the total volume of respondent's business included in the study cannot be justified by differences in cost (RX 186; R. 2464-2465, 2796)."

XLII.

Statement of Fact, page 30, last paragraph, lines 3 to 8.

1296 "* * * and gave a picture of the competitive situation in reference to each account, and respondent's actions in meeting each competitive situation as such developed, and it was shown that in each of said accounts the respondent's price had been always and consistently higher than any of its competitors (Record 2568-2663, 2664-2787)."

This finding by the Trial Examiner is not, in our opinion, in accord with evidence on the point. The testimony referred to was to the effect that respondent did not, in every instance, know the exact identity of its competition or the exact competitive price, but that its conclusion on this point was estimated upon many occasions and was the product of mere speculation. It is submitted, therefore, that the Trial Examiner should have found instead of the statement quoted above, substantially, as follows:

"* * * and gave a picture of the competitive situation in reference to a number of these accounts, and respondent's action in meeting such competitive situations. Respondent's prices to each of the said accounts, about which respondent had knowledge as to prices quoted by its competitors, were always higher than those of its competitors (R. 2568-2786). Relative to competitive prices, respondent in many instances, had no specific information at the time

it extended its prices to those accounts involved (R. 2621, 2668, 2676-2677, 2680-2681, 2745-2747, 2757-2758, 2763, 2765, 2768-2773, 2779-2780)."

XLIII.

Statement of Fact, page 30, last paragraph, lines 9-14:

"Of the 76 off-scale accounts mentioned, 22 were sold on a competitive basis, that is, the difference in respondent's prices and its competitors' prices in each case was based upon competition (Record 2665), respondent shifting its bracket prices in its higher brackets, (4-4A-5) to meet the lower prices of competitors. * * *"

The record discloses, in our opinion, that the aforesaid finding is not consistent with the evidence and that the Trial Examiner should have found, in substance, as follows:

1297 "Among the 76 off-scale accounts mentioned, it was claimed by respondent that 22 were given low prices as a result of competition (R. 2665-2667, 2687). Six of the 22 accounts were in respondent's price brackets 1 to 3A, 8 being in bracket 4, 1 in bracket 4A, and the remaining 7 accounts in bracket 5 (R. 2366, 2375, 2379-2380, 2383-2384, 2386-2392, 2665-2667). In many instances respondent did not know the competitive prices extended to these accounts and, in some cases, did not know exactly which competitor was involved (R. 498, 2573, 2575-2576, 2593-2595, 2606-2621, 2623-2651, 2653-2659, 2680-2684, 2704-2708, 2715, 2718-2720, 2747-2749, 2755-2756, 2779-2781)."

XLIV.

Statement of Fact, page 30, last 4 lines, page 31, lines 1 to 6:

"* * * It ~~often~~ happened that respondent had several customers located in the same locality, such a case being the Quiet Heet Company of Brooklyn, New York. Respondent gave this company a Bracket 1 price in 1940 because said company purchased 679 instruments; another customer in Brooklyn was also given a Bracket 1 price although said customer purchased only 187 instruments (Record 2688; 2592). Both of these accounts, it is shown had purchased the required number of controls under Bracket 1, * * *".

We are of opinion that the above statement does not

clearly represent the situation involved and that the Trial Examiner should have made the following finding:

"* * * It often happened that respondent had several customers located in the same city, for example the Quiet Heet Company and Seal-O-Strain Corporation, in Brooklyn, New York. Respondent gave each of these companies a bracket 1 price in 1941 although the former purchased only 96 instruments and the latter 109 instruments during that year (R. 2370-2371, 2375). Neither of these companies, therefore, purchased respondent's controls in 1941, in quantities sufficient to meet the minimum of bracket 1, and neither was required to pay any additional amount for failing to so meet the required minimum. The basis upon which respondent was said to have given a 1298 bracket 1 price was the 1940 purchases of these two companies, Quiet Heet taking 679 units and Seal-O-Strain buying 187 units (R. 2577-2578, 2592). Their 1940 purchases, therefore, were equivalent to the requirements of respondent's bracket 1 quantities, * * *".

XLV.

Statement of Fact, page 31, lines 9 to 22:

"It is shown that in the 22 competitive accounts referred to (RX 186), respondent extended better prices to such customers by placing said customers in higher price brackets (giving a lower price) than the quantity controls actually purchased by said customers during 1940 or 1941 justified. By lowering its prices to said 22 oil burner manufacturer-customers respondent attempted to meet the lower price competition offered by its competitors, but in no case does the Record show that respondent's price ever equalled the lower price paid by the competitor, and oil burner manufacturers were always able, if they desired, to purchase controls from respondent's competitors at lower prices than respondent's price (Record 2662-2765-2766)."

In our opinion the foregoing finding of fact is not entirely supported by the evidence and the Trial Examiner should have found as follows:

"The record shows that for the year 1941 the 22 accounts referred to were extended lower prices by respondent by being placed in brackets requiring the purchase of larger quantities of controls than the quantities actually

purchased by these accounts, according to quantity standards established by respondent. Respondent, in lowering its prices to these 22 customers was said to have done so in order to attempt to meet lower prices offered by its competitors, but as previously stated, respondent did not know the prices which most of these accounts had been given by its competitors until after respondent had given its firm price to the same accounts (R. 2621, 2668, 2676-2677, 2680-2681, 2745-2747, 2757-2758, 2763, 2765, 2768-2773, 2779-2780).

1299 XLVI.

Statement of Fact, page 31, lines 25 to 27:

"* * * in other cases, respondent may not have known which competitor was quoting or the competitive price offered (Record 2668; 2670; 2680; 2681; 2687; 2743)".

We are of opinion that the nature of the evidence on this point requires a more absolute statement and that the Trial Examiner should have found, in substance, as follows:

"* * * in other cases, respondent did not know, at the time it agreed as to price, the exact identity of its competitors or the price offered by such competitors (R. 2573, 2575-2576, 2593, 2595, 2608-2610, 2612-2616, 2619, 2621, 2627-2628, 2634, 2635, 2638, 2640, 2649, 2668, 2670)."

XLVII.

Statement of Fact, page 31, lines 30 to 34:

"* * * and that in each of the cases where respondent shifted its bracket prices, it was to approach the lower price made by one or more of its competitors (Record 2765; 2568; 2663; 2664 to 2787)."

We submit that the above statement of the Trial Examiner is not supported by the evidence, and that he should have found in substance as follows:

"* * * and respondent's sales manager testified that in each of the 22 instances referred to above in which respondent placed such customers in lower price brackets, it did so for the purpose of approaching still lower prices made to such customers by one or more of respondent's competitors, and that these 22 accounts were the only one where off-scale prices were made to meet competition (R. 2687, 2765-2766). In respect of at least 54 other accounts

respondent granted lower prices than those applicable to its various brackets, because of reasons other than the approachment of lower competitive prices (R. 2569, 2661, 2766)."

XLVIII.

Conclusions of Fact and Law, page 33, lines 33 to 35:

"* * * and for safety, to mix controls of different manufacturers in the same installation is not a good practice."

1300 We submit that the above conclusion of the Trial Examiner is contrary to the evidence for reasons heretofore referred to on page 2 of this memorandum of Exceptions.

XLIX.

Statement of Facts, page 34, lines 5 to 12:

"In all of respondent's said agreements, the oil burner manufacturer-customer was required to buy in sets, taking 90% as many room thermostats, and 100% as many limit controls as primary controls, and it was agreed that it was unsatisfactory, and often dangerous, to mix controls made by different manufacturers, and that respondent would not assure satisfaction or assume any service responsibility as to controls when used with other makes."

The record discloses that all agreements, to which the aforesaid finding refers, did not include a provision to the effect that the mixing of controls of different makes was unsatisfactory and dangerous (CX 1) and for this reason we contend that the foregoing statement of the Trial Examiner should be modified to that extent and that after the word "agreements" in the above statement the following phrase should be inserted:

"for the year 1939 and subsequent thereto,"

L.

Statement of Fact, page 34, line 13:

"On January 23, 1937, the respondent eliminated the 95% clause * * *"

The date on which respondent eliminated the 95% clause from its contracts was "January 28" instead of "January 23" (CX 1).

LI.

Statement of Fact, page 34, lines 15 to 17:

"The 95% provision in respondent's 1936 sales agreement never became operative and no customer was required to comply therewith."

1301 The above statement of the Trial Examiner we feel should be eliminated in its entirety for reasons heretofore stated at page 3 of this memorandum of Exceptions.

LII.

Statement of Fact, page 34, paragraph (a), lines 1 to 4:

"It is shown that respondent is the owner of the Freeman and Cross primary controls and thermostats involved and referred to as charged in Paragraphs 5 and 6 of the complaint in this case."

The aforesaid finding of fact is not in accord with the evidence in the case and we submit that the Trial Examiner should have found in substance as follows:

"It is shown that respondent is the owner of the Freeman system patent covering a furnace control comprising a limit control, a fan control and a thermostat, none of which units is patented. Respondent was the holder of an exclusive license to make, use and sell and to sub-license others to make, use and sell the Cross combination patent, covering a domestic heating system and composed of three main elements, a motor driven stoker, a room thermostat, and combustion stoker switch (CX 52, 53)."

LIII.

Statement of Fact, page 37, lines 2 to 8:

"The Record discloses that respondent's bracket prices as represented by the first five brackets from the discount bracket to and including Bracket 3-A were found to be justified by a cost accounting survey. In respondent's higher brackets (4, 4 A-5) respondent has lowered its prices in making sales of its controls to 22 of its oil burner customers, to meet the lower price competition of competitors; * * *."

The aforementioned conclusion of the Trial Examiner is not in our opinion consistent with the evidence and we feel that he should have concluded substantially, as follows:

"Respondent's cost study (RX 186) discloses that for the first 4 brackets beginning with the discount bracket to and including bracket 3 the differences in the cost of
1302 distribution exceeded the differences in prices applicable to such brackets and therefore appeared to be justified on the basis of differences in cost."

In addition to the foregoing exceptions we are of opinion that the record supports further findings not set forth in the Trial Examiner's report. Such additional findings are as follows:

LIV.

Page 24, paragraph (3), between lines 6 and 7, insert the following:

"The evidence discloses a number of oil burner manufacturer customers of respondent were charged prices for its controls which afforded little, if any, margin of profit on the resale of such controls, in competition with other customers of respondent who were granted lower prices (CX 206-A; R. 925-927, 1080, 1095, 1159, 1166-1167, 1174, 1178-1179)."

LV.

Page 25, line 22; the following clause should have been added to the sentence ending with the word "controls": "until such customer reached the lowest price bracket after which any increase in purchases did not affect the price (CX-1)."

LVI

Page 26, paragraph (b), line 30, the following statement should have been inserted preceding the word "It":

"Respondent did not increase its prices, however, in cases where a customer failed to purchase the minimum quantity of controls established for the bracket to which his price applied (R. 2569-2570)."

1303 LVII.

Page 27, paragraph (a), line 19; the word "manufacturing" should have been inserted before the word "customers" so as to read "oil burner manufacturing customers."

LVIII.

Page 30, last paragraph, line 14, before word "Respondent's" insert the following:

"It is further shown that of the remaining 54 off-scale accounts approximately 48 were granted prices for 1941 which were less than the price applicable to the quantity actually purchased in each instance during that year (R. 2366-2388, 2660-2661). Respondent's prices to these 48 customers were not—extended in order to meet competitive prices and were not so claimed (R. 2568-2569). Four of these 48 customers were extended prices lower than those established for the quantities actually purchased merely because such customers were supplying oil burners without controls to furnace manufacturers who bought controls for such incomplete burners direct from respondent. Such instances previously referred to as "dual transactions," operated so as to enable the burner manufacturer to get a price from respondent based upon the combined quantities of controls purchased by him and by those furnace manufacturers who obtained their burners without controls from the said burner manufacturer (R. 2561, 2574, 2610-2611, 2616-2617, 2649-2651, 2660-2662). Furthermore, 40 of the 48 aforementioned accounts were given contracts for 1941 purchases at prices said to have been extended on the basis of past performances, or future prospects, or both (R. 2661, 2569). As to past performances in some of these 40 instances, respondent reached a simple average between the quantity of controls purchased during the years 1939 and 1940 and classified the customer in the bracket to which his average purchases conformed (R. 2573-2574, 2588, 2594-2597, 2611, 2615, 2700-2703). Others of these 40 accounts did not buy in sufficient quantities either in 1940, or by averaging the 1939 and 1940 purchases, but were given a lower price, nevertheless due to anticipated business (R. 2577-2578, 2587-2589, 2601-2603). For example, the
1304 Milwaukee Oil Burner Corporation was given a bracket #1 price for 1941 although its 1940 purchases had not met the quantity required by respondent for that established price. The lower price to this customer was given on the grounds that its 1940 purchases had been within 10% of the required minimum quantity and furthermore because of the better business outlook at the beginning of 1941 (R. 2577).

"Another of these customers Swirling Heat, Incorporated, was given a bracket #2 price in 1940 but only purchased 122 instruments. There is nothing in the record to show the extent of this company's 1939 purchases from respondent and despite the fact that the quantity purchased in 1940 did not meet the required minimum established for bracket 1, respondent nevertheless gave this customer a bracket #1 price for 1941 and with no explanation as to the reason therefor (R. 2580-2581).

"The Columbia Boiler Company, also among the 40 accounts previously referred to, signed a bracket 1 contract with respondent late in August 1941 and purchased 121 units through the end of the year, insufficient to meet the quantity requirements for the No. 1 price according to respondent's standards. There is no evidence to show that that customer bought any controls from respondent prior to that time. The reason given in justification of the price to this company could not, by its very nature, have been a factor in the granting of this price, for it was merely that had this customer been purchasing throughout the whole year it would have equalled or exceeded the bracket quantity (R. 2582-2584).

"Another of the 40 accounts, Kienzle & Merrick, bought 124 of respondent's controls during the last 8 months of 1940 although being given a bracket #1 price. This account was given a bracket #1 price for 1941 also, on the grounds that had it purchased during the entire 12 months of 1940 at the same quantity rate per month as it actually had purchased during the last 8 months of that year, it would have exceeded the quantity required by respondent for its bracket 1 price (R. 2585-2587).

"In at least 3 other instances among the 40 accounts, respondent granted prices lower than those established for the quantities actually purchased, for the reason that respondent believed such customers would acquire sufficient business during 1941 to reach the minimum quantity required for such low prices (R. 2587-2589, 2601-2603)."

1305 LIX.

Page 31, line 8, add following:

"Another of respondent's customers located in Brooklyn, the Atlas Manufacturing Company, was given a bracket 3 price for 1941 despite the fact that its 1940 purchases from respondent amounted to only 1258 units or slightly

above the minimum quantity required for bracket 2 (R. 2690; CX-1). According to respondent this bracket 3 price was extended in anticipation of an increase in Atlas' business for 1941 (R. 2690). However, this company actually purchased only 819 units in 1941 and according to respondent's price brackets should have paid $17.35 per set instead of $15.90 per set (R. 2712-2713; CX-1). The record contains no evidence tending to show that respondent gave Atlas the lower price in order to meet a competitive price, and furthermore, there was nothing to show that Atlas was buying any competitive equipment (R. 2601-2603, 2690, 2712-2713)."

Respectfully submitted,
Everett F. Haycraft,
Everett F. Haycraft,
Lewis F. Depro,
Lewis F. Depro,
Attorneys.

April 9, 1946.
LFD/amh

1306 UNITED STATES OF AMERICA.

Before Federal Trade Commission.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 14th day of January, A. D. 1948.

Commissioners:

Robert E. Freer, Chairman,
Garland S. Ferguson,
Ewin L. Davis,
William A. Ayres,
Lowell B. Mason.

* * (Caption—4920) * *

FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of the Federal Trade Commission Act, and pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other

purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), and by virtue of the authority vested in the Federal Trade Commission by the aforesaid Acts, the Federal Trade Commission on February 23, 1943, issued and subsequently served its complaint in this proceeding upon the respondent, Minneapolis-Honeywell Regulator Company, charging it with the use of unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act and also charging it with violation of the provisions of subsection (a) of Section 2 and Section 3 of said Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, and said
1307 testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint and answer thereto, testimony and other evidence, report of the trial examiner upon the evidence and exceptions filed thereto, briefs filed in support of and in opposition to the complaint, and oral argument of counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

Findings as to the Facts.

Paragraph One: Respondent, Minneapolis-Honeywell Regulator Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its general office and principal place of business at 2747 Fourth Avenue, South, in the City of Minneapolis, State of Minnesota. Respondent is now, and for several years last past has been, engaged in the manufacture of automatic controls for oil, gas, and coal heating plants and certain industrial operations and in the sale of automatic temperature controls for oil burners, principally to oil-burner manufacturers and also to wholesalers and dealers in oil burners and automatic tem-

perature controls located in the various states of the United States, the Territories thereof, and in the District of Columbia. Respondent causes its automatic temperature controls, when sold, to be transported from the places of manufacture in the States of Minnesota and Indiana and through distribution points in certain other states of the United States to the purchasers thereof located in states other than the State of Minnesota and Indiana or other points of origin of said shipments. Respondent maintains, and during all times mentioned herein has maintained, a course of trade in commerce in said products between and among the various states of the United States, the Territories thereof, and in the District of Columbia.

Paragraph Two: In the course and conduct of its aforesaid business, the respondent has been, and is now, engaged in active and substantial competition with other manufacturers and sellers engaged in the sale and distribution of automatic temperature controls in commerce between and among the various states of the United States, the Territories thereof, and in the District of Columbia.

Paragraph Three: The respondent, Minneapolis-
1308 Honeywell Regulator Company, was organized in 1927 as result of the combination of the Minneapolis Heat Regulator Company of Minneapolis and the Honeywell Heating Specialties Company of Wabash, Indiana. Since that time, said respondent has manufactured and sold the greater part of the automatic temperature controls used in the United States. The total volume of sales of said products by the respondent annually during the years 1939, 1940, and 1941 constituted approximately sixty percent of the total number of automatic temperature controls sold annually in the United States to manufacturers of oil burners and to wholesalers, contractors, and dealers in oil burners and automatic temperature controls.

Respondent, in the sale of its automatic temperature controls during the years 1936 to 1941, inclusive, entered into annual contracts or agreements with manufacturers of oil burners for the purchase of sets or units of automatic temperature controls. The number of manufacturers of oil burners having such contracts with said respondent during said years constituted more than fifty percent of all the manufacturers of oil burners within the United States.

Paragraph Four: "Automatic temperature controls" as the term is used in this proceeding means automatic temperature controls for domestic oil burners of the gun and

rotary types. The automatic temperature controls used on domestic oil burners are usually, but not necessarily, sold in sets of three units each, comprising a room thermostat, a limit control, and a primary control. Some manufacturers of domestic oil burners also use an extra limit control, referred to as a "fan control," and many manufacturers, particularly those who also produce furnaces, use several thermostats and primary controls as zone controls for the heating of large spaces.

The primary control, sometimes referred to as a "stack switch," "Combustion control," "master control," or "safety control," is an essential element in every oil-burner installation of the gun or rotary type. Respondent owns and controls many of the existing patents relating to primary controls. There are many thermostats and limit controls being manufactured and sold by competitors of respondent which could be, and are, satisfactorily and safely used interchangeably with thermostats and limit controls of the respondent. The primary control sold by the respondent is sold under the trade name of "Protec-
1309 torelay." The limit controls of the respondent are known as the "Airstat" for warm-air heating plants, "Aquastat" for hot-water heating plants, and "Pressuretrol" or "Vaporstat" for steam and vapor heating plants.

Paragraph Five: The respondent has developed and established a definite public acceptance for its automatic temperature controls through and by use of extensive advertising of its controls and since the formation of the respondent corporation in 1927, through 1941, respondent has spent on national advertising the sum of $3,948,000. As a result of such advertising there has been developed a large customer demand for, and public acceptance of, respondent's line of automatic temperature controls, with the result that the respondent has been able at all times to sell its automatic temperature controls at prices higher than those charged by its competitors. In many instances manufacturers of oil burners have charged from $2.50 to $5 more for such burners equipped with respondent's automatic controls than for the same burners equipped with controls of respondent's competitors.

Paragraph Six: The principal competitors of the respondent are the Penn-Electric Switch Company of Goshen, Indiana, Mercoid Corporation of Chicago, Illinois, and the Perfex Corporation of Milwaukee, Wisconsin, all of whom manufacture and sell the three types of temperature con-

trols, usually in sets. In addition, there are other competitors of the respondent who manufacture controls other than the primary control. All of said competitors of respondent manufacture controls for use on oil burners, some of which controls made by each are comparable to controls made by respondent and other companies.

I.

Paragraph Seven: During the years from 1936 to 1941, the respondent, in the course of its said business, entered or attempted to enter into written agreements with all of its customers manufacturing domestic oil burners to purchase controls from respondent, such controls to be purchased in sets consisting of a thermostat, a limit control, and a primary control at a combination price per set. It was customary for the respondent to prepare these agreements on a calendar-year basis. The agreements were usually prepared and submitted in the month of Decem-
1310 ber for the following year. These agreements were prepared either by the home office at Minneapolis or by one of its several branch offices, subject to the approval of the home office. Contracts entered into between the respondent and its customers for the years 1936 and 1937 contained, among other things, the following provisions:

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls."

In one instance, in a contract for the year 1936, the following additional agreement was inserted:

"In view of the special prices listed in this agreement, it is understood that the Purchaser will standardize on and use the Company's products exclusively, except for field test or when other makes are specified by dealer."

In seven of its contracts or agreements for the year 1937, the respondent inserted in the blank space between the word "contract" and "sets," the words "season requirements," "estimated requirements," or a similar phrase. In addition, in 79 of the 165 contracts executed for the year 1937, the respondent inserted the additional proviso:

"The Purchaser agrees that at least ninety-five (95) percent of his control requirements, consisting of Thermostats, Primary Controls and Limiting Devices, will be purchased from the Company."

1311 The respondent, on January 28, 1937, sent a letter to all the customers with whom contracts had been made containing the above provision, notifying them that said provision should be eliminated and stricken from the contract, and as a result this provision never became operative during said year.

In the year 1938 the respondent entered into agreements with 131 oil-burner manufacturer-customers which included the following provision:

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls."

In the blank space between the words "contract" and "sets" the number of sets or estimated number of sets was usually inserted but in the case of contracts with twelve of its customers the words "season requirements," "estimated requirements," or a similar phrase was inserted. Subsequent to the year 1938 the phrases "season requirements," "estimated requirements," or similar phrases were omitted from said contracts.

In the year 1939 the respondent entered into agreements with 132 of its oil-burner manufacturer-customers which included the following proviso:

"The Company agrees to sell, and the Purchaser agrees

to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets or more of the Company's automatic temperature controls. Be-
1312 cause the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and to avoid any such difficulty and divided service responsibility, it is agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices."

In the year 1940 the respondent entered into agreements with 132 of its oil-burner manufacturer-customers which included the following proviso:

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ..... sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of satisfactory operation nor assume any service responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices."

In the year 1941 respondent entered into agreements with 122 of its oil-burner manufacturer-customers which included the following provision:

"The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this agreement ..... sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifi-
cally designed to operate one with the other, it is
1313 unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of sat-

isfactory operation or assume any service responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices."

Paragraph Eight: The Commission finds that the various provisions of respondent's contracts, as hereinabove described, which require the purchaser to purchase at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls have had the tendency to induce a substantial number of manufacturers of domestic oil burners to purchase from respondent all or substantially all of their requirements of thermostats and limit controls used with respondent's primary controls, and competitors of respondent have thereby been prevented from selling thermostats and limit controls in substantial quantities to such customers purchasing primary controls from respondent.

Paragraph Nine: The Commission further finds that by reason of the dominant position of the respondent in the sale and distribution of automatic temperature controls, the use by the respondent of the acts and practices as herein described has substantially injured competition in the sale of automatic temperature controls, has unduly and unreasonably hindered, obstructed, restrained, and lessened competition in the manufacture and sale of said automatic temperature controls, and has a tendency to deprive purchasers and the general public of the benefit of free and active competition in the manufacture and sale of automatic temperature controls.

Paragraph Ten: The Commission further finds that the contracts made by the respondent with various oil-burner manufacturers which required that such manufacturers purchase at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls constituted, in effect, contracts for the sale of goods on the condition, and with the agreement and
1314 understanding, that such oil-burner manufacturers should not use or deal in automatic temperature controls of competitors of the respondent.

Since the primary control is an essential element in every domestic oil-burner installation, respondent employed the method of using such control as a gauge for determin-

ing the number of sets of controls a customer would agree to purchase. Such provisions in respondent's contracts with its oil-burner manufacturer-customers operated to preclude the sale of limit controls by competitors of respondent to such manufacturers under contract with respondent at least to the extent of the number of respondent's primary controls purchased by these manufacturers. These provisions also confined the sale of thermostats by competitors of respondent to respondent's contract customers to quantities not exceeding one-tenth of the quantity of primary controls which such customers purchased from respondent.

By reason of the dominant position held by respondent in the sale and distribution of automatic temperature controls and the number of contracts negotiated by the respondent, the effects of such contracts were substantially to lessen competition and tend to create a monopoly in the respondent in automatic temperature controls.

II.

Paragraph Eleven: The respondent is the owner of the Freeman Patent No. 1,813,732, which covers systems of hot-air furnace control in which, upon rise in the temperature of a furnace or like heating device, the source of heat is reduced or shut down but the blower or other circulating means is permitted to operate, and in which, upon fall of such temperature, the blower or other circulating device is stopped but the source of heat is permitted to heat the furnace or other heating device. In the course and conduct of its business for several years prior to 1943, the respondent granted, under threat of infringement suit is necessary, nonexclusive licenses to cer-
1315 tain of its competitors, namely, Perfex Corporation, Penn-Electric Switch Corporation, White-Rodgers Electric Company, Cook Electric Company, and Bendix Aviation Corporation, under said Freeman Patent to make, use, and sell a "combination furnace control," which is defined as a thermostatic switch specially designed for carrying out the system of the Freeman Patent to control the fan and limit circuits. The use of the "combination furnace control" carries with it a license for one installation employing the sequence of operation of the Freeman Patent. Such licensing agreements provided that a royalty of twenty-five cents be paid on each combination furnace

control sold by the licensee and also required the licensee to maintain certain specified minimum selling prices for the combination furnace controls sold by them. Such licenses were granted by the respondent on the express condition that the licensee would sell "combination furnace controls" only at prices and on terms not more favorable to the customer than those fixed by the respondent for its own products embodying the invention covered by said license agreement.

Paragraph Twelve: During the times herein mentioned, the respondent was also the exclusive licensee of the Cross Patent No. 1,758,146. This was a combination or system patent composed of three main elements—(1) a motor-driven stoker, (2) a room thermostat, and (3) a combustion stoker switch. The respondent did not manufacture or install heating systems under the Cross combination patent. Respondent did, however, manufacture and sell the controls necessary for installations under this patent, including a combination stoker switch, which is an unpatented article. In making sales of the combination stoker switch, the respondent granted a license to the purchaser of such stoker switch to install the Cross system of furnace control. In this manner the respondent has precluded the use of combustion stoker switches as an element in the assembly covered by the Cross Patent unless such switches were manufactured by the respondent and purchased from it or from its sub-licensees.

Paragraph Thirteen: Two proceedings, one involving the Cross Patent (*Mercoid Corp.* v. *Midcontinent Co., et al.*, 320 U. S. 661) and the second involving the Freeman Patent (*Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680), came before the Supreme Court of the United States, and that Court in January 1944 held in both cases that the practices of the respondent con-
1316 stituted an extension of the patents to embrace unpatented devices and that the competition which was sought to be controlled was not competition in the sale of the patented combinations but merely competition in the sale of unpatented combustion stoker switches and "combination furnace controls." The conduct of the respondent under said patents was therefore measured in the light of the standards imposed by the anti-trust laws and the Court held that respondent may not obtain from any court of equity any decree which directly or indirectly helps to

subvert the public policy which underlies the grant of its patents.

Paragraph Fourteen: The Commission finds that the acts and practices of the respondent in connection with its attempt to require users of the furnace control system under the Cross Patent to purchase automatic stoker switches for use in said system only from the respondent and in connection with the attempt to exclude competitors from supplying "combination furnace controls" for use in systems covered by the Freeman Patent unless such competitors hold a sublicense from the respondent, pay the respondent a royalty on each "combination furnace control" sold, and maintain prices for such controls established by the respondent, all have a tendency and capacity to restrain, restrict, and lessen competition in the manufacture and sale of controls in heating systems employing the Cross or Freeman combination of controls.

III.

Paragraph Fifteen: The respondent recognized three channels of trade in distribution and sale of its automatic temperature controls—(a) oil-burner manufacturers, who ordinarily sell their products, including the accompanying controls, as original equipment therewith to wholesalers; (b) wholesalers or jobbers, who ordinarily sell both complete heating units and also separate automatic temperature controls to dealers; and (c) dealers, who are retailers selling to the ultimate user.

Respondent published list prices for its automatic temperature controls with discounts or net prices regularly allowed to oil-burner manufacturers, wholesalers, or jobbers and to dealers. Respondent's prices to dealers and to wholesalers or jobbers varied from 25 percent off list price to 43.75 percent (25 percent and 25 percent) off list price, and varied with the trade channels in which the pur-
1317 chasers are engaged. The sales of controls by the respondent to wholesalers and dealers have generally been for resale rather than as original equipment on any domestic oil burners they may resell. Such controls were ordinarily sold by wholesalers and dealers for repair, replacement, or auxiliary equipment beyond that furnished by the original oil-burner manufacturer as part of the original equipment.

Paragraph Sixteen: In addition to the acts and prac-

tices hereinabove described, the respondent, in the course and conduct of its business since June 19, 1936, in connection with the sale and distribution of its automatic temperature controls, has discriminated in price between different purchasers buying such controls of like grade and quality by selling its controls to some of such purchasers at lower prices than it sells its controls of like grade and quality to other of its customers who are competitively engaged with the former in the sale of such controls within the United States.

An example of the discriminations in price made by the respondent is the various discounts allowed to oil-burner manufacturers, who purchase the great majority of automatic temperature controls sold by the respondent. Such oil-burner manufacturers were engaged in competition with each other in the sale of oil burners to wholesalers, dealers, and other users of oil burners.

The respondent has sold its said automatic temperature controls, particularly thermostats, limit controls, and primary controls, in sets of three, comprising one each of said controls. The respondent did not recognize as an oil-burner manufacturer any manufacturers who did not purchase a minimum of 50 sets of controls, or 150 units, annually. However, to such oil-burner manufacturers who had contracts with the respondent, the respondent allowed its maximum discount of 25 percent and 25 percent off list price. Such oil-burner manufacturers were generally designated as "discount customers."

The price per set of controls to oil-burner manufacturers who purchased in excess of 50 sets annually was determined by the annual volume of sets which such oil-burner manufacturers purchased or agreed to purchase. For this purpose the respondent established a series of price brackets based upon volume. Each bracket covered 1318 an annual volume and determined the price per set for the controls purchased by the customer in the particular volume bracket. The volume included in each bracket and the price per bracket varied from year to year. Respondent's several manufacturer quantity brackets determining its net prices for automatic temperature controls sold to the manufacturers of oil burners in the years 1937, 1938, 1939, 1940, and 1941, together with a discount equivalent to the lower prices to such manufacturers purchasing in larger quantities, are set forth in the following table:

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

STATEMENT SHOWING ANNUAL VOLUME AND PRICE BRACKETS FOR SETS[1] AND DISCOUNT EQUIVALENT OFF HIGHEST NET PRICES TO MANUFACTURERS FOR EACH YEAR—1937 TO 1941, INCLUSIVE.

Bracket Number	Annual Volume (Sets)[1]	Net Price Scale[2]	Discount Equivalent Off Highest Net Price to Manufacturers of $23.85
	1937		
1	50 - 99	$23.85	—
2	100 - 349	22.60	5.24%
3	350 - 3,999	21.30	10.69%
3A	— —	—	—
4	4,000 - 7,499	19.85	16.77%
4A	— —	—	—
5	7,500 - 14,999	17.85	25.16%
6	15,000 - up	16.55	30.61%
	1938		
1	50 - 749	$21.05	—
2	750 - 2,999	19.35	8.08%
3	3,000 - 7,499	18.35	12.83%
3A	— —	—	—
4	7,500 - 14,999	17.25	18.05%
4A	— —	—	—
5	15,000 - up	16.25	22.80%
6	15,000 - up[3]	14.90	29.22%

1. Volumes shown hereon are for "Sets" only and are not for separate "Units." Respondent's automatic temperature controls in all five years were priced on a unit basis irrespective of whether purchased by units or by sets, and the several manufacturers' price brackets were similar for those contracting to purchase sets and those contracting to purchase units, the minimum number of units necessary to reach a particular bracket being three times the minimum number of sets necessary to reach that bracket. For example, Bracket 1 prices applied to a customer contracting to purchase either 50 sets or 150 units.

2. The prices set forth above are in each case the sum of the respective net prices in the particular year of a primary control, limit control, and thermostat making up a representative set. For customers receiving the discount of 25% and 25%, the prices of the same sets were as follows: 1939—$20.82; 1940—$20.82; 1941—$20.25. Customers in this class received during 1937 a discount of 40-5%, making a net price of $25.65, and during 1938 a discount of 45%, making a net price of $27.23.

3. A special concession in price was offered to 4 customers under condition that they place order for 10,000 sets prior to September 1, 1938.

1319

Bracket Number	Annual Volume (Sets)[1]	Net Price Scale[2]	Discount Equivalent Off Highest Net Price to Manufacturers of $18.10
	1939		
1	50 - 349	$18.10	—
2	350 - 999	17.25	4.70%
3	1,000 - 4,999	16.65	8.01%
3A	— —	—	—
4	5,000 - 9,999	15.95	11.88%
4A	— —	—	—
5	10,000 - up	14.90	17.67%
6	— —	—	—
	1940		
1	50 - 349	$18.10	—
2	350 - 999	17.25	4.70%
3	1,000 - 2,499	16.65	8.01%
3A	2,500 - 4,999	16.25	10.22%
4	5,000 - 7,499	15.85	12.43%
4A	7,500 - 9,999	15.15	16.30%
5	10,000 - up	14.65	19.06%
6	— —	—	—
	1941		
1	50 - 349	$17.35	—
2	350 - 999	16.45	5.19%
3	1,000 - 2,499	15.90	8.36%
3A	2,500 - 4,999	15.35	11.33%
4	5,000 - 7,499	14.90	14.12%
4A	7,500 - 9,999	14.25	17.87%
5	10,000 - up	13.75	23.05%
6	— —	—	—

1320 As indicated by the foregoing table, respondent discriminated in price in favor of customers buying in larger quantities as against those customers buying in smaller quantities. A set of automatic temperature controls represents the largest single item of cost (in some cases approximately 40 percent of total material cost) among the various parts of a finished oil burner. Changes

in the price of controls to oil-burner manufacturers resulted in many instances in corresponding changes in the price of completed oil burners and necessarily affected sales and profits. In some instances customers of respondent lost business to certain of their competitors who enjoyed lower control prices from the respondent.

The quantity or bracket prices were usually based upon the quantity set out in contract executed by the oil-burner manufacturers at the beginning of the year. The execution of a contract was not, however, essential, as bracket prices were allowed to some customers who did not execute contracts. The quantity set out in the contract was based either upon number of controls purchased the previous year, the average of two or more prior years, or the estimated quantity which the manufacturer expected to use during the year. If the manufacturer failed to purchase sufficient sets of controls to entitle him to the bracket price allotted, the respondent did not require additional payment because of the lesser quantity purchased. If, however, the manufacturer purchased a greater quantity of controls than estimated or set out in the contract and if such quantity was sufficient to place the manufacturer in a larger quantity bracket, the respondent allowed such manufacturer the larger quantity bracket price on all purchases during the year and issued refund or rebate to the manufacturer covering the difference in the bracket prices.

1321 Paragraph Seventeen. In an effort to justify its various price brackets, respondent, after the issuance of the complaint herein, and during the pendency of this proceeding, employed a recognized accounting firm to prepare a study of costs. This study was based upon the bracket prices adopted and used by respondent during the year 1941, which were as follows:

Bracket	Unit Volume	Set Volume	Price Per Set
Discount Bracket	1 - 149	1 - 49	$20.25
Bracket #1	150 - 1,049	50 - 349	17.35
" #2	1,050 - 2,999	350 - 999	16.45
" #3	3,000 - 7,499	1,000 - 2,499	15.90
" #3A	7,500 - 14,999	2,500 - 4,999	15.35
" 4	15,000 - 22,499	5,000 - 7,499	14.90
" 4A	22,500 - 29,999	7,500 - 9,999	14.25
" 5	30,000 and over	10,000 and over	13.75

The original study was completed on February 7, 1944, and supplemental study, May 16, 1945. Respondent did not

maintain any current analysis of distribution cost for the year 1941, and the controlling factors used in the aforesaid study in allocating costs necessarily had to be estimated.

In this cost study, no attempt was made to allocate costs as between each of the three lowest price brackets (4, 4A, and 5), since the difference in price was greater than the amount of unallocated costs and it was deemed impractical to allocate additional items of cost which were excluded from the study. More than 55 percent of respondent's total volume of controls sold to oil-burner manufacturers was sold at prices applicable to brackets 4, 4A, and 5, the three lowest price brackets. Prices for each of the first five brackets, namely, the discount bracket and brackets 1 to 3A, inclusive, appear to have been justified by the study on the basis of cost differentials applicable in each case. Respondent, however, did not know the cost of selling and distributing to any particular customer within any of the price brackets, and no attempt was made to analyze its cost of distribution on an order basis.

Testimony concerning respondent's cost report disclosed that approximately 43 percent of the total cost
1322 of manufacturing used in the study was applicable to customers who paid more or less than the bracket price to which their purchases ostensibly entitled them. These were known as "off-scale sales."

In order to allocate costs to the proper quantity brackets, respondent had its accountants recast its cost study and prepare a supplemental study. In recasting the off-scale sales for the supplemental study, the costs applicable in each instance were transferred from the particular price bracket to the bracket consistent with the number of units purchased. The supplemental report did not change any of the accounting principles or measuring factors used for allocating costs, the latter being based upon estimates arrived at several years subsequent to the transactions to which they referred, but the recasting did change the distribution costs, the discount bracket being increased, while brackets 1 through 3-A were decreased. It also caused a change in the cost differential between brackets 3 and 3-A so that the reduction in price between those two brackets exceeded the reduction in cost by two cents, whereas the original study shows a cost reduction of fourteen cents in excess of the price reduction between the same two brackets.

Paragraph Eighteen: The Commission finds that the price differences allowed by the respondent in the sale of its automatic temperature controls, based upon quantities as set out in respondent's various bracket prices, constituted discriminations in price between purchasers of commodities of like grade and quality.

Based upon the cost studies introduced by the respondent and the testimony in connection therewith, the Commission finds that only the quantity prices included in the discount bracket and brackets 1 to 3-A, inclusive, make due allowance for differences in cost of manufacture, sale, or delivery resulting from the differing quantities in which respondent's automatic temperature controls were sold or delivered to purchasers. The Commission further finds that respondent's price differences based upon quantity purchases under respondent's price brackets 4, 4-A, and 5 have not been shown to be justified by reason of differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which respondent's automatic temperature controls were sold or delivered to its various oil-burner manufacturer-customers.

1323 The Commission further finds that oil-burner manufacturers who received the benefit of the various discriminatory prices, discounts, or rebates granted by the respondent have a substantial advantage in selling oil burners equipped with respondent's controls in competition with other oil-burner manufacturers purchasing and using respondent's controls who do not receive the benefit of such discriminatory prices, discounts, or rebates and who are obliged to pay respondent's higher cost bracket price. In order to sell their oil burners equipped with respondent's automatic temperature controls in competition with customers of the respondent who receive the benefit of respondent's discriminations in price, oil-burner manufacturers who pay respondent's discount or higher bracket price or who are denied discounts or rebates allowed to such favored customers must either sell at competitive prices and, in so doing, reduce their possible profits by the amounts of discriminations against them or attempt to sell at higher prices than those which the favored customers of respondent charge for oil burners equipped with respondent's automatic temperature controls, with the result of inability to secure business and a reduction in the volume of their sales.

By respondent's method of selling and the use of the

price discriminations hereinabove described, customers paying a higher price are discriminated against with respect to all other customers paying a lower price, while the customers paying a lower price are given the benefit of discrimination as against the other customers of the respondent who pay a higher price.

Paragraph Nineteen: The Commission further finds that the price discriminations based upon quantity purchases as set out in its various bracket prices and particularly in brackets 4 to 6, inclusive, have the capacity and tendency to induce the purchase of respondent's automatic temperature controls by various oil-burner manufacturers and have tended to, and do, divert trade to the respondent from its competitors and have had a substantial injurious effect upon competition in the sale and distribution of automatic temperature controls in commerce among and between the various states of the United States.

Paragraph Twenty: The Commission further finds that the price differences allowed by the respondent to its customers on so-called off-scale sales constituted a discrimination in price. In 1941 there were 76 customers 1324 who were classified as "off-scale sales." In the cost report submitted by the respondent, approximately 43 percent of the total cost of manufacturing was applicable to such off-scale customers. The cost study introduced by the respondent dealt principally with an effort to justify differentials in respondent's quantity or bracket prices. This study did not justify the price differentials to any particular customer. Consequently, so far as such off-scale sales are concerned, there has been no justification submitted.

These off-scale sales involve almost entirely sales to customers at a bracket price lower than the customer was entitled to by reason of the quantity purchased by him. For example, a customer might be allowed a bracket 4 or 5 price on estimated purchases for the year when in fact his yearly purchases were such as to entitle him only to a bracket 3 or 3-A price. In so doing, the respondent discriminated in price in favor of such off-scale customer as against other customers who were paying a higher price for automatic temperature controls, including customers who were in fact purchasing substantially as many automatic temperature controls as such off-scale customer but

who were not granted the higher bracket price enjoyed by such off-scale customer.

Paragraph Twenty-one: The Commission further finds that the respondent engaged in further discriminations in price by allowing an oil-burner manufacturer to count for bracket price purposes automatic temperature controls purchased by the customer or furnace manufacturer buying from such oil-burner manufacturer. In this manner, while the furnace manufacturer obtained a discount based upon his purchase of controls from the respondent, the oil-burner manufacturer who supplied the oil burner without controls to such furnace manufacturer obtained credit on total purchases for not only the quantity of controls purchased by him from the respondent but also the controls purchased by the furnace manufacturer to whom he had sold, thereby entitling such oil-burner manufacturer to be included in a lower price bracket. This was known as a "dual transaction."

For example, Automatic Burner Corporation in the year 1939 purchased 21,753 units from the respondent, and its customer the Holland Furnace Company purchased 10,224 for the same year. Although the 10,224 controls were shipped directly to the Holland Furnace Com-
1325 pany, the Automatic Burner Corporation received credit for the purchase of the total volume of both. This practice on the part of the respondent also constituted a discrimination in price in that it allowed a lower bracket price to a customer whose purchases were not sufficient to bring it within such price bracket except when combined with automatic temperature controls purchased by its customer.

Paragraph Twenty-two: The respondent, in effect, accepted the cost justification shown by its cost study as to brackets 1 to 3-A, inclusive, but as to brackets 4, 4-A, and 5 it contended that the quantity prices shown in those latter brackets were made to meet competition. There was a total of 76 accounts upon which off-scale prices had been allowed to the various customers in the year 1941. The respondent selected 22 accounts from these off-scale accounts and claimed that the prices allowed to those customers were lower prices made to meet competitive prices. Since there were 76 off-scale accounts and no such contention made as to the remaining 54, this defense or contention of meeting competitive prices cannot be considered as justifying respondent's practice of off-scale

selling. The respondent attempted to use these accounts to prove a defense of meeting an equally low price of a competitor under Section 2(b) of the Clayton Act, not only as to the off-scale sales but also as a defense to the lower quantity prices in brackets 4, 4-A, and 5, which were not justified by its cost study.

The trial examiner in his conclusions of fact and of law has accepted the contention of the respondent that the quantity prices shown in brackets 4, 4-A, and 5 were made to meet competitive prices and has found that—

"In respondent's higher brackets (4, 4A, -5) respondent has lowered its prices in making sales of its controls to 22 of its oil burner customers, to meet the lower price competition of competitors."

Since all of the 22 oil-burner-customer accounts do not come within the classification of brackets 4, 4-A, and 5 and do not constitute all the customers of the respondent who received the lower prices provided for in brackets 4, 4-A, and 5, this conclusion by the trial examiner cannot be accepted. The record shows that of these 22 accounts, only four—Cleveland Steel Products Company, 1326 Delco Appliance Division of General Motors, Gilbert & Barker Manufacturing Company, and Williams Oil-O-Matic Heating Corporation—purchased in sufficient quantities in 1941 to entitle them to the quantity prices provided for in brackets 4, 4-A, and 5. The remaining 18 fell within the discount bracket and brackets 1 to 3-A and were so recast by respondent's supplemental cost study.

In the Williams Oil-O-Matic transaction, the meeting of a lower price of a competitor was not involved. In 1936 Williams Oil-O-Matic purchased 3,527 units from the respondent. During that year Williams was charging $2.50 more for burners equipped with respondent's controls. Based upon 1936 purchases, the respondent gave Williams the 3,000 price for controls for 1937. This was a price higher than previously charged. Williams immediately retaliated by charging $7.50 more for burners equipped with respondent's controls. For the purpose of inducing Williams to reduce this price differential respondent gave Williams its best price for 1938, and the differential charged by Williams was reduced to $2.50 for 1938, no price difference for 1939, $2.50 for 1940, and no price difference for 1941.

The Cleveland Steel Products Company transaction also

involved an effort to reduce the price differential of $5 charged by Cleveland for burners equipped with respondent's controls. Also this account fell within the classification of a dual transaction in that Cleveland was allowed credit for purchases of controls made by Fox Furnace Division, American Radiator Company, for whom Cleveland was furnishing burners without controls.

The Delco Appliance Division of General Motors transaction did not involve meeting the price of a competitor. This company made its own thermostats and primary controls and purchased only limit controls from respondent with the exception of some items for replacement. Units purchased brought Delco within the 4-A bracket, but it was accorded the bracket 5 price by respondent.

In the Gilbert & Barker Manufacturing Company transaction, this company began the development and sale of a low-priced burner equipped with Penn Switch controls in 1939. On the basis of information that this company had sold 3,000 Penn-equipped burners in 1939, respondent gave Gilbert & Barker its lowest price, or bracket 5 price, for 1940. It was not until six months later that respond-
1327 ent was informed that the price of the Penn relay switch was 50 cents under respondent's price on relay switch. No further reduction was made by respondent for 1941. Consequently, respondent's price to Gilbert & Barker Manufacturing Company was based entirely on potential output and was not made to meet the price of Penn Switch or any other competitor.

Consequently, the respondent has failed to prove that any customer whose quantity purchases placed him in brackets 4, 4-A, and 5 received a lower price, off-scale or otherwise, to meet an equally low price of a competitor. As a matter of fact, in practically all of the 22 accounts listed by the respondent, it followed its regular practice of submitting a contract in December for the following year at a time when it had no knowledge as to what the following-year price of its competitors would be.

Even if it be considered that respondent did in fact meet an equally low price of a competitor in the above-mentioned transactions, this would not constitute a justification either for respondent's practice of allowing off-scale prices or for respondent's prices for the quantities provided in brackets 4, 4-A, and 5, which have been found not to be justified under the provisos of Section 2(a) of the Clayton Act. In making his conclusion of fact and

of law based upon these transactions, the trial examiner has made his own interpretation of the Clayton Act, which interpretation is contrary to the express provisions of the Act and contrary to the decisions of the Supreme Court construing said Act.

"Section 2(b) of the Clayton Act does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. This Section speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The act thus places emphasis on individual competitive situations rather than upon a general system of competition." (*F. T. C.* v. *Staley Mfg. Co.*, 324 U. S. 746, 753.)

The trial examiner has also erroneously concluded that the price discriminations given by the respondent have not tended to substantially lessen, injure, prevent, or
1328 destroy competition between respondent's customers.

This conclusion is not supported by the greater weight of the evidence in this record. The great majority of automatic temperature controls for domestic oil burners sold by the respondent were purchased by oil-burner manufacturers. Since a set of temperature controls represents the largest single item of cost among the various parts of a finished oil burner, changes in the price of controls to oil-burner manufacturers resulted in many instances in corresponding changes in the price of completed oil burners and necessarily affected sales and profits. Furthermore, oil-burner manufacturers testified that the question of price was important in the purchase of automatic temperature controls and that they had lost business to certain competitors, including Quiet-Heet, who enjoyed lower control prices from respondent, although the exact volume of such lost business could not be calculated.

Conclusion.

The acts and practices of the respondent of incorporating various provisions in its contracts as hereinabove found, such as agreements which require the purchaser to purchase at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls, have the tendency and capacity to induce a substantial number of manufacturers of domestic oil burners

to purchase from respondent all or substantially all of their requirements of thermostats and limit controls used with respondent's primary controls; have substantially injured competition in the sale in commerce of automatic temperature controls; have unduly and unreasonably hindered, obstructed, restrained, and lessened competition in the manufacture and sale in commerce of respondent's automatic temperature controls; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

The acts and practices of the respondent in attempting to require users of the furnace control system under the Cross Patent to purchase automatic stoker switches for use in said system only from the respondent and in attempting to exclude competitors from supplying "combination furnace controls" for use in systems covered by the Freeman Patent unless such competitors hold a sublicense from the respondent, pay the respondent a royalty on each "combination furnace control" sold, and maintain prices for such controls established by the re-
1329 spondent, have a tendency and capacity to restrain, restrict, and lessen competition in the manufacture and sale of controls and heating systems employing the Cross and Freeman combination of controls and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

The acts and practices of the respondent as hereinabove found of entering into contracts with various oil-burner manufacturers which required the purchase of at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls constituted, in effect, contracts for the sale of goods on the condition, and with the agreement and understanding, that such oil-burner manufacturers should not use or deal in automatic temperature controls of competitors of the respondent and constituted a violation of the provisions of Section 3 of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act.

The aforesaid discriminations in price by the respondent, as hereinabove found, constitute violations of subsection (a) of Section 2 of an Act of Congress entitled

"An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act).

By the Commission.

R. E. Freer,
Chairman.

Dated this 14th day of January, A. D. 1948.

Attest:
Otis B. Johnson,
Secretary.

1330 UNITED STATES OF AMERICA

Before Federal Trade Commission.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 14th day of January, A. D. 1948.

Commissioners:

Robert E. Freer, Chairman,
Garland S. Ferguson,
Ewin L. Davis,
William A. Ayres,
Lowell B. Mason.

* * (Caption—4920) * *

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of the respondent, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence and exceptions filed thereto, briefs filed in support of the complaint and in opposition thereto, and oral argument of counsel; and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the

Federal Trade Commission Act and has violated the provisions of Section 3 of that certain Act of Congress of the United States entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, commonly known as the Clayton Act, and subsection (a) of Section 2 of said Clayton Act as amended by an Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act:

I. It Is Ordered that the respondent, Minneapolis-Honeywell Regulator Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device in connection with the offering for sale, sale, and distribution of 1331 automatic temperature controls and other furnace controls in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

1. Selling or making any contract for the sale of automatic temperature controls on the condition, agreement, or understanding that the purchaser shall purchase as many limit controls as primary controls.

2. Selling or making any contract for the sale of automatic temperature controls on the condition, agreement, or understanding that the purchaser thereof shall purchase 90 percent as many thermostats as primary controls.

3. Entering into, continuing, or carrying out any agreement or understanding which requires a purchaser to buy any number of limit controls or thermostats with the purchase of respondent's primary controls; provided, however, that nothing herein contained shall prohibit the respondent from selling its automatic temperature controls in sets at a specified price per set.

4. Licensing or otherwise authorizing the use of the furnace control system covered by the Cross Patent on the condition, agreement, or understanding that only automatic stoker switches manufactured or sold by the respondent shall be used in such combination.

5. Licensing or otherwise authorizing the use of the furnace control system covered by the Freeman Patent on the condition, agreement, or understanding that the combination furnace control or any other control used in such system be sold at the price established by the respondent.

6. Using any patent covering a system of furnace controls to require the purchase from respondent of any unpatented control used in said system or requiring the maintenance of prices established by the respondent for any such unpatented control.

1332 II. It Is Further Ordered that the respondent, Minneapolis-Honeywell Regulator Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device in connection with the sale or the making of any contract for the sale of automatic temperature controls or other furnace controls in commerce as "commerce" is defined in that Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), do forthwith cease and desist from—

1. Selling or making any contract for the sale of primary controls on the condition, agreement, or understanding that the purchaser thereof shall not use with such primary controls any limit controls or thermostats other than those acquired from respondent or from some source authorized by respondent.

III. It Is Further Ordered that respondent, Minneapolis-Honeywell Regulator Company, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in the sale of automatic temperature controls or other furnace controls in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among oil-burner manufacturers purchasing said automatic temperature controls and other furnace controls—

1. By selling such controls to some oil-burner manufacturers at prices materially different from the prices charged other oil-burner manufacturers who in fact compete in the sale and distribution of such furnace controls, when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered.

1333 IV. It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it

of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

By the Commission.

(Seal) Otis B. Johnson,
Secretary.

Opinion of the Commission attached.

Dissenting Opinion of Commissioner Mason attached.

1334 Opinion of the Commission

In the Matter of
Minneapolis-Honeywell Regulator Co.

Docket No. 4920.

Ayres, Commissioner.

The Complaint is directed against practices by respondent in connection with the sale of automatic temperature controls manufactured by it which are used in connection with oil burners of the pressure and rotary types for domestic heating plants. Respondent's sales of such products annually during 1939, 1940 and 1941 represented approximately 60% of the total number of such controls sold during those years in the United States.

Count I of the complaint alleges, among other things, that respondent sells controls in sets of three units consisting of a thermostat, a limit control and a primary control, and that its annual contracts with manufacturers of oil burners or furnaces provide, in part, "that the purchaser will buy at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls," or contain substantially similar provisions. It also alleges that some of respondent's contracts contain provisions which require its customers to buy respondent's controls exclusively or which limit the extent to which they may buy controls from respondent's competitors.

The evidence disclosed that a number of contracts which respondent entered into with its manufacturer-customers near the end of 1936 for 1937 business required such customers to purchase "at least 95 per cent" of their control requirements from respondent. On advice of counsel the

contracts were amended on January 28, 1937, by deleting that provision and respondent's customers were advised that they were not bound by it. That provision never had any substantial effect and has not been repeated. It was abandoned by respondent in recognition of its illegality and there is no reason to believe that it will be resumed. Accordingly, the order does not include any prohibition with respect to it.

Respondent, in effect, concedes that the provision of its contracts requiring customers to purchase from it as many limit controls as primary controls was improper. It contends, however, that it should not be prohibited from requiring its customers to purchase from it 90 per cent
1335 as many thermostats as primary controls. (It should be explained that the purpose of this provision is to require the use of respondent's thermostats exclusively with its primary controls. The provision for 90 per cent instead of 100 per cent as many thermostats as primary controls is due to the fact that on some installations a second limit control is used to perform the function of the thermostats and also that on replacement sales the old thermostat can sometimes be continued in use.) Respondent asserts that its thermostats and primary controls differ from those of its competitors in certain scientifically important respects and are designed to operate together. It is urged by respondent that it is inefficient and dangerous to use respondent's primary controls in the same installation with thermostats of other makes.

It is stipulated in the record, among other things, that

> "Thermostats and limit controls of the proper type manufactured and sold by a number of competitors of the respondent could be and are satisfactorily and safely used by manufacturers of oil burners, furnace manufacturers and contractors interchangeably for thermostats and limit controls of the same type sold by respondent on installations where respondent's primary controls are used."

This provision of the stipulation is also supported by evidence appearing elsewhere in the record.

In *Thomson Manufacturing Company* v. *F. T. C.*, 150 F. (2nd) 952, the respondent leased its rivet-setting machines and required that rivets used in them be purchased from it. The Court said that the evidence indicates that the best results are obtained when the machines and rivets of one

manufacturer are used together, and that if improper rivets are used, repairs to the machines and interruptions in the work might ensue. After citing *United States Shoe Machinery Corp.* v. *U. S.*, 258 U. S. 451, and *International Business Machines Corp.* v. *U. S.*, 298 U. S. 131, the Court stated:

> "The open market not the court should be the forum for the presentation of claims as to the merits of tied articles. The lessees are quite capable of judging
> 1336 for themselves in an atmosphere of competition whether or not rivets of one manufacturer will work in the machines of another. That decision involves considerations of economy and efficiency that will likely vary from lessee to lessee."

In the present case, oil burner manufacturers should be left free to judge for themselves in an atmosphere of competition whether or not thermostats of one manufacturer will work with the primary controls of another. Since the use of proper type thermostats and primary controls of different makes in the same installation is safe, we must leave for local regulation the problem of hazardous conditions which may result from the improper mixing of controls.

Respondent's annual contracts with oil burner manufacturers contain a blank space intended for the insertion of the number of sets of controls which the manufacturers agree to buy from respondent during the life of the contract. In 1937 and 1938 the blank space in some of these contracts carried the words "season's requirements" or "estimated requirements" in lieu of a specific number. It is argued on one hand that such language committed the oil burner manufacturer to purchase all of its automatic control requirements during the life of the contract from the respondent; and, on the other hand, that it committed the oil burner manufacturer to purchase from respondent only that number of respondent's controls which the customer might need during the season, and that it did not limit the right of the customer to purchase controls from others. Respondent apparently recognized the questionable nature of this language and discontinued its use. It does not appear necessary, therefore, to include in the order any specific prohibition with respect to this point.

Count I of the complaint also charges misuse of two system patents, the details of which are set out in the find-

ings. In two decisions in January, 1944, involving private litigants, the Supreme Court held that both of the system patents were being improperly used by respondent (*Mercoid Corp.* v. *Mid-Continent Investment Company and Minneapolis-Honeywell Regulator Co.*, 320 U. S. 661; and *Mercoid Corporation* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680). Respondent urged without contradiction that promptly after the decisions of the Supreme
1337 Court all of its agreements of every kind involving the two patents were terminated and that "all of the practices condemned by the Supreme Court have been eliminated and are not now being carried on in any way by M-H."

The decisions of the Supreme Court were in private litigation. It is difficult to appraise the scope and effect of those decisions in correcting the practices insofar as they may affect parties not involved in those proceedings. The misuse of the patents was redressable in the courts by private litigants, but the unfair practices involved in such misuse also substantially affected the public. Such unfair practices were, therefore, properly included in the complaint. The allegations with respect to them were sustained by the record, and such practices have accordingly been prohibited by the order. Insofar as there is no intention to resume the practices or insofar as they are restrained by the decisions of the courts, the prohibitions of the order with respect to them constitute no burden or penalty on respondent. To the extent, however, that the practices may be resumed in a form which will not be reached by the decisions of the courts, the prohibitions of our order afford a measure of protection and assurance to the public which could otherwise be obtained only by instituting a new proceeding when warranted by future developments, with its consequent delays and costs.

The charges in Count II of the complaint are substantially the same as in Count I insofar as they relate to the tying and exclusive dealing provisions of respondent's contracts, except that they allege violation of Section 3 of the Clayton Act, rather than Section 5 of the Federal Trade Commission Act. Substantially the same considerations which show the violations under Count I also show violations under Count II and the findings and order have covered both counts.

The majority decision on the foregoing points is sub-

stantially in accord with the recommendations of the Trial Examiner.

Count III of the complaint charges price discrimination in violation of Section 2(a) of the Clayton Act. The Trial Examiner concluded that the respondent sells its controls to certain oil burner and furnace manufacturers at lower prices than to others, but that such price differentials do not tend to lessen competition or create a monopoly, that certain of the price differentials are justified by cost differences, and that others resulted from prices which were made for the purpose of meeting the lower prices of 1338 competitors. He recommended that the charges of Count III be dismissed without prejudice. The majority of the Commission is in disagreement with the conclusions of fact and law and with the recommendations of the Trial Examiner with respect to this count.

Respondent's price schedules to oil burner and furnace manufacturers have been based upon annual quantity purchases and have varied to some extent from year to year both in the price differentials and the quantity brackets upon which they were based. The method of pricing during the period covered by the record in this case, however, has remained essentially the same. Because respondent's cost study was based on its price schedule for 1941 and because that is the most recent year covered by the evidence, our consideration has been directed primarily to that schedule.

Respondent's price differentials to manufacturers were based upon annual quantity purchases graduated according to brackets numbered, respectively, 1, 2, 3, 3A, 4, 4A and 5, each bracket progressively being based on a larger quantity and reflecting a lower price. The Commission has found that the quantity price differentials represented by bracket 1 through 3A make only due allowance for differences in cost within the meaning of the Act, but that the price differentials based on brackets 4, 4A and 5 have not been justified by cost differences. In reaching this decision, the Commission has recognized certain practical difficulties in the case and has given effect to certain general considerations.

Cost studies of the sort presented in this matter ordinarily do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations. There is inherent in them a reasonable margin of allowable

error. Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight. Respondent had an extensive cost study made by an independent firm of accountants and auditors which disclosed cost justification for the price differentials resulting only from brackets 1 through 3A. It apparently was made with considerable care and great particularity of detail. Although basic questions may properly be raised with respect to the soundness of certain of the procedures and allocations upon which the cost differentials were determined, respondent's effort represents a fair and objective study of the problem which was probably done as well as it could be done under the circumstances. Respondent's burden under the Act is very great and it should have a liberal measure of consideration when it becomes apparent that it has made sincere and extensive efforts to discharge that burden. We have accordingly accepted the results of the cost study as fairly reflecting respondent's cost differentials within a reasonable margin of error.

1339 It has been urged that there is necessarily a failure of cost justification where the quantities purchased by two competing customers at applicable price differentials are nearly the same, with one being just below and the other being at or slightly above the minimum quantity for a particular bracket. This argument may be persuasive in a case where such a situation is actually shown and where there is some indication that it is a matter of competitive importance. But there has been no such showing in this case. Any annual quantity system of pricing is vulnerable to this argument and it may be controlling where it has practical aspects. Where it is purely theoretical, however, it does not constitute a satisfactory basis for disallowing the whole effort at cost justification.

The record discloses instances in which respondent granted bracket 1 through 3A prices to certain customers who did not purchase the quantities required under its schedule for such prices. These instances are designated "off-scale sales". Where annual purchases of a customer are less than the minimum quantity required for the price granted, the cost study shows no justification for the resulting price differential.

Such situations result primarily from respondent's practice of entering into annual contracts with its customers at the beginning of a year based on past experience. If a

customer fails to purchase the quantity provided in the contract, and upon which the price is based, the contract price is not increased, and sales to such customer are at off-scale prices. If, on the other hand, the customer purchases more than the contract quantity and qualifies during the year for a lower price under the next bracket, the lower price is given to him in full by means of retroactive discounts or otherwise. Respondent defends this practice as a business necessity, stating that it is impossible to determine at the beginning of the year the unusual factors which may adversely affect the quantity of a customer's purchases, and that it would be prohibitively difficult to require a customer during the year to adjust the price upward.

From a practical standpoint this is no doubt a valid and sufficient reason to respondent. But the respondent has voluntarily chosen its method of selling and pricing. If that method, as it does here, involves practical difficulties which make it hard to comply with the require-
1340 ments of the law, such difficulties constitute a calculated risk. It is respondent's responsibility, in spite of these practical difficulties, to comply with the law. Otherwise, a seller could set up a schedule of annual quantity prices, justify the differentials, and then sell freely to favored customers at off-scale prices so long as the customers agreed in advance to buy the quantities required for the prices made to them. The law could not be effectively applied on such a basis.

Respondent also gave off-scale prices to certain oil burner manufacturers who sold oil burners without controls to furnace manufacturers who, in turn, bought controls directly from the respondent. The quantity of controls bought from respondent by the furnace manufacturer in such instances was credited to the oil burner manufacturer in addition to the controls purchased by the latter. The aggregate quantity so computed was used to determine the bracket price granted to the oil burner manufacturer on his own purchases, resulting in some instances, in his receiving a lower price than he would otherwise have received under respondent's schedule. Such instances are characterized as "dual" transactions. Prices determined on this basis result in price differentials which are not justified by respondent's cost study.

The price differentials resulting from respondent's price brackets 4, 4A and 5 were not justified by cost differences,

but were defended on the basis of meeting in good faith the lower prices of competitors.

Respondent argues in effect that the accounts paying the higher prices are manufacturers who purchase in small volume and that the competition for their business is not as severe as it is for the business of manufacturers who purchase in larger volume. It was urged that all of the manufacturers of automatic controls go after the business of the larger accounts, resulting in the keenest competition for that business throughout the period covered by this case. Respondent argues, therefore, that it had to reduce its prices to customers in the three lowest price brackets in order to keep its share of their business. The record indicates generally that competitors of respondent were offering lower prices to comparable accounts and no instance is shown in which respondent actually undercut competitors' prices.

1341 Respondent's three lowest price brackets do not represent prices made in particular instances to meet competitors' prices, but reflect progressive reductions in a comprehensive price schedule based on increased quantity purchases. It is significant that more than 55 percent of respondent's total volume of controls sold to oil burner manufacturers were at prices in the three lowest brackets. Such prices were probably established for the purpose of obtaining the business of the larger oil burner and furnace manufacturers, and it is apparent that they were largely effective in accomplishing that result. But they represented no sharp departure from respondent's general pricing policy. All of respondent's prices were established with knowledge of the price levels of its competitors, and were undoubtedly influenced by those price levels. As shown in the findings, respondent has developed a large customer demand for, and public acceptance of its controls, and has been able consistently to sell them at prices higher than those charged by its competitors.

The mere fact that competitors' prices are lower than respondent's discriminatory prices does not constitute a showing that such discriminatory prices were made in good faith to meet the equally low or lower prices of competitors. When price differentials of an established schedule reach a point where they cannot be justified by cost differences, it is unsound and inconsistent to urge that they then become prices which have been made in good faith to meet equally low or lower prices of competitors simply

because they may not be lower than competitors' prices. To accept this proposition would mean that any seller of a commodity which generally sells at a premium price may freely discriminate among its customers so long as it does not undercut the prices of competitors. Such an interpretation would make the Act largely unworkable and would, to a substantial extent, defeat its objectives. Respondent has not met the good faith requirement of Section 2(b) of the Act, either with respect to its three lowest price brackets or with respect to its "off-scale" prices in the higher price brackets. Its defense on this basis has been rejected by the Commission.

Respondent argues that its discriminatory prices have not resulted in injury to competition within the meaning of the Act. This point is covered in the findings in considerable detail.

1342 Respondent urges that the businesses of its competitors in the types of automatic temperature controls involved in this matter have grown, and that its own relative position in the industry decreased from approximately 73 percent in 1937 to about 60 percent in 1941, and that, therefore, the practices with which it is charged have not substantially lessened competition or tended to create a monopoly. But the law does not permit respondent to resort to unfair or discriminatory practices in order to maintain its competitive position in the industry. If its use of such practices substantially interferes with or impedes the progress or growth of competitors, there has been a substantial injury to or lessening of competition within the meaning of the law. That respondent's discriminatory practices and prices have had such an effect on competition is fully established by the record.

The competitive effects of respondent's discriminatory prices on other manufacturers of controls are persuasively indicated by its own arguments that its discriminatory prices were made for the purpose of meeting competition. These arguments show that respondent's discriminatory prices were made to retain the business of certain customers or to secure the business of others and that they were largely successful in doing so. To the extent that business is held by or diverted to respondent from its competitors by its discriminatory prices and unfair practices, competition has been adversely affected within the meaning of the law. That this has been done to a substantial extent is clear from the record.

Annual quantity prices tend to encourage customers to concentrate their purchases with a single source of supply rather than to distribute their business among competitors. When an oil burner manufacturer sees that his total control requirements, if concentrated with respondent, will entitle him to a bracket 4 price, for example, but if divided among other sources of supply he may receive only a bracket 2 or a bracket 3 price, the competitive tendency of the discriminatory bracket 4 price is apparent. The very nature of quantity price differentials is to divert business to the seller granting such differentials, and, insofar as they cannot be justified by cost differences or otherwise defended, any substantial injury to competition due to them falls within the ban of the Act.

Respondent also argues that there has been no adverse effect on competition among its customers as a result of its discriminatory prices. It contends that the prices 1343 of oil burners vary as much as $60.00 per burner among the various manufacturers, and that frequently the highest prices are charged by oil burner manufacturers who paid respondent's lowest prices for controls.

The record shows that automatic controls are the most important single item of cost of any of the components involved in the manufacture of oil burners, estimates in the record indicating that they may represent as much as 40 percent of the material cost of manufacturing an oil burner. In addition to controls, oil burner manufacturers purchase motors, pumps, fans, transformers, etc. Respondent asserts that on each such item the burner manufacturer gets a discount if he buys in volume and does not get it if he does not buy in volume. It is argued, therefore, that the differences in the prices of controls alone and their proper place in the competitive picture cannot be traced with certainty through the oil burner manufacturer to determine their effect on competition among such manufacturers.

Accept, for the purposes of the argument, respondent's statement that oil burner manufacturers who buy in volume receive discounts on motors, pumps, fans and transformers as well as controls. The cost of producing oil burners by large quantity manufacturers would thereby be made substantially less than the cost of producing oil burners by smaller manufacturers who buy in smaller quantities. The larger manufacturers would receive aggregate cost advantages of substantial competitive importance. Such advan-

tages may be reflected in the competition of selling oil burners, either in lower prices, more extensive advertising, better service to customers, more effective selling methods, or improved quality, or in a combination of these potent competitive factors. Each seller who may have contributed to the aggregate price or cost advantages obtained by the favored burner manufacturers is, in part, responsible for the aggregate competitive result. The fact that the whole competitive effect cannot be traced to respondent alone does not relieve respondent of its share of responsibility—a share which appears to have been real and substantial.

It is also argued that other controls are available to oil burner manufacturers at lower prices, and, therefore, that respondent's discriminatory prices do not injure competition among them. The record discloses that there is a substantial demand for respondent's controls and that in order to be competitive, manufacturers of furnaces and oil burners must be able to supply them. Dealers 1344 frequently request manufacturers to supply respondent's controls with the burners purchased by such dealers. In such situations the manufacturers must buy respondent's controls at respondent's prices, but must still compete with other manufacturers for the dealer's business. Where competitive manufacturers receive discriminatory prices from the respondent, competition between the manufacturers for the dealer's business may be very substantially affected.

References have been made in this opinion to the discriminations and competitive effects resulting from lower prices being granted to some buyers than to others. Such references could just as well have been to the discriminations and competitive effects resulting from higher prices being charged some buyers than others. There should be no confusion concerning the purpose of the Commisison's order on this phase of the case. It is not the intent of the order, nor is its effect to prevent or restrain respondent from reducing prices to the trade or to consumers. This Commission has no authority or desire to intrude in the field of price control either by enhancement, curtailment or stabilization, and its effort here is not directed to that end. There is no showing that respondent has endeavored to reduce prices to the trade or to consumers, and there is nothing in our order which would prevent its doing so. The order directs respondent to cease and desist from discriminating in prices, and it may eliminate the discrimina-

tions by reducing its high prices as well as by increasing its low prices. But the law requires that the discriminations be eliminated. We think that this requirement is sound and that it yields results of great benefit to the trade and to consumers, but regardless of our choice of economic philosophies, it is our obligation to enforce the law.

Here we have discussed some of the general considerations which guided the Commission in reaching its decision. The findings as to the facts cover the several points involved with considerable particularity and they are fully supported by the record. On the findings and the supporting evidence, the Commission has reached its conclusions and issued its order to cease and desist.

1345 UNITED STATES OF AMERICA.

Before Federal Trade Commission.

* * (Caption—4920) * *

OPINION OF COMMISSIONER LOWELL B. MASON DISSENTING IN PART AND CONCURRING IN PART.

It is only fair to assume that the answer to a question of business procedure, whether it is the decision of a court or the official ruling of a Government agency, should be recognized as some kind of a guide for businessmen. At least, following a court's ruling should never be used against a citizen as the basis for a cease and desist order.

If Government is going to switch the rules on a businessman in the middle of a play, we should at least give him a chance to start running the other way before slapping penalties on him. Yet that is what I believe the order in this case seeks to do here, as the following facts disclose:

In 1942 this respondent was operating under a patent system which in a private litigation had been approved by the Federal Circuit Court of Appeals (Seventh Circuit). The next year the Federal Trade Commission charged this method of operation was illegal.

1346 In 1944 the Supreme Court reversed the Circuit Court of Appeals and decided that the respondent's course of action was improper.

Of course, when the rules of commerce are switched on a

businessman by a superior court reversing a lower court, if he persists in following the inferior court, then that is something else.

But in this case, when the Supreme Court reversed the Circuit Court of Appeals, the respondent immediately reformed its practices to comply with the latest judicial ruling. What more could anyone do?

The Commission seeks to justify an order to cease and desist on the grounds that the Supreme Court decision entered in a private suit, only protects the plaintiff in that case and not other competitors. I see no foundation for us to assume that the respondent will violate the decree of the Supreme Court either against the litigants named or by repeating the acts complained of against any other person.

It is difficult, in view of the Jeddo-Highland decision recently entered by the Commission (Docket 4468), to reject the Commission's reasoning in the Jeddo case when deciding this case, unless there is evidence in the record which makes us doubt this respondent's good faith or even its good judgment.

The case at bar goes much further than the Jeddo case,
the dismissal of which was based on the economic im-
1347 practicality of Jeddo attempting a repetition of the
unlawfu acts charged. Here the Circuit Court of Appeals approved the acts in question, but when the Court of Last Resort reversed the rule of conduct that should govern, the respondent was immediately obedient to its terms. It is Quixotic to imagine the respondent laying itself open to further legal burdens by resuming the practices abandoned four years past. I see no profit in shooting a tiger stuffed and mounted so long ago.

So much for that part of the controversy dealing with Section 5 of the Federal Trade Commission Act.

As for the portion dealing with Section 3 of the Clayton Act, I am in accord with the majority opinion, findings and order.

As to that portion of the controversy dealing with Section 2 of the Clayton Act, I desire to direct my dissent to the findings of fact, order and opinion relating to the price differentials resulting from respondent's price brackets 4, 4A and 5. These were not justified by cost differences but were defended on the basis of meeting the lower prices of competitors.

Here there seems to be but little variance between the majority and myself as to the facts of the case, my dis-

sent being based on the conclusions derived therefrom. In order to clarify these, let me catalog those things about which I believe there to be no controversy.

First, Minneapolis-Honeywell was a combination of two of the oldest heat control manufacturers in the business. Its antecedents date back to 1885. As pioneers in
1348 this business, vigorously pressing its engineering and research work for the creation of new devices and redesigning and improving its existing devices, it early established a dominant position in the heat control industry. Its price structure was higher than those of its competitors and there was a greater public acceptance for its products. These higher prices were good targets for entrepreneurs entering the field to shoot at. As these newcomers acquired the skill, the "know-how" and good will which had heretofore been largely the sole possession of Minneapolis-Honeywell, the respondent gradually lost its relatively high market position in the heat control field to its competition.

Between 1937 and 1941, Minneapolis-Honeywell suffered a decline of 20 per cent in the total heat control business obtained. This, it seems to me, ought to warn anyone who wanted to stay in business that it should bring its prices in line with its competition.

In this case, the respondent, having lost this ratio of business, made up its corporate mind to hang on to what business it had left and in good faith and what appears to be only ordinary common sense, brought its price down closer to the level of its competitors.

And it is here that I again part with the majority views.
It is their contention, as I see it, that the trial exam-
1349 iner was wrong when he "concluded that the price discriminations given by the respondent have not tended to substantially lessen, injure, prevent or destroy competition between respondent's customers."

I am of the opinion that on this point the findings of the trial examiner are correct. He held:

> "It is shown from the evidence that respondent's selling of its automatic temperature controls, of like grade and quality, to certain of its oil burner manufacturer-customers at lower prices than respondent sells its automatic temperature controls of like grade and quality to others of its oil burner manufacturer-customers, has not tended to substantially lessen, injure, prevent or destroy competition between respond-

ent's customers, or create a monopoly in the line of commerce in which respondent and its competitors are engaged."

The trial examiner also found:

"Competitors' prices have always and consistently remained under the prices of respondent, and oil burner manufacturers were always able, if they desired, to purchase controls from respondent's competitors at prices lower than respondent's prices."

The Commission majority contends that in some cases Minneapolis-Honeywell did not lower its price to meet competitors but lowered its price to get the assemblers of heating units who used Minneapolis-Honeywell controls to sell the finished product cheaper to the consumer. What an unhappy bit of evidence to justify a cease and desist order against any businessman. The respondent got caught endeavoring to reduce prices to consumers! That old cliche about how wicked industrialists are always reducing
1350 prices to consumers in order to put some competitor out of business has too long been overworked. If reducing prices is wrong, I wish more businessmen were guilty of it. The Commission here condemns a respondent for doing what the Commission is supposed to accomplish itself—the protection of the consumer.

The contention that Section 2 (b) of the Clayton Act does not concern itself with pricing systems does not mean that the pricing systems of respondent's competitors cannot be considered to prove that at all times the prices of competitors were less than the respondent's. Even though the pricing system of competitors may not be used to justify the defense of the proviso in Section 2 (b), there is nothing in the Staley case to prevent its being used to show that the price discrimination has not tended to substantially lessen, injure, prevent or destroy competition.

Referring to the trial examiner's conclusions that "the price discriminations given by the respondent have
1351 not tended to substantially lessen, injure, prevent or destroy competition between respondent's customers," the Commission states: "This conclusion is not supported by a greater weight of the evidence in this record."

My dissent is here directed to the point that a respondent charged with violating the law in a Federal Trade Commission complaint does not have to prove its innocence. The

burden of proof has not been removed from the Government's shoulders, nor can the Government brush this duty aside by merely making a general findings of fact that they (oil burner manufacturers) "had lost business to certain competitors, including Quiet-Heet, who enjoyed lower control prices from respondent, although the exact volume of such lost business could not be calculated." To my mind, this is not sufficient to show injury to competition.

In fact, the greater weight of the testimony, taking into consideration that respondent's competitors had gained instead of lost business during the period under scrutiny, whilst the respondent receded from its dominant position in the market, would indicate that competition had been very much improved in the heat control industry.

On the record I believe it to be impossible for the Commission to make a specific finding that the effect of the discrimination was to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition. A general finding is insufficient for this purpose.

1352 The prosecuting function in Government is often beset with the cry that "competition is being injured" whenever someone reduces prices.

We must not confuse "injury to competition" with the normal effect resulting from the clash between two businessmen, both endeavoring to obtain the patronage of the consumer by making a better product for less. As I said in my Standard Oil dissent, "We mouth the phrase 'injury to competition' so often that we confuse it with 'injury to a competitor.' When you meet your competitor's lower price so as to keep a customer he sought to take away from you, he feels he has been injured. Of course he has, but that does not mean that competition has been injured. On the contrary, it may have been improved."

If Minneapolis-Honeywell had known that the Federal Trade Commission was going to sue it back in 1943, Minneapolis-Honeywell would still have been faced with two dilemmas. Either it had to cut its price, meet its competition, but get involved in a Government suit—or not cut its price, not meet its competition and today have no suit—nor business, either.

Minneapolis-Honeywell took the former course. Now it finds itself tied up with an order which in no way affects the conduct of its competitors, but which will certainly pre-

vent it from ever approaching a competitor's price if doing so will keep business away from the competitor.

1353 The majority decision in this case, I believe, indicates that such acts have the tendency and capacity to injure competition. Carried to its ultimate end, the order imposed on Minneapolis-Honeywell can very well mean that the Commission itself, by a strict enforcement of this strained interpretation of the law, can remove Minneapolis-Honeywell as a competitive factor in this field of industry.

To this can be added the ironic touch that the testimony in this case indicates the competitors of Minneapolis-Honeywell are following the same practices which the Commission here condemns. Only they have no suits pending against them. If suits are filed and orders entered against them in accord with the instant case, we will have arrived at the millenium when no one will be allowed to take any business away from anyone else, and free competition will be in the museum of quaint and outmoded ideas.

The Standard Oil decision (Docket 4389) and this instant matter are but a series of technical, obscure and esoteric cease and desist orders, each of which attacks only a small segment of free enterprise, but they are slowly etching away our economic liberties in the name of saving them.

My prognosis is no idle fancy for, while the Congress has given businessmen the right to meet competitors' prices, the decision of this agency takes it away from

1354 this particular respondent. That we do it piecemeal can be no comfort to anyone for who can tell where our next order will strike?

In the instant case, the Commission has repeated the error I complained against in my dissent in the Standard Oil case, and I am encouraged to reiterate the objection by quoting the decision of Mr. Justice Briggs recently delivered in Morton Salt *vs.* Federal Trade Commission. The general sweeping language of the order to cease and desist exceeds the jurisdiction of the Commission.

> "The gist of this order is to require the petitioner to conduct its business generally at its peril, leaving the Commission or any person or litigant claiming injury to harass petitioner by proceedings under the Act for a mistake in interpretation or application of the order. In a similar case in disposing of a sweeping

and general order of the National Labor Relations Board, the Supreme Court said:

> 'But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall a any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. * * *
>
> 'We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found.' "

But here the order is even less specific than the stat-
1355 ute, for the statute does give a citizen the right to meet the competitors' price, something which the order of this Commission takes away.

I am against it.

Lowell B. Mason,
Commissioner.

1356 IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

9584

Minneapolis-Honeywell Regulator Company,
Petitioner,

against

Federal Trade Commission,
Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed Mar. 11, 1948. Kenneth J. Carrick, Clerk.)

Cravath, Swaine & Moore,
15 Broad Street,
New York 5, N. Y.

Bair & Freeman,
135 South La Salle Street,
Chicago 3, Illinois
Attorneys for Petitioner.

March 12, 1948.

1357 IN THE

UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—9584) * *

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now comes your petitioner, Minneapolis-Honeywell Regulator Company, a Delaware corporation (hereinafter called the petitioner), by its attorneys, and presents its petition to review and set aside the Order of the Federal Trade Commission (hereinafter referred to as the Commission), made and entered on the 14th day of January, 1948, and served on your petitioner on January 21, 1948, and in support thereof respectfully shows as follows:

1358 Statement of the Nature of the Proceedings As to Which Review Is Sought.

A. The Complaint.

First: The Order of the Commission herein which your petitioner seeks to have reviewed and set aside arises out of a complaint issued by the Commission on February 23, 1943 (hereinafter called the complaint). The complaint, which contains three Counts, sought a cease and desist order against the continuance of certain alleged practices of the petitioner on the ground that such practices prevented competition in the sale of automatic temperature controls for domestic heating plants, unreasonably restrained interstate commerce in such controls, tended to create a monopoly in interstate commerce in the interstate sale and distribution of such controls, and constituted unfair methods of competition, in violation of Section 5 of the Federal Trade Commission Act (15 U. S. C. § 45), Section 3 of the Clayton Act (15 U. S. C. § 14), and Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. § 13).

Second: The alleged practices of petitioner charged under Count I of the complaint to be violative of Section 5

of the Federal Trade Commission Act include petitioner's (a) requiring manufacturers of oil burners for domestic heating to purchase at least 90% as many of one type of automatic temperature control and 100% as many of another type of such control from petitioner as they purchase of still another type of such control, and (b) inducing others, by threatening infringement suits, to accept licenses to use certain inventions covered by patents owned or controlled by petitioner in combination with certain un-
1359 patented articles under agreements not to sell such articles upon terms more favorable than those fixed by petitioner for its own products.

Third: The principal charge under Count II of the complaint is that petitioner's alleged practice of selling certain of its controls on condition that the purchasers thereof shall not deal in or use similar controls made by competitors of petitioner is violative of Section 3 of the Clayton Act.

Fourth: The charges in Count III of the complaint alleging violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, are based upon alleged practices of petitioner of selling its controls to some of its customers at prices different from those charged others of its customers, which such different prices are alleged to discriminate unfairly in favor of some of such customers.

B. The Answer.

Fifth: In its answer, while admitting some of the allegations of fact contained in the complaint, petitioner denies any violation on its part of Section 5 of the Federal Trade Commission Act or of Section 3 of the Clayton Act or of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

C. Introduction of Evidence and Final Hearing.

Sixth: At numerous hearings before a Trial Examiner appointed by the Commission, which were conducted during the period from August 10, 1943 to October 4, 1945, evidence to support the charges of the complaint was presented on behalf of the Commission, and evidence in defense against such charges was presented on behalf of petitioner.

Thereafter, on February 21, 1946, the Trial Examiner
1360 filed his Report, and subsequently exceptions thereto were filed by petitioner, and by counsel for the Commission. The cause came on for hearing before the Commission on September 10, 1946, on briefs and oral argument.

D. The Order of Which Review is Sought.

Seventh: On January 14, 1948, the Commission issued its Findings as to the Facts and Conclusion and its Order to Cease and Desist entered thereon, and filed its accompanying opinion; and Commissioner Lowell B. Mason filed an opinion in which he dissented in part from the Commission's Opinion, Findings and Order and concurred in part therewith. On January 21, 1948, the Commission served copies of such Findings and Conclusion, Order and Opinions upon petitioner by registered mail. A copy thereof is annexed hereto as Exhibit A and made a part hereof.

Facts and Statutes Upon Which Venue Is Based.

A. The Statutes.

Eighth: The statutes under which this Court has jurisdiction to grant the relief prayed for in this petition are Section 128 of the Judicial Code (28 U. S. C. § 225), Section 5 of the Federal Trade Commission Act (15 U. S. C. § 45) and Section 11 of the Clayton Act (15 U. S. C. § 21). 28 U. S. C., Section 225, provides in paragraph (e):

> "The circuit courts of appeal are further empowered to enforce, set aside, or modify orders of the Federal Trade Commission, as provided in section 45 of Title 15; and * * * as provided in section 21 of Title 15. * * *"

1361 15 U. S. C., Section 45, provides in paragraph (c) in part as follows:

> "(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries

on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *."

15 U. S. C., Section 21, provides in part as follows:

"Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto [except common carriers and banks] is hereby vested: * * * in the Federal Trade Commission * * *

* * * * *

1362 "* * * the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. * * *

"Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written

petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order * * *."

B. The Facts.

Ninth: The petitioner regularly carries on business in this Circuit within the meaning of Section 5 of the 1363 Federal Trade Commission Act and of Section 11 of the Clayton Act in that petitioner maintains one of its manufacturing plants in the City of Wabash, State of Indiana, maintains another such plant and a sales office in the City of Chicago, State of Illinois, is regularly engaged in the manufacture and sale of its products in this Circuit, and otherwise carries on business in this Circuit within the meaning of Section 5 of the Federal Trade Commission Act and of Section 11 of the Clayton Act. Moreover, petitioner has been required by the aforesaid Order of the Commission to cease and desist from continuing certain acts and practices in the sale of its products in this Circuit.

Prayer For Relief.

Wherefore, your petitioner prays:

1. That a copy of this petition be served forthwith by the Clerk of this Court upon the Federal Trade Commission pursuant to the provisions of Section 5 (c) of the Federal Trade Commission Act (15 U. S. C. § 45(c)) and Section 11 of the Clayton Act (15 U. S. C. § 21);

2. That this Court review said Order of the Commission together with its Findings as to the Facts and Conclusion, and set aside and vacate said Findings, Conclusion and Order;

3. That enforcement of the Commission's Order in this cause be stayed pending the review thereof by this Court; and

1364 4. That this Court grant such other and further relief as this Court may deem proper.

March 12, 1948.

Cravath, Swaine & Moore,
by Roswell L. Gilpatric,
a Partner,
15 Broad Street,
New York 5, N. Y.,

Bair & Freeman,
by Will Freeman,
a Partner,
135 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

1392 In the United States Circuit Court of Appeals.

* * (Caption—9584) * *

STATEMENT OF POINTS UPON WHICH THE PETITIONER INTENDS TO RELY.

To the Honorable the Judges of the United States Court of Appeals for the Seventh Circuit:

Now Comes the petitioner above-named, having duly filed in this Court on the 11th day of March, 1948, its petition to review and set aside an Order to Cease and Desist (hereinafter called the Order) of the Federal Trade Commission (hereinafter called the Commission) made on the 14th day of January, 1948, and pursuant to the Order of this Court duly made on the 15th day of March, 1948, makes and files this its statement of points in which it sets out each error which it asserts and intends to urge in support of said petition.

1393 I.

1. The Commission exceeded its powers in ordering, in subparagraphs 2 and 3 of Paragraph I of the Order, that the respondent (the petitioner herein) cease and desist from

"2. Selling or making any contract for the sale of automatic temperature controls on the condition, agree-

ment, or understanding that the purchaser thereof shall purchase 90 percent as many thermostats as primary controls.

"3. Entering into, continuing, or carrying out any agreement or understanding which requires a purchaser to buy any number of * * * thermostats with the purchase of respondent's primary controls; * * *"

because:

(a) As established by substantial evidence in the record herein, the provision in respondent's contracts with respect to the purchase of respondent's thermostats with respondent's primary controls is to insure proper sequence of operation of each control installation and thus to avoid unsatisfactory, inefficient and often dangerous results which arise from mixing controls of more than one manufacturer on the same installation.

(b) The respondent's acts and practices with respect to the sale of its thermostats and primary controls were not improper and did not constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

1394 (c) Said subparagraphs 2 and 3 of Paragraph I of the Order are for those reasons arbitrary and without basis in law.

2. The Commission exceeded its powers in ordering, in subparagraphs 4 and 5 of Paragraph I of the Order, that the respondent cease and desist licensing or otherwise authorizing the use of the furnace controls systems covered by the Cross Patent and the Freeman Patent on the conditions, agreements or understandings set forth in said subparagraphs 4 and 5, because long prior to the making of the Order the respondent had ceased such acts and practices immediately following the decisions of the United States Supreme Court in *Mercoid Corporation* v. *Mid-Continent Investing Co.*, 320 U. S. 661 (1944), and *Mercoid Corporation* v. *Minneapolis-Honeywell Regulator Company*, 320 U. S. 680 (1944), whereupon the charges of the Commission based on such acts and practices became moot and no longer constituted a proper subject for the entry of an order by the Commission.

3. The Commission exceeded its powers in ordering, in subparagraph 6 of Paragraph I of the Order, that the respondent cease and desist from

"Using any patent covering a system of furnace controls to require the purchase from respondent of any unpatented

control used in said system or requiring the maintenance of prices established by the respondent for any such unpatented control."

1395 because there is no substantial evidence in the record herein that any patent other than the Cross and Freeman Patents referred to in subparagraphs 4 and 5 of Paragraph I of the Order has been so used by the respondent. Said subparagraph 6 of Paragraph I of the Order is therefore arbitrary and without basis in law.

4. The Commission exceeded its powers in ordering, in Paragraph II of the Order, that the respondent cease and desist from

"Selling or making any contract for the sale of primary controls on the condition, agreement, or understanding that the purchaser thereof shall not use with such primary controls any * * * thermostats other than those acquired from respondent or from some source authorized by respondent."

for the reason set forth in Paragraph 1(a) above, and for the further reason that the acts and practices sought to be prohibited by said Paragraph II did not constitute violations of Section 3 of the Clayton Act. Said Paragraph II of the Order is therefore arbitrary and without basis in law.

5. The Commission exceeded its powers in ordering, in Paragraph III of the Order, that the respondent cease and desist, in the sale of automatic temperature controls or other furnace controls, from discriminating, directly or indirectly, in the price of such products of like grade and quality as among oil burner manufacturers purchasing said controls in the respects set out in said Paragraph III because:

1396 (a) There is no substantial evidence in the record herein

(i) that the respondent sold such controls to some oil burner manufacturers at prices materially different from the prices charged other competing oil burner manufacturers except where those prices either were such as only made due allowance for differences in costs resulting from the different quantities in which respondent's controls were sold and delivered, or were made in good faith to meet competition; or

(ii) that, as to price differentials not justified by differences in costs, the effect may have been substantially to lessen competition among either control manufacturers or oil burner manufacturers;

(b) The respondent's acts and practices in such regard did not constitute price discrimination in violation of Section 2(a) of the Clayton Act; and

(c) Said Paragraph III of the Order is for those reasons arbitrary and without basis in law.

II.

The Commission erred in its Findings as to the Facts in the following respects:

1. The Commission erred in the first subparagraph of Paragraph Four of the Findings in finding that some
1397 manufacturers of domestic oil burners use an extra limit control, referred to as a "fan control," and that many manufacturers use several primary controls as zone controls for the heating of large spaces.

2. The Commission erred in the second subparagraph of Paragraph Four of the Findings in finding that the respondent owns and controls many of the existing patents relating to primary controls and that there are many thermostats being manufactured and sold by competitors of the respondent which could be, and are, satisfactorily and safely used interchangeably with thermostats of the respondent.

3. The Commission erred in Paragraph Eight of its Findings in finding that competitors of the respondent have, as a result of the provisions of the respondent's contracts referred to in said Paragraph, been prevented from selling thermostats and limit controls in substantial quantities to customers purchasing primary controls from the respondent.

4. The Commission erred in Paragraph Nine of its Findings in finding that the use by the respondent of the acts and practices described in its Findings has substantially injured competition in the sale of automatic temperature controls, has unduly and unreasonably hindered, obstructed, restrained and lessened competition in the manufacture and sale of such controls, and has a tendency to deprive
1398 purchasers and the general public of the benefit of free and active competition in the manufacture and sale of such controls.

5. The Commission erred in the first subparagraph in Paragraph Ten of the Findings in finding that the contracts made by the respondent with various oil burner manufac-

turers which required that such manufacturers purchase at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls constituted, in effect, contracts for the sale of goods on the condition, and with the agreement and understanding, that such oil burner manufacturers should not use or deal in automatic temperature controls of competitors of the respondent.

6. The Commission erred in the second subparagraph of Paragraph Ten of the Findings in finding that such contract provisions confined the sale of thermostats by competitors of the respondent to respondent's contract customers to quantities not exceeding one-tenth of the quantity of primary controls which such customers purchased from respondent.

7. The Commission erred in the third subparagraph of Paragraph Ten of the Findings in finding that by reason of the dominant position held by the respondent in the sale and distribution of automatic temperature controls and the number of contracts negotiated by the respondent, the
1399 effects of such contracts were substantially to lessen competition and tend to create a monopoly in the respondent in such controls.

8. The Commission erred in Paragraph Fourteen of the Findings in finding that the acts and practices of the respondent therein described have a tendency and capacity to restrain, restrict, and lessen competition in the manufacture and sale of controls in heating systems employing the Cross or Freeman combination of controls, because such acts and practices of the respondent were discontinued long prior to the making of that finding by the Commission, as set forth in paragraph I(2) hereof.

9. The Commission erred in the first and second subparagraphs of Paragraph Sixteen of the Findings in finding that the respondent, since June, 1936, in connection with the sale and distribution of its automatic temperature controls, has discriminated in price between different purchasers buying such controls of like grade and quality, if by that Finding it was intended that it should be understood that respondent has discriminated in price in violation of Section 2 of the Clayton Act, as amended.

10. The Commission erred in the penultimate paragraph of Paragraph Sixteen of the Findings in finding that respondent discriminated in price in favor of customers
1400 buying in large quantities as against those customers buying in smaller quantities, if by that Finding it was

intended that it should be understood that respondent discriminated in price in violation of Section 2 of the Clayton Act, as amended.

11. The Commission further erred in the penultimate subparagraph of Paragraph Sixteen of the Findings in finding that changes in the price of controls to oil burner manufacturers necessarily affected sales and profits and that in some instances customers of the respondent lost business to certain of their competitors who enjoyed lower control prices from the respondent.

12. The Commission erred in the first subparagraph of Paragraph Eighteen of the Findings in finding that the price differences allowed by the respondent in the sale of its automatic temperature controls, based upon quantities as set out in respondent's various bracket prices, constituted discriminations in price between purchasers of commodities of like grade and quality.

13. The Commission erred in the third subparagraph of Paragraph Eighteen of the Findings in finding that oil burner manufacturers who received the benefit of respondent's lower prices have a substantial advantage in selling oil burners equipped with respondent's controls in competition with other oil burner manufacturers purchasing
1401 and using such controls who are obliged to pay respondent's higher prices and that oil burner manufacturers who pay respondent's discount or higher bracket price must, in order to sell their oil burners equipped with respondent's automatic temperature controls in competition with customers of the respondent who receive the benefit of respondent's lower prices, either sell at competitive prices and, in so doing, reduce their possible profits or attempt to sell at higher prices than those charged by such other customers of the respondent with the resultant inability to secure business and a reduction in the volume of their sales.

14. The Commission erred in the last subparagraph of Paragraph Eighteen of the Findings in finding that as a result of the respondent's method of selling, customers paying a higher price are discriminated against with respect to customers paying a lower price while customers paying a lower price are given the benefit of discrimination against customers paying the higher price.

15. The Commission erred in Paragraph Nineteen of the Findings in finding that the respondent's various bracket

prices, particularly in brackets 4 to 6, have tended to, and do, divert trade to the respondent from its competitors and have had a substantial injurious effect upon competition in the sale and distribution of automatic temperature controls.

1402 16. The Commission erred in the first subparagraph of Paragraph Twenty of the Findings in finding that the price differentials allowed by the respondent to its customers on so-called "off-scale sales" constituted a discrimination in price and that as to such off-scale sales no justification has been submitted.

17. The Commission erred in the second subparagraph of Paragraph Twenty of the Findings in finding that in doing what is therein set forth the respondent discriminated in price, if by that finding it was intended that it should be understood that respondent discriminated in price in violation of Section 2 of the Clayton Act, as amended.

18. The Commission erred in the first subparagraph of Paragraph Twenty-One of the Findings in finding that in connection with what is therein referred to as a "dual transaction" the respondent engaged in discriminations in price, if by that finding it was intended that it should be understood that respondent engaged in discriminations in price in violation of Section 2 of the Clayton Act, as amended.

19. The Commission erred in the second subparagraph of Paragraph Twenty-One of the Findings in finding that the practice of the respondent therein referred to constituted a discrimination in price, if by that finding it was intended that it should be understood that such practice of respondent constituted a discrimination in price in violation of Section 2 of the Clayton Act, as amended.

1403 20. The Commission erred in the first subparagraph of Paragraph Twenty-Two of the Findings in finding that the defense or contention of meeting competitive prices cannot be considered as justifying respondent's practice of off-scale selling.

21. The Commission erred in the second subparagraph of Paragraph Twenty-Two of the Findings in finding that the conclusion by the Trial Examiner with respect to 22 of the respondent's oil-burner customers in bracket 4, 4-A and 5 cannot be accepted.

22. The Commission erred in the third subparagraph of Paragraph Twenty-Two of the Findings in finding that in the Williams Oil-O-Matic transaction the meeting of the lower price of a competitor was not involved and also in certain of the statements supporting that finding.

23. The Commission erred in the fourth subparagraph of Paragraph Twenty-Two of the Findings, if by any statement or statements in such subparagraph it was intended that it should be understood that any act of the respondent in connection with the Cleveland Steel Products Company transaction was improper or unlawful.

24. The Commission erred in the fifth subparagraph of Paragraph Twenty-Two of the Findings in finding that the Delco Appliance Division of General Motors transac-
1404 tion did not involve meeting the price of a competitor.

25. The Commission erred in the sixth subparagraph of Paragraph Twenty-Two of the Findings in finding that respondent's price to Gilbert & Barker Manufacturing Company was based entirely on potential output and was not made to meet the price of Penn Switch or any other competitor.

26. The Commission erred in the seventh subparagraph of Paragraph Twenty-Two of the Findings in finding that the respondent failed to prove that any customer whose quantity purchases placed him in brackets 4, 4-A or 5 received a lower price, off-scale or otherwise, to meet an equally low price of a competitor and that at the time the respondent submitted its contracts to such customers it had no knowledge as to what the following-year price of its competitors would be.

27. The Commission erred in the eighth subparagraph of Paragraph Twenty-Two of the Findings in finding that a showing of meeting an equally low price of a competitor in the transactions referred to therein would not constitute a justification either for respondent's practice of allowing off-scale prices or for respondent's prices in brackets 4, 4-A and 5 and that the interpretation of the Clayton Act made by the Trial Examiner is contrary to the express provisions of the Act and the decisions of the Supreme Court construing said Act.

28. The Commission erred in the last subparagraph of Paragraph Twenty-Two of the Findings in finding

1405 that the Trial Examiner erroneously concluded that the price differences of the respondent have not tended to substantially lessen, injure, prevent or destroy competition between the respondent's customers and that such conclusion is not supported by the greater weight of the evidence in this proceeding and, further, that changes in the price of controls to oil burner manufacturers necessarily affected sales and profits.

III.

The Commission erred in its Conclusion in the following respects:

1. The Commission erred in the first paragraph of its Conclusion in holding that the acts and practices of the respondent in incorporating "various provisions" in its contracts have substantially injured competition in the sale in commerce of automatic temperature controls; have unduly and unreasonably hindered, obstructed, restrained and lessened competition in the manufacture and sale in commerce of respondent's automatic temperature controls; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

2. The Commission erred in the second paragraph of its Conclusion in holding that the acts and practices of the respondent therein described in connection with the Cross and Freeman Patents have a tendency and capacity to restrain, restrict, and lessen competition in the manufacture
1406 and sale of controls and heating systems employing such Patents and constitute unfair methods of competition under the Federal Trade Commission Act, because such acts and practices of the respondent had ceased long prior to the making of the Commission's Findings and Conclusion in this proceeding, as set forth in paragraph I(2) hereof.

3. The Commission erred in the third paragraph of its Conclusion in holding that the acts and practices of the respondent of entering into contracts with the provisions therein described constituted a violation of the provisions of Section 3 of the Clayton Act.

4. The Commission erred in the fourth paragraph of its Conclusion in holding that the differences in prices charged

by the respondent (characterized by the Commission as "discriminations in prices") constitute violations of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act.

June 10, 1948.

Respectfully submitted,
Cravath, Swaine & Moore,
by Roswell L. Gilpatric,
a Partner,
15 Broad Street,
New York 5, N. Y.,

Bair & Freeman,
by Will Freeman,
a Partner,
135 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

1407 Endorsed: Filed June 9, 1948. Kenneth J. Carrick, Clerk.

1408 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

(Caption—9584)

MOTION FOR AN EXTENSION OF TIME FOR FILING PETITIONER'S STATEMENT OF POINTS AND DESIGNATION OF PORTIONS OF THE TRANSCRIPT TO BE INCLUDED IN THE PRINTED RECORD, FOR STAY OF ENFORCEMENT OF ORDER AND FOR OTHER RELIEF.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now comes the above-named petitioner, by its attorneys, and respectfully moves this Honorable Court for an order granting relief as follows:

1. That the time of petitioner within which to file its statement of points herein and within which to serve and file a designation or stipulation of the portions of the transcript to be contained in the printed record in this Court be extended until 60 days after the date upon which

the Federal Trade Commission shall file in this Court a complete transcript of the record before the Commission;

2. That petitioner, in assigning error in its statement of points with respect to the admission or rejection of
1409 evidence, may make references to the pages of the transcript in lieu of quoting in full the evidence in respect of the admission or rejection of which error shall be so assigned;

3. That enforcement of the Commission's Order in this cause be stayed pending the review thereof by this Court.

In support of this motion, there is attached hereto the affidavit of Roswell L. Gilpatric, Esq.

New York, N. Y.,

March 10, 1948.

Cravath, Swaine & Moore,
by S/ Roswell L. Gilpatric,
A Partner,
15 Broad Street,
New York 5, N. Y.,

Bair & Freeman,
by S/ Will Freeman,
A Partner,
135 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

1410 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—9584) * *

AFFIDAVIT OF ROSWELL L. GILPATRIC.

State of New York,
County of New York. } ss.

Roswell L. Gilpatric, being duly sworn, deposes and says:

1. I am an attorney and counsel-at-law, duly admitted to practice in all the Courts of the State of New York and am a member of the firm of Cravath, Swaine & Moore, attorneys for the above-named petitioner, which is petitioning this Court to review and set aside the Order of the Federal Trade Commission heretofore made in this proceeding.

2. This affidavit is submitted in support of a motion on behalf of petitioner (a) for an extension of time within which to file its statement of points and to serve upon respondent and file with the Court its designation of
1411 the portions of the transcript of the record in such proceeding which are to be contained in the printed record in this Court, (b) for stay of enforcement of said Order, and (c) for other relief incident thereto specifically requested in the foregoing motion.

3. The motion in support of which this affidavit is made accompanies a petition to be filed in this Court to review and set aside said Order of the Federal Trade Commission (hereinafter called the Commission). Said Order directs that petitioner cease and desist from engaging in certain alleged acts and practices in violation of Section 5 of the Federal Trade Commission Act and Sections 2 and 3 of the Clayton Act, as amended by the Robinson-Patman Act.

4. The Findings as to the Facts and Conclusion upon which said Order of the Commission was made are extensive, consisting of 20 single-spaced typewritten pages of elite type. The record before the Commission upon which said Findings as to the Facts and Conclusion are based is voluminous. Hearings before the Trial Examiner appointed by the Commission began on August 10, 1943, and were concluded on October 4, 1945. The typewritten transcript of the oral testimony consists of more than 2,800 pages, and approximately 400 documentary exhibits were received in evidence. Many single exhibits consist of a number of pages, with the result that the exhibits so received in evidence taken together comprise a large number of pages.

5. Said Findings as to the Facts, Conclusion and Order of the Commission were dated and filed on January 14, 1948, and were served on petitioner on January 21, 1948.

6. The pertinent portions of the Rules of this Court
1412 and Statutes relating to the filing of a statement of points are the following:

"* * * The party seeking review shall file a petition and a statement of points * * * within the time prescribed by statute for the filing of such petition. * * *" (Subdivision 1 of Rule 34 of this Court)

"Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the

United States * * * by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. * * *" (Subdivision (c) of Section 5 of the Federal Trade Commission Act) (See also Section 11 of the Clayton Act)

"* * * [The statement of points] shall set out separately and particularly each error asserted and intended to be urged. No appeal shall be considered, unless such a statement of points shall have been so filed." (Subdivision 1 of Rule 9 of this Court)

"When the error urged goes to the admission or to the rejection of evidence, the statement of points shall quote the full evidence so admitted or rejected and the objections and rulings thereon, unless the quotation is extremely long or unless the court shall order that page references in lieu of quotations be made." (Subdivision 2 of Rule 9 of this Court)

"The time for taking any action under this rule (except where the time is fixed by statute) may be enlarged by a judge of this court, upon verified petition or motion supported by affidavit." (Subdivision 8 of Rule 34 of this Court)

7. The preparation of a statement of points as required by the above-mentioned Rules of this Court to accompany said petition for review requires an extensive examination and study of the record in said proceeding. The voluminous record of testimony and exhibits must be examined in the light of the Findings as to the Facts, Conclusions and
1413 Order of the Commission. To do that will require a review of all the objections made and exceptions taken in the course of the proceeding before the Trial Examiner on behalf of petitioner, and of the question whether and to what extent said Findings as to the Facts are sustained by evidence. Various errors will have to be asserted in order to raise and preserve the questions of fact and law arising out of the charges made in the complaint of the Commission in said proceeding and out of said Findings as to the Facts.

8. In order that extremely long quotations may not be required in asserting error in the admission or exclusion of evidence, it would be useful if this Court by order, as provided in Subdivision 2 of Rule 9 of the Rules of this Court, as quoted above, should permit that page references in lieu of quotations be made.

9. Designation or stipulation as to the portions of the transcript of the record before the Commission which are to be contained in the printed record is required by Subdivision 5 of Rule 34 of the Rules of this Court. Said Subdivision 5, by reference to the provisions of Rule 75 of the Federal Rules of Civil Procedure, requires that all matter not essential to the decision of the questions presented shall be omitted from the printed record. Selection of the portions of the transcript to be designated or stipulated will depend, therefore, upon the points presented by petitioner in its statement of points. After the selection thereof it will be necessary to indicate the testimony designated or stipulated by appropriate reference to the certified transcript from which the record is to be printed. While petitioner has a copy of the typewritten transcript of the
1414 testimony taken before the Trial Examiner, petitioner does not have a copy of such transcript which has been conformed to show the numerous changes therein that by stipulation have been agreed upon between counsel for the Commission and counsel for petitioner. Moreover, petitioner does not have copies of or reasonable access to a number of the exhibits that were introduced in evidence, and copies of other exhibits which petitioner does have are illegible. For the foregoing reasons petitioner will be unable, within the time within which petitioner is permitted by Section 5 of the Federal Trade Commission Act to file its petition for a review of said Order of the Commission, to prepare a statement of points, and will be unable, within the time specified in the Rules of this Court, to prepare its designation of the portions of the transcript to be contained in the printed record as is required by said Rules. In addition, an extension of the time specified in such Rules for designating the portions of the transcript to be contained in the printed record will provide an opportunity to determine whether it may be possible to stipulate with counsel for the Commission as to portions of the transcript to be contained in the printed record.

Wherefore, this Court is respectfully requested to enter an order granting the motion of petitioner (a) for an extension of time within which to file its statement of points and within which to serve and file its designation of the portions of the transcript to be contained in the printed record in this Court until 60 days after the date upon which the Commission shall file in this Court a complete transcript of the record before the Commission in the above-men-

1415 tioned proceeding, (b) for stay of enforcement of the Order of the Commission pending the review thereof by this Court, and (c) for other relief incident thereto specifically requested in the foregoing motion.

S/ Roswell L. Gilpatric.

Sworn to before me this 10th day of March, 1948.

Donald E. Gould,

(Notarial Seal) *Notary Public, State of New York.*

Residing in Queens County
Queens Co. Clk's No. 2151, Reg. No. 69-C-9
Certificates filed in
N. Y. Co. Clk's No. 485, Reg. No. 84-C-9
Kings Co. Clk's No. 42, Reg. No. 89-C-9
Commission Expires March 30, 1949

1416 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—9584) * *

March 15, 1948.

Before:

Honorable William M. Sparks, Circuit Judge.
Honorable Otto Kerner, Circuit Judge.

ORDER.

On motion of counsel for petitioner, it is

Ordered that the time of petitioner within which to file its statement of points herein and within which to serve and file a designation or stipulation of the portions of the transcript to be contained in the printed record in this Court is hereby extended until 60 days after the date upon which the Federal Trade Commission shall file in this Court a complete transcript of the record before the Commission; and it is

Further Ordered that petitioner, in assigning error 1417 in its statement of points with respect to the admission or rejection of evidence, may make reference to the pages of the transcript in lieu of quoting in full the evidence in respect of the admission or rejection of which error shall be so assigned; and it is

Further Ordered that enforcement of the Commission's Order in this cause is hereby stayed pending the review thereof by this Court.

1418 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

(Caption—9584)

STIPULATION WITH RESPECT TO THE PORTIONS OF THE FILED TRANSCRIPT TO BE CONTAINED IN THE PRINTED RECORD.

It Is Hereby Stipulated by the respective counsel for the parties hereto, subject to the approval of the Court, that in the printing of the printed record in this case the following portions of the transcript shall be included subject to the omissions indicated. The purpose of this Stipulation is merely to reduce the size of the printed record and all documents and omitted material remain in the case for reference thereto by the parties and by the Court in the presentation and determination of this cause.

1. Complaint of Federal Trade Commission dated February 23, 1943.

2. Answer of Minneapolis-Honeywell Regulator Company filed April 17, 1943.

2a. Order of the Federal Trade Commission appointing W. W. Sheppard as Trial Examiner.

3. Official report of proceedings before the Trial
1419 Examiner of the Federal Trade Commission (Docket No. 4920), pages 1 through 2815, inclusive, corrected in accordance with directions of Trial Examiner W. W. Sheppard.

4. All exhibits introduced in evidence before the Trial Examiner by the Federal Trade Commission except Commission's Exhibits Nos. 11, 12, 37-53, 55-65, 88-90, 92-102D, 110, D, E, 120-123, 153-195, 204C-D, 208-209.

5. All exhibits introduced in evidence before the Trial Examiner by respondent, Minneapolis-Honeywell Regulator Company, except Respondent's Exhibits Nos. 1-7, 12-22, 24-42, 44-69, 72, 80-101, 103-111, 116, 118-125, 126B-P, 127-132, 133B-F, 134-142, 145-146, 148, 150-151, 156, 158, 160-162, 169-170, 174-179C, 183, and 186.

6. Trial Examiner's Report dated February 21, 1946.

7. Respondent's Exceptions to Trial Examiner's Report dated April 5, 1946.

8. Exceptions of Counsel for the Commission to Trial Examiner's Report dated April 9, 1946.

9. Findings as to the Facts and Conclusion of the Federal Trade Commission dated January 14, 1948.

10. Order to Cease and Desist of the Federal Trade Commission dated January 14, 1948.

11. Opinion of the Commission.

12. Opinion of Commissioner Lowell B. Mason Dissenting in Part and Concurring in Part.

13. Petition, dated March 12, 1948, to Review and Set Aside Order of the Federal Trade Commission filed on behalf of Minneapolis-Honeywell Regulator Company, omitting Exhibit A thereto, consisting of a copy of the Findings as to the Facts and Conclusion of the Commission, a
1420 copy of the Order to Cease and Desist of the Commission, a copy of the Opinion of the Commission and a copy of the opinion of Commissioner Lowell B. Mason.

14. Motion, dated March 10, 1948, for extension of time for filing statement of points and the designation of portions of the transcript to be included in the printed record, etc., and the order made thereon March 15, 1948.

15. Statement of Points filed June 10, 1948, on behalf of Minneapolis-Honeywell Regulator Company.

16. Stipulation with respect to portions of the filed transcript to be contained in the printed record dated June 9, 1948.

June 9, 1948.

Cravath, Swaine & Moore,
by Roswell L. Gilpatric,
A Partner.
15 Broad Street,
New York 5, N. Y.,

Bair & Freeman,
by Will Freeman,
A Partner.
135 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

James W. Cassedy,
Assistant General Counsel and Attorney for Respondent Federal Trade Commission.

It Is So Ordered:
William S. Sparks,
United States Circuit Judge.

June 10, 1948.

Endorsed: Filed June 9, 1948. Kenneth J. Carrick, Clerk.

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and fifty and of our Independence the one hundred seventy-fifth:

No. 9584

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY, PETITIONER

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Trade Commission

And afterward, to-wit, on the fourteenth day of May, 1951, the following further proceedings were had and entered of record, towit:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, May 14, 1951

Before HON. OTTO KERNER, *Circuit Judge;* HON. PHILIP J. FINNEGAN, *Circuit Judge;* HON. WALTER C. LINDLEY, *Circuit Judge*

No. 9584

MINNEAPOLIS HONEYWELL REGULATOR COMPANY, PETITIONER

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Trade Commission

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of record and on the briefs of counsel and on oral argument by Mr. Will Freeman and Mr. Roswell L. Gilpatric, counsel for the Petitioner, and by Mr. James W. Cassedy, counsel for the Respondent, and the Court takes this cause under advisement.

And afterward, to-wit, on the fifth day of July, 1951, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

October Term, 1950, April Session, 1951

No. 9584

MINNEAPOLIS HONEYWELL REGULATOR COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Trade Commission

July 5, 1951

Before KERNER, FINNEGAN, and LINDLEY, *Circuit Judges*

KERNER, *Circuit Judge:*

This is a proceeding to review Part III of an order of the Federal Trade Commission entered on Count III of a complaint filed by the Commission on February 23, 1943, charging in three counts violation by petitioner of §5 of the Federal Trade Commission Act, §3 of the Clayton Act, and §2 of the Clayton Act as amended by the Robinson-Patman Act. We shall refer to petitioner as M-H. Since M-H does not challenge Parts I and II of the order based on the first two counts of the complaint we shall make no further reference to them.

Following hearings before a trial examiner extending from August 12, 1943 to February 14, 1946, that officer rendered his report recommending dismissal of the charges contained in Count III on the ground that it did not appear that M-H had violated §2 of the Clayton Act as amended. The Commission rendered findings of fact and conclusions of law contrary to the report of the examiner and based its cease and desist order thereon. One member dissented.

The alleged violations of §2(a) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. §13(a) and (b)) relate to M-H's practices in connection with the sale of automatic temperature controls to oil burner manufacturers for use in oil burners of the gun or pressure type and the rotary type, both for domestic heating plants. With respect to this the complaint charged price discriminations arising out of M-H's quantity discount pricing system, the effect of which "has been or may be substantially to lessen competition in the line of commerce in which respondent [M-H] is engaged and to injure, destroy and prevent competition between the respondent and its competitors, and to injure, destroy and prevent competition between the customers of said respondent * * *."

Part III of the order here under review provides:

> "It Is Further Ordered that respondent * * * directly or through any corporate or other device in the sale of automatic temperature controls or other furnace controls in commerce * * * cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among oil-burner manufacturers purchasing said automatic temperature controls and other furnace controls—
>
> "1. By selling such controls to some oil-burner manufacturers at prices materially different from the prices charged other oil-burner manufacturers who in fact compete in the sale and distribution of such furnace controls, when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered."

For a proper understanding of the case it is necessary to look to the history of M-H as related to the industry in which it became a dominant factor in its early days. M-H is the successor of two corporations, the Minneapolis Heat Regulator Company which began making heat regulating devices in 1885, and the Honeywell Heating Specialties Company, established in 1906. The two were consolidated in 1927. About 80% of its business is devoted to the manufacture of automatic temperature controls. Its principal competitors during the period here involved were the Mercoid Corporation which had made automatic controls for domestic oil burners since 1922, the Penn Electric Switch Company which started to manufacture and sell such controls in 1932, and the Perfex Corporation which began to sell one of the controls in 1936 and a complete line in 1937.

The process of manufacturing oil burners is one of fabrication in the sense that the manufacturer assembles and puts together the various parts including controls, motors, pumps, fans and transformers, which parts are generally purchased from different sources. Three controls are usually used in each burner, and these three are customarily dealt in as sets, with prices quoted for the sets rather than the individual units.

The examiner found that M-H "has always * * * been a leader in the field * * * and in the development * * * of new and better controls, and * * * throughout the years has spent extensive sums of money in engineering and development work, not only creative engineering of new devices, but in the constant redesigning and improving of its products, and in the lowering of costs." It has also advertised its products very extensively and has maintained 39 branch and district offices equipped with a complete line of its products as well as service personnel trained by M-H to service

those products. The examiner also found that as a result of its advertising and the reputation of its controls for performance and efficiency in operation, there had been developed a large customer demand for and public acceptance of its controls which had for a number of years sold at higher prices than controls of other makes. This public demand enabled dealers to obtain higher prices for burners equipped with M-H controls than with those of its competitors, and there was evidence that there were some dealers who would not purchase burners without M-H controls.

The pricing system which the Commission found was a violation of the Act was a standard quantity discount system. M-H published list prices with discounts or net prices regularly allowed to its various customers according to the trade channels in which they were engaged. These were classified as oil-burner manufacturers who ordinarily used them in the fabrication of their burners, and wholesalers or jobbers and dealers who ordinarily handle them for repair, replacement or auxiliary equipment. Most of its business was with manufacturers who had to purchase at least 50 sets annually in order to qualify as such. M-H usually made contracts with such manufacturers at the beginning of the year, providing for quantity or bracket prices based upon either the number of controls purchased the previous year or, in some cases, the average for two years, or the estimated quantity the manufacturer expected to use during the contract year. If the manufacturer failed to purchase sufficient sets to entitle him to the bracket price allowed, M-H did not require additional payment. However, if he purchased a greater number he was allowed the larger quantity bracket price for the entire year with a credit or refund for the difference in price already paid. The brackets varied somewhat from year to year as to number of sets and prices. The bracket setup for 1947 is shown in Table I.[1]

The Commission found that this system had the capacity and tendency to induce the purchase of M-H controls by various manufacturers and tended to and did divert trade to M-H from its competitors and had had a substantial injurious effect on competition in the sale and distribution of controls. With respect to the effect on customer competition it found that by this system M-H discrim-

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[1]

TABLE I

Bracket	Annual Volume (Sets)	Net Price Scale
1	50— 349	$17.35
2	350— 999	16.45
3	1,000— 2,499	15.90
3A	2,500— 4,999	15.35
4	5,000— 7,499	14.90
4A	7,500— 9,999	14.25
5	10,000—up	13.75

inated in price in favor of customers buying in larger quantities as against those buying in smaller quantities; that changes in the price of controls to oil burner manufacturers resulted in many instances in corresponding changes in the price of completed oil burners and necessarily affected sales and profits; and that in some instances customers of M-H lost business to certain of their competitors who enjoyed lower control prices from M-H. Since it further found that the discriminatory differentials were justified by cost differentials only as to the prices in the first four brackets which were applicable to less than 45% of its manufacturer business, leaving over 55% of the business in the three lowest cost price brackets not subject to that defense, and that M-H had not established that any customer in those three brackets had received a lower price to meet an equally low price of a competitor, it concluded that the discriminations constituted violations of the Act. In reaching this conclusion it stated that the examiner was in error in his conclusion that the price discriminations given by M-H had not tended to substantially lessen, injure, prevent or destroy competition.

Under the rule of *Universal Camera Co.* v. *National Labor Relations Board*, 340 U. S. 474, 496, it is the duty of this court to examine the record as a whole, including the report of the examiner, in order to determine whether the evidence supporting the Commission's order is substantial. As the Court there observed, "* * * evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony." And we think the evidence supporting the conclusion may become even less substantial when it fails to persuade an experienced member of the Commission who dissents from its findings and conclusions.

With this general test of substantiality in mind we turn to a study of the evidence as it relates to the issue whether M-H discriminations in fact did or might tend to injure or prevent competition as between itself and its competitors or as between its customers. We deem this the primary issue here involved. Unless its discriminations do or may tend to injure competition there is no need for M-H to justify them. From our examination of the record as a whole we are convinced that the findings of the examiner were supported by very substantial evidence, considerable of which the Commission rejected because, it stated, it found it immaterial or uncorroborated.

Among the various undisputed facts as to the effect of M-H's practices on competitor competition, as summarized by M-H, are

(a) that the prices charged for controls by M-H's competitors were generally lower than those of M-H and that there is no evidence of any undercutting of its competitors' prices by M-H;

(b) that throughout the complaint period there existed the keenest kind of price competition among control manufacturers;

(c) that the total business of M-H's competitors increased, and the three new concerns which entered the industry after 1932 have enjoyed a steady growth in sales volume;

(d) that M-H's share of the available control business was reduced from 73% in 1937-1938 to only 60% in 1941;

(e) that in 1941 M-H lost to its competitors 53% of the control business of 31 customers who previously had standardized on M-H's controls; and

(f) that in the same year, 126 of M-H's other oil burner manufacturer-customers also purchased competitive controls.

The foregoing facts fully establish the examiner's finding that competitor competition was not injured, a finding concurred in by the dissenting member of the Commission, and they outweigh the facts relied upon by the Commission in reaching the opposite conclusion. And while the findings of an examiner are not "as unassailable as a master's" (*Universal Camera Co.* v. *National Labor Relations Board*, 340 U. S. 474, 492), where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary. *Folds* v. *Federal Trade Commission*, 187 F. 2d 658, 661. M-H was entitled to meet the competition built up in its field, and even if it did succeed in retaining or diverting some business which might otherwise have gone to some of its competitors, where those competitors were able to enter its field and build thriving businesses in spite of M-H's commanding position and alleged wrongful practices, we think it cannot be said that the effect of those practices was substantially to injure competition. And we construe the Act to require substantial, not trivial or sporadic, interference with competition to establish violation of its mandate. Even though we assume that the burden of proving absence of injury to competition falls on the accused (see *Samuel H. Moss* v. *Federal Trade Commission*, 148 F. 2d 378; *Federal Trade Commission* v. *Standard Brands, Inc.*, decided by the

Second Circuit March 30, 1951, modified June 4, 1951), we think M-H has met that burden with respect to its competitor competition.

With respect to the question of customer competition a somewhat different problem is presented. The Commission based its conclusion that M-H's practices injured that competition on the general finding that because the price of the control represented the largest single item of cost among the various parts of the finished burner, changes in the price of controls to manufacturers resulted in corresponding changes in the price of completed burners and necessarily affected sales and profits. It further found generally that "oil-burner manufacturers testified that the question of price was important in the purchase of automatic temperature controls and that they had lost business to certain competitors, including Quiet-Heet, who enjoyed lower control prices from respondent, although the exact volume of such lost business could not be calculated."

The absence of causal connection between the price of controls and the price of the finished products generally is demonstrated by the stipulation entered into prior to the hearing:

> "Some manufacturers paying higher prices for respondent's automatic temperature controls were able to, and often did, sell their oil burners complete with controls at prices below those which other similar manufacturers paying lower prices for respondent's * * * controls sold their oil burners.
>
> "Some manufacturers paying lower prices for respondent's * * * controls were able to, and often did, sell their oil burners complete with controls at prices below those which other similar manufacturers paying higher prices for respondent's * * * controls sold their oil burners."

Even though some manufacturers did testify that "the question of price was important * * * and that they had lost business to certain competitors who enjoyed lower control prices * * *" we think it is equally significant that other manufacturers who paid the higher prices testified that they did not lose business as a result of paying such higher control prices, and that they considered other factors of far greater importance in determining the price of the completed burner. They referred to such matters as manufacturing methods, overhead, distribution costs, service, advertising, as having an important bearing on comparative prices in addition to the costs of the component parts.

In further proof of its contention that the price of controls was not the vital factor in arriving at burner prices and in fact had very little relation to it, M-H submitted a table derived from the findings of a nation-wide survey showing the range of prices charged by its

customers in each price bracket for the year 1941.[2] From this survey, it will be noted that the highest price charged for burners, $114.50, was by a customer having the advantage of the lowest price bracket for M-H controls, and that a customer in the next-to-highest price bracket sold its burner for the lowest price, $45. Many variations can be made from these facts. All seem to add up to the one fact that there is little, if any, relationship between the prices of the controls and the prices of the burners into which the controls are built, hence that the evidence does not support the Commission's finding that "changes in the price of * * * controls resulted in corresponding changes in the price of completed burners."

Reference was made in the general finding quoted above to Quiet Heet as one of the manufacturers enjoying lower control prices to which other manufacturers lost an undetermined volume of business. There is no question on this record but that Quiet Heet, entering the field in 1936, very soon became the largest producer in the industry, and by 1941 was able to sell its burners at the lowest price. The Commission attributed this to the fact that it bought its controls from M-H for the lowest price. We think this is to ignore the vast discrepancy between the range of prices for controls and that for the finished burners. The fact was, as established by the evidence, that Quiet Heet entered the field with entirely different theories of production and distribution from those of its already established competitors. Its proprietor testified that he "started out to merchandise it on a volume basis, effecting certain economies, making a few shortcuts here and there and trimming down my overhead and operating costs to the minimum." Among those economies were the elimination of all field service which was one of the heavy items of expense of the higher price manufacturers, reduction of advertising costs to a minimum by its own use of printed postcards to the trade and by charging dealers for all advertising matter furnished to them, and adoption of cheaper packaging methods and materials. It was this type of economies that enabled Quiet Heet to sell its burner in 1941 for $68.50 less than its highest price competitor who paid the

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[2]

TABLE II

Prices Charged Oil Burner Manufacturers by M-H for Controls	Range of Prices Charged Wholesalers by Oil Burner Manufacturers for Burners	
	Low	High
Bracket 1	$17.35	$50.00	$111.00
Bracket 2	16.45	45.00	96.20
Bracket 3	15.90	47.50	102.00
Bracket 3A	15.35	52.50	89.00
Bracket 4	14.90	61.70	100.00
Bracket 4A	14.25	55.00	101.25
Bracket 5	13.75	45.00	114.50

same price for the control, and for $66 less than its next highest price competitor who paid only $3.60 more for its controls, as shown in Table II, footnote 2.

Part of the fallacy of the Commission's position lies in its analysis of the competitive situation between the various manufacturers. This is reflected in its order where it refers to manufacturers "who in fact compete in the sale and distribution of such furnace controls," as if the controls themselves were the article of merchandise they dealt in instead of the burners of which the controls were only one part. It may be true that if the manufacturers were generally selling controls as such, a differential of two or three dollars in the price they paid for them would have a substantial effect on the price obtained. Under such circumstances a finding that a competitive advantage in purchase price paid would necessarily give rise to a competitive advantage in sale price would perhaps be justified. But where the controls were used in the manufacture of burners, the cost of which was determined by many other factors—cost of other materials and parts, service, advertising, to mention only a few—it cannot be said that discriminatory price differentials substantially injure competition or that there is any reasonable probability or even possibility that they will do so. Cf. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 738, 742; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46. And a mere possibility of such injury is insufficient to sustain a charge of violation of the Act. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 742.

We are convinced that here "the inferences on which the * * * findings were based were so overborne by evidence calling for contrary inferences that the findings * * * could not, on the consideration of the whole record, be deemed to be supported by 'substantial' evidence." (*National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502.)

Since we have concluded that the Commission was in error in finding that the effect of M-H's practices was to substantially lessen or prevent competition between either it and its competitors or its customers, we do not reach the question whether M-H justified those practices by an adequate showing that its differentials in the lowest price brackets which it did not contend were justified by cost differentials were made in good faith to meet an equally low price of a competitor.

Part III of the order must be reversed and Count III of the complaint upon which it is based, dismissed. It is so ordered.

And on the same day, to-wit, on the fifth day of July, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Thursday, July 5, 1951

Before Hon. Otto Kerner, *Circuit Judge;* Hon. Philip J. Finnegan, *Circuit Judge;* Hon. Walter C. Lindley, *Circuit Judge*

No. 9584

Minneapolis-Honeywell Regulator Company, petitioner

vs.

Federal Trade Commission, respondent

Petition for Review of an Order of the Federal Trade Commission

This cause came on to be heard on the transcript of the record from the Federal Trade Commission and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that Part III of the decision of the Federal Trade Commission entered in this cause on January 14, 1948, be, and the same is hereby, Reversed, and Count III of the complaint upon which it is based be, and the same is hereby Dismissed.

And afterward, to-wit, on the eighteenth day of September, 1951, the following further proceedings were had and entered of record, to-wit:

Filed September 18, 1951. Kenneth J. Carrick, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 9584

Minneapolis-Honeywell Regulator Company, a Corporation, petitioner

v.

Federal Trade Commission, respondent

Final Decree

Minneapolis-Honeywell Regulator Company, a corporation, petitioner herein having filed in this Court on March 11, 1948 its petition to review and set aside an order to cease and desist issued

against it on January 14, 1948 by the Federal Trade Commission, respondent herein, in a proceeding before said respondent entitled "In the Matter of Minneapolis-Honeywell Regulator Company, a corporation, Docket 4920"; and a copy of said petition having been served upon respondent; and the respondent having thereafter certified and filed herein as required by the Federal Trade Commission and Clayton Acts, a transcript of the entire record in said proceeding; and the respondent having filed herein a cross-petition against the petitioner Minneapolis-Honeywell Regulator Company praying that petitioner's petition to review be dismissed and that the Court make and enter herein a decree affirming and enforcing respondent's said order to cease and desist; and the matter having been heard by this Court on briefs and oral argument; and the Court having thereafter fully considered the matter; and it appearing to the Court that petitioner does not challenge Parts I and II of the order to cease and desist and that said parts of the order should be affirmed and enforced; and it further appearing to the Court that Part III of the order to cease and desist should be reversed and Count III of the complaint upon which it is based should be dismissed;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(a) That Part III of the order to cease and desist issued by the Federal Trade Commission against Minneapolis-Honeywell Regulator Company, a corporation, on the 14th day of January, 1948, in a proceeding before the Federal Trade Commission entitled "In the Matter of Minneapolis-Honeywell Regulator Company, a corporation, D. 4920" be and the same is hereby reversed and Count III of the complaint upon which it is based be and the same is hereby dismissed;

(b) That Parts I and II of the order to cease and desist issued by the Federal Trade Commission against Minneapolis-Honeywell Regulator Company, a corporation, on the 14th day of January, 1948, in a proceeding before the Federal Trade Commission entitled "In the Matter of Minneapolis-Honeywell Regulator Company, a corporation, Docket 4920" be and the same hereby are affirmed;

(c) That Minneapolis-Honeywell Regulator Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale, and distribution of automatic temperature controls and other furnace controls in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

1. Selling or making any contract for the sale of automatic temperature controls on the condition, agreement, or under-

standing that the purchaser shall purchase as many limit controls as primary controls.

2. Selling or making any contract for the sale of automatic temperature controls on the condition, agreement, or understanding that the purchaser thereof shall purchase 90 percent as many thermostats as primary controls.

3. Entering into, continuing, or carrying out any agreement or understanding which requires a purchaser to buy any number of limit controls or thermostats with the purchase of respondent's primary controls; provided, however, that nothing herein contained shall prohibit the respondent from selling its automatic temperature controls in sets at a specified price per set.

4. Licensing or otherwise authorizing the use of the furnace control system covered by the Cross Patent on the condition, agreement, or understanding that only automatic stoker switches manufactured or sold by the respondent shall be used in such combination.

5. Licensing or otherwise authorizing the use of the furnace control system covered by the Freeman Patent on the condition, agreement, or understanding that the combination furnace control or any other control used in such system be sold at the price established by the respondent.

6. Using any patent covering a system of furnace controls to require the purchase from respondent of any unpatented control used in said system or requiring the maintenance of prices established by the respondent for any such unpatented control;

(d) That Minneapolis-Honeywell Regulator Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the sale, or the making of any contract for the sale of automatic temperature controls or other furnace controls in commerce, as "commerce" is defined in that Act of Congress entitled "An Act to Supplement Existing Laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (Clayton Act), do forthwith cease and desist from—

1. Selling or making any contract for the sale of primary controls on the condition, agreement, or understanding that the purchaser thereof shall not use with such primary controls any limit controls or thermostats other than those acquired from respondent or from some source authorized by respondent.

And It Is Hereby Further Ordered, Adjudged and Decreed that within 90 days after the entry of this decree the petitioner, Minneapolis-Honeywell Regulator Company, a corporation, shall file with the Federal Trade Commission a report in writing setting

forth in detail the manner and form in which it has complied with this decree.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act to prosecute suits, to recover civil penalties for violations of Part I of the aforesaid order to cease and desist hereby affirmed and enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court.

(S.) OTTO KERNER,
(S). PHILIP J. FINNEGAN,
(S.) WALTER C. LINDLEY,
United States Circuit Judges.

Tuesday, September 18, 1951.

A True Copy
Teste:
[SEAL.]

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 16, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages contain a true copy of the order taking the cause under advisement, the opinion of the Court, the Judgment of the Court, and the final decree, in: Cause No. 9584, Minneapolis-Honeywell Regulator Company, Petitioner, vs. Federal Trade Commission, Respondent, as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-seventh day of November A. D. 1951.

[SEAL.]

(S.) KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

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SUPREME COURT, U.S.

No. 11

In the Supreme Court of the United States

OCTOBER TERM, 1951

FEDERAL TRADE COMMISSION, PETITIONER

v.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above-entitled cause on September 18, 1951.

OPINION BELOW

The opinion of the court of appeals (R. 2308-2315) is reported at 191 F. 2d 786.

JURISDICTION

The final decree of the court of appeals was entered on September 18, 1951 (R. 2316-2319). The jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a proceeding under Section 2(a) of the Clayton Act involving injury to competition among a seller's customers resulting from the seller's discriminatory pricing practices, a finding of such injury to competition is adequately supported by evidence showing that substantial price differentials have been given to customers competing with each other, or whether it is also necessary to prove that particular customers have in fact been adversely affected by the discriminatory prices.

2. Whether under *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, a reviewing court is justified in setting aside findings of fact by an administrative agency because of the reviewing court's conclusion that contrary findings recommended by the trial examiner have substantial evidentiary support which outweighs the facts relied on by the Commission.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where

such commodities are sold for use, consumption, or resale within the United States * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

This petition seeks review of the portion of a judgment of the Court of Appeals for the Seventh Circuit which reversed a part of an order of the Federal Trade Commission directing respondent to cease and desist from violating Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. § 13). The Commission's order, issued January 14, 1948, after extended hearings, comprised three parts. Part III, the portion presently involved, dealt with price discriminations resulting from respondent's quantity discount pricing system.[1]

The facts relating to respondent's business, as found by the Commission and accepted by the court below (R. 2309-2311), are as follows:

Respondent is one of the country's principal manufacturers of automatic temperature controls (R. 2241). These controls, constituting an important item in oil burners, are sold by respondent to manufacturers of such burners, and to wholesalers, contractors and dealers in burners and automatic temperature controls (*ibid.*). The controls generally are sold in sets of three (R. 2242), and a set constitutes the principal cost item of the burner—

---

[1] Parts I and II, dealt, respectively, with unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, and exclusive dealing contracts in violation of Section 3 of the Clayton Act. Although respondent's petition to review attacked all three parts of the order (R. 2284-98), respondent abandoned its challenge to parts I and II during the proceedings in the court below (R. 2308). The court of appeals affirmed and enforced Parts I and II (R. 2317-2318).

often as high as 40% of the total cost (R. 2252). From 1939 to 1941, respondent sold approximately 60% of all automatic controls sold in the United States (R. 2241). As a result of substantial advertising expenditures, respondent has developed a large public demand for its controls, and burners equipped with them frequently have been sold for $2.50 to $5.00 more than the same burners equipped with controls made by respondent's competitors (R. 2242).

During the period 1937 to 1941 respondent followed a standard quantity discount pricing system (R. 2250-52). Discounts from published list prices were given to all purchasers of 50 or more sets of controls annually (2250). The net prices decreased as the quantities purchased increased. During 1941 respondent had seven different quantity price brackets. Prices varied from $17.35 per set in the lowest volume bracket (50-349 sets) to $13.75 per set for the largest purchasers (10,000-up) (R. 2252).

At the beginning of each year respondent generally entered into annual contracts covering customer requirements (R. 2243, 2253). The specified quantity, upon which the price was determined, was based upon the customer's past requirements (R. 2253). If a customer failed to purchase the specified quantity, the price was not increased to the higher level which would have been required to comply with the standard discount scale (*Ibid.*). On the other hand, if total purchases exceeded the

contract figure so as to bring the purchaser into a lower price range, he received such lower price, by retroactive discounts or otherwise (*ibid.*) This system was known as "off-scale" pricing (R. 2254).

On the basis of the foregoing facts, the Commission found, contrary to the conclusion of the trial examiner (R. 2202), that the price differentials substantially injured competition between respondent and its competitors, and among its customers, (R. 2256, 2260). It further found, on the basis of a cost accounting study made by respondent, that the differentials were justified by cost differentials only in the four highest price brackets, covering less than 45% of respondent's total sales (R. 2254), and that the differentials in the three lowest price brackets, as well as the "off-scale" prices, were justified neither by cost differentials nor were made in good faith to meet an equally low price of a competitor (R. 2257-60). The Commission accordingly directed respondent to cease and desist from—

> selling such controls to some oil-burner manufacturers at prices materially different from the prices charged other oil-burner manufacturers who in fact compete in the sale and distribution of such furnace controls, when the differences in prices are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or

quantities in which such products are sold or delivered [R. 2264].

On respondent's petition to review the Commission's order, the court of appeals held that the Commission's findings that respondent's practices had substantially lessened or prevented competition between it and its competitors, or among its customers, were not supported by substantial evidence. (R. 2315.) The court accordingly did not reach the question whether the discriminations had been made in good faith to meet an equally low price of a competitor.

The court, in rejecting the Commission's findings as to injury to *customer* competition, relied upon evidence that in many instances there appeared to be no direct correlation between the size of the discount on the controls and the price at which burners were sold by the purchasers of the controls, and that one manufacturer, although in the highest price bracket, had been able to undersell all competitors because of production economies (R. 2313-2315). The court also pointed to the fact that the cost of controls was only one element in the over-all cost of the burners (R. 2315). In overturning the Commission's findings as to injury to *competitor* competition, the court relied on evidence that the business of respondent's competitors had increased during the period involved (R. 2312). The court stated that such facts "fully establish the examiner's finding

that competitor competition was not injured", and concluded that when the examiner's findings "are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary" (*ibid.*).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred—

(1) In holding that proof of injury to customer competition required a showing of causal relationship between the seller's discriminatory prices and its customers' prices, and in failing to hold that a finding of injury to customer competition was adequately supported by evidence that substantial price discriminations were given by the seller among customers who were competing with each other.

(2) In holding that the Commission acted arbitrarily in rejecting the trial examiner's recommended findings, and that an Examiner's findings which the reviewing court believes to be supported by the preponderance of the evidence are binding upon the Commission.

(3) In holding that the Commission erred in finding that the effect of respondent's quantity discount pricing system was substantially to lessen or to prevent competition between respondent and its competitors, or among its customers.

(4) In substituting its judgment for that of the Commission as to the effects upon competition of respondent's quantity discount pricing system.

(5) In reversing part III of the Commission's order and dismissing Count III of the Commission's complaint.

REASONS FOR GRANTING THE WRIT

1. The rationale of the decision by the court below on injury to *customer* competition was its determination that no actual injury to such competition had been shown. In reaching this conclusion the court applied an unduly restrictive standard of injury to competition—actual injury rather than a reasonable possibility thereof—directly contrary to the interpretation which this Court placed upon Section 2(a) in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37.[2]

In the *Morton Salt* case, the Court had before it a standard quantity discount system similar to that of respondent. The Commission had held that such a system violated Section 2(a) of the Act in that it injured competition among customers. The company contended, *inter alia*, that the findings failed to show that the discriminatory discounts had in fact injured competition, and that the evidence was insufficient to support the findings.

In rejecting the first contention, this Court pointed out that, although there were specific findings that injury to competition had resulted from the discounts, "the statute does not require the

[2] The test applied also is narrower than the "reasonable probability" test approved in the dissenting opinion of Mr. Justice Jackson (334 U. S. at 56).

Commission to find that injury has actually resulted" (p. 46). The Court said (pp. 46-47):

> The statute requires no more than that the effect of the prohibited price discriminations "may be substantially to lessen competition * * * or to injure, destroy, or prevent competition." After a careful consideration of this provision of the Robinson-Patman Act, we have said that "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Corn Products Co.* v. *Federal Trade Comm'n*, 324 U.S. 726, 742. Here the Commission found *what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay.* [Italics added]

In holding that the findings were supported by the evidence, the Court first noted the testimony of many witnesses "that they had suffered actual financial losses on account of respondent's discriminatory prices." It went beyond this, however, and pointed out that such evidence was unnecessary. The Court stated (pp. 50-51):

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected

> by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

Thus, under *Morton Salt* all that is needed to support a finding of injury to customer competition under Section 2(a) is a showing that discriminatory prices have been given to customers competing with each other, and that such discriminations were substantial. As *Morton Salt* makes clear, such discriminations perforce injure competition. This rule reflects the Congressional determination that it was an "evil" that a large buyer could secure a "competitive advantage" over a smaller buyer "solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price." 334 U.S. 37, 43.

Although in the present case the Commission found that there had been substantial price discriminations among customers competing with each other (R. 2255)—a finding that under *Morton Salt*

is sufficient to establish a violation of Section 2(a)— the court below ignored the *Morton Salt* rule and substituted a requirement of "causal connection" between the price discriminations and the customers' selling prices. (R. 2313). By this the court obviously meant that there must be direct proof that the discount affected the price of the customers' products. The court below thus reviewed the Commission's order on the very basis rejected in *Morton Salt*, namely, whether the evidence showed that particular customers had in fact been adversely affected by the discriminatory prices.

The evidence that the court relied on—the apparent lack of causal connection between the size of the discount on the controls and the selling price of the burners—was considered by the Commission but not deemed persuasive. The Commission found that competitors paying the higher prices "must either sell at competitive prices and, in so doing, reduce their possible profits by the amounts of discriminations against them or attempt to sell at higher prices than those which the favored customers of respondent charge for oil burners equipped with respondent's automatic temperature controls, with the result of inability to secure business and a reduction in the volume of their sales" (R. 2255). Furthermore, the court below conceded that "some manufacturers did testify that 'the question of price was important * * *

and that they had lost business to certain competitors who enjoyed lower control prices * * *" but thought this testimony outweighed by the evidence of other manufacturers (R. 233). It is apparent from this discussion that the court was substituting its own appraisal of the evidence for that of the Commission.

The court of appeals did not attempt to distinguish the *Morton Salt* situation factually. It merely concluded that here there was no more than a mere possibility of injury to competition. However, in the *Morton Salt* case this Court in effect held as a matter of law that sale to two competitors at substantially different prices of itself permits the Commission to infer the existence of a reasonable possibility of injury to competition.

The decision of the court below treats as a problem requiring weighing of evidence the same kind of a situation in which this Court in *Morton Salt* admonished the Commission for taking evidence. As the Court stated in *Morton Salt* (334 U.S. at 50):

> The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices * * * The evidence covers about two thousand pages, largely devoted to this single issue—injury to competition.

The Commission hearings in this case (held before the decision in *Morton Salt*) ran intermittently from August 10, 1943, to October 4, 1945, took place in Chicago, Illinois, New York City, and "other cities throughout the country" (R. 2171), and cover more than 1600 pages in the printed record (R. 29-1640). It was precisely a hearing of this magnitude that the rule of *Morton Salt* was intended to obviate. The administrative process would be unduly burdened if the Commission were required to develop a comparable factual record in every Section 2(a) case showing that discriminatory prices had in fact resulted in variations among customers' selling prices. Cf. 334 U.S. at 50.

The fact, adverted to by the court below, that controls are only one element that goes into a burner—albeit the major one—and that burner manufacturers also may obtain discounts from manufacturers of other component parts, affords no basis for distinguishing *Morton Salt*. Competition still is injured. As the Commission stated in its opinion (R. 2275): "Each seller who may have contributed to the aggregate price or cost advantages obtained by the favored burner manufacturers is, in part, responsible for the aggregate competitive result. The fact that the whole competitive effect cannot be traced to respondent alone does not relieve respondent of its share of responsibility * * *." Respondent cannot find exculpation for its injury to competition in similar

injuries that may have been inflicted by other manufacturers. A similar argument was rejected in *Morton Salt* (pp. 48-49).[3]

If the decision below—clearly in conflict with *Morton Salt*—is allowed to stand unreversed, the law in this field will be left in a state of confusion, and the Commission will (at least in the substantial number of cases where review in the Seventh Circuit is a possibility)[4] have to return to the practice of receiving evidence of effects upon competition in an area where this Court has held that such effects may be presumed.

2. Insofar as injury to competition with *competitors* of respondent is concerned, the decision of the court below involves a misapplication of the doctrine of *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474. In the *Universal Camera* case this Court merely held that in

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[3] "* * * reference is made to the fact that salt is a small item in most wholesale and retail businesses and in consumers' budgets. For several reasons we cannot accept this contention.

"There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."

[4] Under Section 11 of the Clayton Act, review of Commission orders may be had in any circuit in which the violation was committed or where the violator resides or carries on business. Many cases would thus be subject to review in the Seventh Circuit, and the Commission would have no way of ascertaining in advance of the hearing where a petition to review might be filed.

deciding whether an agency's findings were supported by substantial evidence, the Administrative Procedure Act requires appellate courts to look at the whole record, not just at those portions sustaining the agency action, and that the "whole record" includes the trial examiner's report. However, nothing in that case intimates that the reviewing court is to substitute the examiner's decision for that of the agency whenever it finds that the examiner's recommended findings are themselves supported by substantial or even (in the court's opinion) a preponderance of the evidence. On the contrary, this Court in *Universal Camera* specifically rejected the "notion" that the Board "has power to reverse an examiner's findings only when they are 'clearly erroneous'" (340 U.S. at 492).

Yet the court below appears to have given just such primacy to the examiner's conclusions in reviewing the substantiality of the evidence. The court stated that from its examination of the record as a whole it was "convinced that the findings of the examiner were supported by very substantial evidence" (R. 2311). After summarizing "various undisputed facts" relating to competitor competition, the court said (R. 2312):

> The foregoing facts fully establish the examiner's finding that competitor competition was not injured * * * and they outweigh the facts relied upon by the Commission in reaching the opposite conclusion. And while the findings of an examiner are not "as unassail-

able as a master's " (*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 492), where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary.

Thus not only did the court below erroneously substitute its judgment for that of the Commission—a practice specifically condemned in the *Universal Camera* case (see 340 U.S. at 488)—but it accorded a significance to the examiner's report that would stifle a regulatory agency's exercise of its own independent judgment on the basis of the entire record before it and its expertise in the field. This criticism is particularly pertinent where, as here, the evidence did not require the Commission to resolve conflicting testimony as to factual matters, in which situation the examiner's opportunity to appraise the credibility of witnesses entitles his recommendations to special weight. The Commission's decisional process in this case involved the drawing of inferences from uncontradicted evidence.[5]

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[5] In Section 2(a) proceedings "The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 739; cf. *Federal Trade Commission* v. *Staley Manufacturing Co.*, 324 U. S. 746, 760.

The conclusion of the court below that competitor competition was not injured was based primarily on evidence that the business of respondent's competitors had increased during the period in question. There was evidence in the record, however, of losses in business by specific competitors of re-

We submit that the court below has misinterpreted the principles of the *Universal Camera* case both in respect to the weight to be given the examiner's report and the extent to which the court may substitute its judgment for that of the administrative agency when it disagrees with the latter's analysis of the facts. Both of these questions have obvious importance to all administrative agencies and reviewing courts.

CONCLUSION

The decision below is in conflict with one decision of this Court and misapplies another, and involves important questions of federal law. It is respectfully submitted that the petition for certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

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spondent to respondent (e.g., R. 160-1, 839-40). Furthermore, as the Commission pointed out, the tendency of respondent's quantity discount system would be to cause customers to concentrate their purchases in respondent to obtain the lower prices, and thus take business away from respondents competitors (R. 2274).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

FEDERAL TRADE COMMISSION,
Petitioner,

v.

MINNEAPOLIS-HONEYWELL
REGULATOR COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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January 28, 1952

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

FEDERAL TRADE COMMISSION, *Petitioner,* v. MINNEAPOLIS-HONEYWELL REGULATOR COMPANY, *Respondent.*	No. 479

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the Federal Trade Commission (R. 2265-2282) are reported at 44 F. T. C. 390. The opinion of the Court of Appeals for the Seventh Circuit (R. 2308-2315) is reported at 191 F. 2d 786.

JURISDICTION

The judgment of the Court of Appeals (R. 2316) was entered on July 5, 1951, and not on September 18, 1951, as claimed by petitioner. The petition was filed on December

14, 1951, more than 90 days after the entry of judgment; the time for applying for the writ was not extended, and, even if it had been extended for the maximum period permitted by statute, the time would have expired on December 2, 1951. Therefore, as is hereinafter set forth, the petition is untimely, and this Court does not have jurisdiction to entertain it. 28 U. S. C. § 2101(c).

QUESTIONS PRESENTED

(1) Whether this Court has jurisdiction to entertain the petition; and

(2) Whether either of the grounds urged by the petition (pp. 2, 9, 15) constitutes a special or important reason why this Court should grant the petition.

STATUTES INVOLVED

Jurisdiction

28 U. S. C. § 1254, is in part as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

28 U. S. C. § 2101(c), is as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A

justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."*

Price Discrimination

The applicable portion of Section 2 of the Clayton Act is as follows (15 U. S. C. § 13):

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ."

STATEMENT

The Facts

Respondent (M-H), a pioneer in the heating controls industry, is, and for a number of years has been, one of the

*An application for an extension of the time for filing a petition for a writ of certiorari cannot be granted unless presented to a Justice of this Court prior to the expiration of the statutory period. *Cresswell* v. *Tillinghast*, 286 U. S. 560 (1932); *Finn* v. *Railroad Commission*, 286 U. S. 559 (1932); Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States § 415 (1951 ed., Wolfson and Kurland.

principal manufacturers of automatic temperature control for oil burners which are used in domestic heating plants.

The Commission found that as a result of the demand for, and public acceptance of, M-H's controls, M-H had at all times sold its controls at prices higher than those charged by its competitors (FF 5, R. 2242).

M-H's most important customers for its oil burner controls are manufacturers of oil burners (R. 39). In 1941 there were approximately 300 oil burner manufacturers. The large majority of oil burner manufacturers are not engaged in fabricating the burners they sell, but rather in assembling the various parts thereof, including motors, pumps, transformers, controls, fans and blower wheels, the several parts usually being purchased by the oil burner manufacturers from different sources (R. 2182, 2309). Thus, oil burner manufacturers ordinarily furnish controls to their customers as parts of complete oil burners (R. 1108-09).

M-H has charged varying prices to oil burner manufacturers for controls and that fact was used as the basis for the principal charge made by the Commission in this proceeding.

M-H's competitors are the 15 other control manufacturers in the United States, chief among them being Mercoid Corp., Penn Electric Switch Co. and Perfex Corp. (R. 48-49; FF 6, R. 2242). Each of the principal control manufacturers solicited business from, and entered into contracts with, most of the oil burner manufacturers including *all* the larger accounts (R. 59-60, 749, 801-02). Since no important oil burner manufacturer used exclusively the controls of a single control manufacturer, competition was "ever present" (R. 1528), and, as the Commission

found, M-H was engaged in active and substantial competition with its competitors (FF 2, R. 2241). During the period in question, although M-H was the largest manufacturer of controls for oil burners, the total business of M-H's competitors increased (R. 222, 231-32, 418-21, 798, 826), while M-H's share of the available business was reduced (R. 876-77). Illustrative of the competitive situation that existed are the facts that in 1941 M-H lost to its competitors 53% of the control business of 31 customers who previously had for the most part used M-H's controls; and in the same year, 126 of M-H's other customers also purchased competitive controls (R. 961-64).

Prior Proceedings

This proceeding was instituted by the service on M-H of the Commission's complaint (R. 2) dated February 23, 1943, containing three counts. Count I charged M-H with violation of Section 5 of the Federal Trade Commission Act; Count II, realleging matters set forth in Count I, charged violation of Section 3 of the Clayton Act; and Count III charged violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. In Count III it was alleged that M-H had sold its controls to some of its oil burner manufacturer-customers at prices different from those charged others of such customers with resulting unlawful discriminations in price.

Hearings were conducted before a Trial Examiner from August, 1943, to October, 1945. On February 21, 1946, the Trial Examiner filed his Report (R. 2166-2203), wherein he recommended that an order be issued requiring M-H to cease and desist from the acts and practices charged

under Counts I and II, and that the charges set forth in Count III be dismissed (R. 2203). The latter recommendation was based upon the Trial Examiner's findings that

> (1) the differences in M-H's prices did not tend substantially to injure competition either among M-H and its competitors or among M-H's customers;
>
> (2) some of M-H's prices were justified by differences in its costs; and
>
> (3) M-H's other prices were made in good faith to meet the competition of its competitors.

On January 14, 1948, the Commission rendered its decision and issued its order to cease and desist. The Commission followed the recommendations of the Trial Examiner as to Counts I and II of the complaint,* but the majority declined to follow the Trial Examiner's recommendation as to Count III, except that it agreed that some of M-H's varying prices were justified by differences in M-H's costs. Com. Mason, dissenting, agreed with the Trial Examiner that Count III should be dismissed (R. 2276-82).

---

*Com. Mason concurred (R. 2277) as to the disposition of Count II which, as noted above, merely alleged that certain practices, set forth in Count I as violative of the Federal Trade Commission Act, were also violative of Section 3 of the Clayton Act. As to the other practices alleged to be unlawful in Count I, Com. Mason dissented (R. 2276-77) on the ground that M-H had discontinued those practices immediately upon the reversal by this Court of two decisions of the Court of Appeals for the Seventh Circuit which had approved such practices. See *Mercoid Corp.* v. *Mid-Continent Investment Co., et al.*, 320 U. S. 661 (1944) and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944). Com. Mason, in his dissent as to Count I, said (R. 2277): "I see no profit in shooting a tiger stuffed and mounted so long ago."

The conclusion of the majority of the Commission that M-H's varying prices injured competition was predicated upon its paradoxical theory that M-H, by lowering its prices to meet competition, had by that very act injured competition.

The Commission's formal finding on that point, namely, that M-H's varying prices had diverted trade to M-H from its competitors and, therefore, had had a "substantial injurious effect upon competition" (FF 19, R. 2256), is amplified by the following statement in the opinion of the Commission (R. 2273):

> "The competitive effects of respondent's [M-H's] discriminatory prices on other manufacturers of controls are persuasively indicated by its own arguments that its discriminatory prices were made for the purpose of meeting competition. These arguments show that respondent's [M-H's] discriminatory prices were made to retain the business of certain customers or to secure the business of others and that they were largely successful in doing so. To the extent that business is held by or diverted to respondent [M-H] from its competitors by its discriminatory prices and unfair practices [*i.e., we suppose by lowering its prices in good faith to meet competition*], competition has been adversely affected within the meaning of the law . . ."

The Commission majority's paradoxical theory has since been specifically rejected by this Court in *Standard Oil Co.* v. *Federal Trade Commission,* 340 U. S. 231, 250 (1951).

The Commission's order (R. 2262-65) is in four parts. Parts I and II enjoin M-H from engaging in the acts and practices charged in Counts I and II of the complaint; and

Part IV is merely the customary direction as to the compliance report. Part III (R. 2264), which was entered pursuant to Count III of the complaint, directs that M-H

> ". . . forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among oil-burner manufacturers purchasing said automatic temperature controls and other furnace controls——
>
> "1. By selling such controls to some oil-burner manufacturers at prices materially different from the prices charged other oil-burner manufacturers who in fact compete in the sale and distribution of such furnace controls, when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered."

On March 11, 1948, M-H filed with the Court of Appeals for the Seventh Circuit its petition to review and set aside the order of the Commission (R. 2283), and, subsequently, the Commission filed a cross-petition for affirmance and enforcement. M-H, however, did not press its petition as to Parts I and II of the order, and, before the Court of Appeals, announced that it did not challenge those Parts of the order. Neither M-H nor the Commission briefed or argued before the Court of Appeals any question arising out of Part I or Part II.

On July 5, 1951, the Court of Appeals handed down its opinion (R. 2308) unanimously reversing Part III of the order and dismissing Count III of the complaint, holding that, on the entire record, the Commission acted arbitrarily when it rejected the findings of the Trial Examiner that

M-H's pricing practices did not tend to injure competition. That being the basis for its decision, the court did not even reach the question whether M-H's varying prices were justified, as M-H strongly contended, on the ground that the lower of those prices were made in good faith to meet the equally low prices of its competitors. *Cf. Standard Oil Co. v. Federal Trade Commission, supra,* 340 U. S. 231 (1951). The court, in its opinion, did not refer to Parts I and II of the order except as follows (R. 2308):

> "... Since M-H does not challenge Parts I and II of the order based on the first two counts of the complaint we shall make no further reference to them."

The judgment of the court (R. 2316), reversing Part III of the order and dismissing Count III of the complaint in accordance with its opinion, was entered on July 5, 1951, the day that the opinion was filed. A certified copy of said judgment, in lieu of mandate, was issued to the Commission on August 6, 1951.

The Commission did not ask for rehearing, but about August 21, 1951, submitted to the court a proposed "Final Decree" and a typewritten memorandum which recognized that judgment as to Part III of the order had already been entered, but which argued that the court should affirm and enforce Parts I and II as requested in the Commission's cross-petition. The proposed "Final Decree" contained, in addition to provisions affirming and enforcing Parts I and II, a provision, identical in substance and practically identical in wording to the judgment of July 5, reversing Part III of the order and dismissing Count III of the complaint. On September 18, 1951, the court entered the decree proposed by the Commission (R. 2316-19). On December

14, 1951, the Solicitor General filed the petition for writ of certiorari to review the judgment in respect of Part III of the order.

ARGUMENT

POINT I

THE COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN THE PETITION.

That a petition for a writ of certiorari must be filed within 90 days after entry of judgment (unless the time be extended by a Justice of this Court for a period not to exceed 60 days more) is not open to question, 28 U. S. C. § 2101(c). If a petition is untimely, the Court does not have jurisdiction to entertain it. *Hope Basket Company, et al.* v. *Product Advancement Corporation, et al.*, 72 Sup. Ct. 44 (1951); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942); Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States § 409 (1951 ed., Wolfson and Kurland).

If the judgment of the Court of Appeals which was entered July 5, 1951, was the judgment of that court with respect to Part III of the Commission's order, the petition now before this Court, which was filed more than 150 days after July 5, 1951, is untimely and must be denied.

The July 5 judgment is as follows (R. 2316):

> "This cause came on to be heard on the transcript of the record from the Federal Trade Commission and was argued by counsel.
>
> "On consideration whereof, it is ordered and adjudged by this Court that Part III of the decision

> of the Federal Trade Commission entered in this cause on January 14, 1948, be, and the same is hereby, Reversed, and Count III of the complaint upon which it is based be, and the same is hereby Dismissed."

From the language of the judgment there appears to be no basis for contending that it was interlocutory, or that the court intended to give the case any further consideration. It would seem, from the face of the judgment, that the court intended thereby to make final disposition of the case. What appears from the face of the judgment is confirmed by the record, including the opinion of the court below.

Accordingly, there is not any basis for disputing that the judgment of July 5 was the judgment of the court as to Part III of the order. Petitioner, however, seeks to review the decree of September 18, 1951, which affirmed and enforced Parts I and II of the Commission's order, and also reiterated the judgment of July 5 as to Part III. The Commission, in its memorandum dated August 21, 1951 in support of that decree, recognized that the court had already entered judgment as to Part III of the order and did not seek any alteration of that judgment. Thus, the memorandum commenced as follows:

> *"On July 5, 1951 the Court entered its opinion and judgment reversing Part III of the decision of the Federal Trade Commission dated January 14, 1948 and dismissing Count III of the complaint upon which it is based.* No disposition has been made of the Cross-Petition filed by the Commission for affirmance and enforcement of the entire decision. The Commission takes the position that its Cross-Petition should be in part sustained, *i.e.*, to the extent that the Court should make and enter herein a decree affirm-

> ing Parts I and II of the Commission's order to cease and desist and commanding Minneapolis-Honeywell Regulator Company to obey the same and comply therewith . . ." [Emphasis supplied]

A timely petition for rehearing, of course, tolls the running of the time within which to apply for a writ of certiorari, *Department of Banking* v. *Pink*, 317 U. S. 264, 266 (1942). The Commission, however, never made any such petition. The typewritten memorandum of August 21, which the Commission filed in support of the decree more than 15 days after the entry of the judgment of July 5, was not, and did not purport to be, a petition for rehearing. In the first place, as noted above, it did not seek any alteration of the judgment of July 5. Furthermore, it did not comply with the requirements of Rule 22 of the Court of Appeals either as to time of filing or as to form:

> "*Rehearing.*—Printed petition for rehearing may be filed within 15 days after entry of judgment. Three copies of such petition shall be served forthwith by the clerk of this court upon the opposing party, who within 10 days from such service may file a printed answer, three copies of which shall be served on the opposing party, and the petition shall be determined without oral argument unless otherwise ordered. Thirty copies of such petition and answer shall be filed with the clerk of this court."

The proceedings in this case subsequent to the entry of the judgment of July 5 did not affect in any way the court's disposition of Part III of the order, but were solely concerned with Parts I and II of the order. Parts I and II ordered M-H to cease and desist from practices found by

the Commission to be violative of Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Act and are, therefore, wholly separate from, and have no relation to, Part III of the order which dealt with practices found by the Commission to be violative of Section 2 of the Clayton Act. Moreover, in the memorandum of August 21, which the Commission filed, it did not present a substantive question with respect to Parts I and II of the order, but only the narrow and technical question whether the Court of Appeals, which had not adjudicated any issue arising therefrom, should nevertheless affirm and enforce Parts I and II without regard to the fact that M-H, by announcing its decision not to press its petition as to those Parts of the order, had already placed itself under the duty to comply therewith. That question was not even remotely related to Part III of the order.

The decree of September 18 did nothing more as to Part III of the order than to restate the court's judgment of July 5. Its only function was to dispose of Parts I and II of the order as to which the Court of Appeals had made no adjudication; but over which, according to the Commission's theory, that court had obtained jurisdiction.

The only issues presented to and decided by the Court of Appeals in its opinion of July 5 arose from Part III of the order. The judgment of July 5, final on its face, made complete and unambiguous disposition of Part III, and was in complete accord with the opinion of the court. The court was never asked by the Commission to alter that judgment, and there is no indication that the court ever considered altering it. The fact is that the court did not alter it.

It is submitted that the judgment of July 5, 1951, was the judgment of the Court of Appeals as to Part III of the order, that the petition for a writ of certiorari filed December 14, 1951, is untimely, and that, accordingly, the petition should be denied.

POINT II

PETITIONER HAS NOT SHOWN ANY REASON WHY THE PETITION SHOULD BE GRANTED.

In stating the questions to be considered by this Court, in specifying the errors to be urged, and in advancing reasons why, in its opinion, a writ of certiorari should be granted, petitioner has urged only two points which are:

(1) that the decision of the court below is in conflict with the decision of this Court in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37; and

(2) that the court below misapplied the decision of this Court in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474.

Neither of those points has merit.

A. The Decision of the Court Below Is Not in Conflict with the *Morton Salt* Case.

As this Court recognized in *Corn Products Refining Co. et al.* v. *Federal Trade Commission*, 324 U. S. 726, 738 (1945), Section 2(a) of the Clayton Act does not prohibit all discriminations in price, but only those discriminations whose effect

> "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ."

Petitioner contends, however, that this Court has eliminated the above-quoted language from the statute by holding in the *Morton Salt* case that a showing that a seller has sold a commodity of like grade and quality to two or more customers at substantially different prices gives rise to a *conclusive presumption* that such price differentials may have the defined effect on competition (Pet., pp. 11-15).

Such an interpretation of the *Morton Salt* decision would render nugatory that part of Section 2(a) of the Act quoted above and make discriminations in price unlawful, without regard to their effect on competition. Such an interpretation would be contrary to everything that this Court, or any other court, has ever said on the subject.

Such was not the holding of this Court in the *Morton Salt* case. The Court said (334 U. S. at p. 47) that ". . . the Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition" (citing the "injury to competition" language of Section 2(a) of the Act). The Court not only pointed out that the Commission in the *Morton Salt* case had made adequate findings that there was a reasonable possibility of injury to competition (pp. 45-7), but also determined that the evidence in that case supported such findings (pp. 47-51)—specifically, the showing that the seller's differentials in the price of salt

between purchasers who competed in the resale of such salt were "sufficient in amount to influence their resale prices" (p. 47).

This Court did not hold that price differences alone give rise to a conclusive presumption of injury to competition, or that all price discriminations are unlawful discriminations. The Court's opinion and its approving reference (p. 45, n. 13) to *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F. 2d 378, 379 (2d Cir. 1945), *cert. denied*, 326 U. S. 734 (1945), make that clear.

This Court did hold that it was sufficient to make out a *prima facie* case for the Commission to prove that a seller has charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors; from which it follows that unless the seller sustains the burden of proof which is thereby placed upon him, the Commission could properly conclude that the price discrimination was unlawful.

In the *Morton Salt* case the seller did *not* sustain its burden of proof with respect to injury to competition.

In the instant case, the situation is entirely different. The court below recognized that the burden of proof was on M-H to show that M-H's prices had not tended to injure competition, either among M-H and its competitors or among M-H's customers, and it found, upon examination of the whole record, that M-H had sustained that burden. Thus, with respect to the question whether competitor competition had been injured the court said (R. 2312-13):

> ". . . Even though we assume that the burden of proving absence of injury to competition falls on the accused (see *Samuel H. Moss* v. *Federal Trade Commission*, 148 F. 2d 378; *Federal Trade Commission* v. *Standard Brands, Inc.*, decided by the Second

> Circuit March 30, 1951, modified June 4, 1951), we think M-H has met that burden with respect to its competitor competition."

Similarly, with respect to the question whether customer competition had been injured the court said (R. 2315):

> "We are convinced that here 'the inferences on which the . . . findings were based were so overborne by evidence calling for contrary inferences that the findings . . . could not, on the consideration of the whole record, be deemed to be supported by "substantial" evidence.' (*National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502.)"

Furthermore, contrary to petitioner's contention (Pet., p. 9), the court below did not apply "an unduly restrictive standard of injury to competition—actual injury rather than a reasonable possibility thereof— . . ." The court stated that:

> ". . . it cannot be said that [M-H's] discriminatory price differentials substantially injure competition or that there is any reasonable probability or even possibility that they will do so. Cf. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 738, 742; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46. And a mere possibility of such injury is insufficient to sustain a charge of violation of the Act. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 742."

Manifestly, there is not any conflict between the decision of this Court in the *Morton Salt* case and the decision of the court below in the instant case.

B. The Court Below Did Not Misapply the Decision of This Court in the *Universal Camera* Case.

In *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951), this Court held that the Court of Appeals for the Second Circuit had erred in deeming itself bound by the NLRB's rejection of its Trial Examiner's findings, and remanded the case to that court for reconsideration of the record, with instructions that it should "accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial." (340 U. S. at p. 497). Elsewhere in its opinion, the Court indicated that reviewing courts should give a trial examiner's report "such probative force as it intrinsically commands" (p. 495) and recognized "that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case, has drawn conclusions different from the Board's than when he has reached the same conclusion" (p. 496).

In the instant case, as in the *Universal Camera* case, the administrative tribunal, with one member dissenting, rejected the findings of its Trial Examiner.

The court below in the instant case, in reviewing the decision of the Commission, was guided by the principles laid down by this Court in the *Universal Camera* case. The court below noted that under the rule of that case, it was its duty to examine the record as a whole, including the rejected report of the Trial Examiner, in order to determine whether the evidence supporting the Commission's order was substantial. The court also indicated that the dissent of an experienced member of the Commission from the Commis-

sion's findings and conclusions was in itself a reason to scrutinize carefully the evidence relied upon to support such findings and conclusions (R. 2311). The court recognized, however, that the findings of the Trial Examiner must be considered along with " 'the consistency and inherent probability of testimony' " (R. 2311), and that such findings are not " 'as unassailable as a master's' " (R. 2312). Clearly, as shown by its opinion, the court carefully followed the principles laid down by this Court, and was keenly aware that those principles were intended to be applied with caution.

Thus guided, the court below came to the conclusion, from its examination of the record as a whole, that the Commission had acted arbitrarily in rejecting the trial examiner's findings to the effect that M-H's pricing practices had not tended substantially to lessen competition. The court did not hold that the Commission was arbitrary merely because it reversed the Trial Examiner, but because on the whole record, the Trial Examiner was right, and the Commission's findings were not supported by substantial evidence (R. 2312, 2315).

The court below did not misapply, but rather faithfully followed, the decision of this Court in the *Universal Camera* case. The assertions by petitioner that the court gave more weight to the Trial Examiner's report than it ought to have given, and that the court merely substituted its judgment for that of the Commission, are unjustified. The court below did no more than perform its *statutory duty* to set aside such action, findings and conclusions of the Commission as it found to be unsupported by substantial evidence, arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Administrative Procedure Act § 10(e), 5 U. S. C. § 1009(e).

Accordingly, there is not any occasion for this Court to exercise its power to review the decision of the court below. A writ of certiorari will be granted only for special and important reasons (Rules of the Supreme Court of the United States, Rule 38(5)); and this Court has clearly indicated that in the light of that Rule, it will "leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality", *NLRB* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502 (1951). As the Court said in *Radio Corporation of America et al.* v. *United States et al.*, 341 U. S. 412, 415 (1951):

> "... in considering the question of sufficiency of evidence to support an administrative order this Court must and does rely largely on a first reviewing court's conclusion. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474."

In the *Universal Camera* case, after stating that a Court of Appeals must set aside the findings of an administrative agency when, upon its review of the record in its entirety, such findings are found to be not supported by substantial evidence, the Court said (340 U. S. at pp. 490-91):

> "... Our power [*i.e.*, the power of the Supreme Court] to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 479

In the Supreme Court of the United States

OCTOBER TERM, 1951

FEDERAL TRADE COMMISSION, PETITIONER

v.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In point I of its brief in opposition, respondent contends that the petition was not filed in time and that this Court therefore has no jurisdiction to entertain the petition.[1] The basis for the contention is that the judgment of the court of appeals sought to be reviewed was entered on July 5, 1951, and not, as stated in the petition for certiorari, on September 18, 1951. We submit, to the contrary, that the court of appeals made its judgment of September 18, 1951, its final judgment in the proceeding pending before it, and

[1] The Government considers that the other two points in the brief in opposition are adequately presented in its petition and require no further comment.

that the entry of this judgment fixed the time within which the petition for certiorari might be filed.

The substantive prohibitions of the Commission's order are set forth in three paragraphs or parts, designated I, II, and III (R. 2263–2264). Respondent's petition to review challenged the entire order (R. 2284, 2288), and the Commission, by cross petition, sought enforcement of the entire order.[2] During the court proceedings respondent abandoned its challenge to Parts I and II of the order, but such abandonment did not eliminate the issue before the court as to the judgment to be entered with respect to Parts I and II.

The opinion which the court rendered on July 5, 1951, discussed only Part III of the Commission's order (R. 2308–2315). The court stated that, since respondent was not challenging Parts I and II, it would "make no further reference to them" (R. 2308). On the day on which the opinion was filed the court entered an order which reversed Part III of the "decision" of the Commission, but was silent as to Parts I and II of the order (R. 2316). The court therefore left undetermined what judgment should be entered with re-

[2] While the cross-petition was not incorporated in the printed record filed with this Court, the final decree entered by the court below on September 18, 1951, recites that the Commission had filed a cross-petition praying for enforcement of its order against respondent (R. 2317).

spect to this portion of the order. This issue was before the court not only because of the cross petition filed by the Commission, but also because the court had the duty to affirm, modify, or set aside the order brought before it for review.[3] Parts I and II of the Commission's order were not affirmed, modified or set aside by the judgment entered on July 5, 1951, and this judgment was therefore not dispositive of the review proceeding.

The Commission, being of the opinion that the court's order of July 5, 1951, was not final, filed with the court a memorandum dated August 21, 1951, requesting entry of a judgment affirming and enforcing Parts I and II of its order,[4] Fol-

[3] Part I of the Commission's order was grounded on Section 5 of the Federal Trade Commission Act, Part II on Section 3 of the Clayton Act, and Part III on Section 2 of the Clayton Act (R. 2284–5). Section 5 (c) of the former Act (15 U. S. C. 45 (c)) and Section 11 of the latter Act (15 U. S. C. 21), the statutory basis for the review proceeding (R. 2286), made it the duty of the court, on review, to enter a judgment "affirming, modifying, or setting aside" the order of the Commission.

Section 5 (c) of the Trade Commission Act requires the court to enter a decree "enforcing" the order under review "to the extent that such order is affirmed." And in review proceedings under Section 11 of the Clayton Act, the general practice has been to enforce orders of the Commission to the extent that they are affirmed. See petition for certiorari in *Federal Trade Commission* v. *Ruberoid Co.*, No. 448, this Term, certiorari granted January 28, 1952.

[4] The memorandum is entitled "Statement of the Position of the Federal Trade Commission Relative to Settlement of a Final Decree Herein." A copy of this memorandum, which is not a part of the record, has been filed with the Clerk.

lowing the filing of an opposing memorandum by respondent and a reply to this memorandum by the Commission, the Court on September 18, 1951, entered a judgment which it captioned "Final Decree" (R. 2316). The judgment recites the prior proceedings in the case, including the cross petition filed by the Commission (R. 2316–2317). It recites that it appears to the court that Parts I and II of the Commission's order should be "affirmed and enforced" and that Part III should be "reversed" (R. 2317). The judgment then provides: "Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed" that Part III of the order "be and the same is hereby reversed" and that Parts I and II "be and the same hereby are affirmed" (*ibid.*).[5]

1. A court has plenary power while the term is in existence to modify or vacate its judgment. *Zimmern* v. *United States*, 298 U. S. 167, 169–170. In the instant case, if the judgment entered on September 18 had vacated the judgment of July 5, the September 13 judgment would plainly govern on time for filing petition for certiorari. We submit that it is clear that the court below intended that its later judgment of September 18 should supersede its earlier, incomplete judgment.

[5] In addition, the judgment incorporates the prohibitions of Parts I and II of the Commission's order, and decrees that respondent file with the Commission within 90 days a written report setting forth its compliance with the judgment (R. 2317–2319).

If this had not been the case the later judgment would merely have affirmed and enforced Parts I and II of the Commission's order, and recited the reversal of Part III by the judgment entered in July. Instead, the later judgment not only affirmed and enforced Parts I and II, but also specifically reversed Part III. The court manifested its intention to make the September 18 judgment the court's final judgment as to Part III, both by providing therein for reversal of Part III and by denominating this judgment "Final Decree." Where the date of entry of final judgment is in doubt, the court's intention as to the act constituting its final judgment in the cause is controlling. *United States* v. *Hark*, 320 U. S. 531, 535. Here, as in the *Hark* case, it is not to be assumed that the court entered a formal order intended to be merely "an empty form" (*ibid.*). The court's reversal of Part III by the judgment entered on September 18, 1951, obviously was an empty form if the court intended its July 5 order to stand as its judgment as to Part III. See *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689 (C. A. 6), quoted at pages 8–9, *infra*.

2. The fact that the court entertained and acted upon the application made by the Commission (dated August 21, 1951) for entry of a judgment dispositive of the proceeding is in itself sufficient to make the September 18 judgment the court's final judgment as to all parts of the Commission's

order. It is well settled that "where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend, or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion." *Leishman* v. *Associated Electric Co.*, 318 U. S. 203, 205; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177. While such motion or petition does not have this effect if it is "addressed to mere matters of form" and does not raise "questions of substance" (*Leishman* case, p. 205), it is clear that the Commission's application raised a question of substance, since it asked that the court enter judgment with respect to Parts I and II of the Commission's order.

In this case, the Commission's application was not filed within the 15 days allowed for petitions for rehearing. But it did induce the court to revise the judgment in matters of substance. An untimely petition for rehearing or to amend a judgment, if entertained or considered on its merits, has the same effect as a timely petition. *Bowman* v. *Loperena*, 311 U. S. 262, 266, and cases cited; cf. *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 150. In these circumstances, "the judgment of the court as originally entered does not become final" until the action of the court on such petition, "and the time for appeal runs from the date thereof." *Bowman* v. *Loperena*, *supra*. In the *Bowman* case and each

of the three cases it cites the untimely petition for rehearing, although considered by the lower court, was denied. The problem presented in those cases was therefore more difficult than that raised here, in which the application to change the judgment was successful. It follows *a fortiori* in the latter situation that the entry of a different judgment extends the time to appeal.

Indeed, the general rule in this country (subject to an exception for clerical or formal errors) is "that where a judgment, order, or decree is amended or modified the time within which an appeal from such determination may be taken begins to run from the date of the amendment or modification." Annotation, 80 Law Ed. 1121, and cases cited. Federal cases include *United States* v. *Gomez*, 1 Wall. 690, 700; *Memphis* v. *Brown*, 94 U. S. 715, 718; *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689, 690 (C. A. 6); cf. *Zimmern* v. *United States*, 298 U. S. 167.

3. Respondent's principal contention is based on the facts that the judgment of September 18 did not alter the provisions of the earlier order of July 5 insofar as Part III of the Commission's order was concerned, and that the Commission's petition in this case relates only to Part III. But if a new judgment is entered, the time for appeal is extended with respect to all its provisions, and not merely those which have been changed, or with respect to which the petition

for rehearing is filed. If the question were open, wise judicial policy would dictate such a result, in view of the undesirability of piecemeal and separate appeals in what is essentially a single case. But the question is not open, although there seems to have been so little doubt about it that the answer has been assumed without explanation. Thus, in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177, the *plaintiff's* time to appeal was held to be extended by the *defendant's* motion to amend the findings—although the amendments to the findings did not relate to the portion of the judgment from which the plaintiff was appealing.[6] It has also been held that the entry of a new judgment supersedes the old even though there is no change of substance. In *Memphis* v. *Brown*, 94 U. S. 715, 718, the Court said:

> the form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the court had the right to do during the term, and for the very purpose of giving it effect for a *supersedeas*.

See also *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689 (C. A. 6), in which the court said (p. 690):

[6] Similarly, in *Johnson* v. *Eisentrager*, 339 U. S. 763, the Government's petition for certiorari was filed within 90 days of the denial of *respondent's* petition for rehearing below, not within 90 days of the original order.

> The order of March 18 did not expressly vacate the order of March 7, but we think it should be considered as having that effect. It covered exactly the same subject-matter, and there could have been no object in entering it, unless it was intended to supersede the earlier order.

Clearly where the new order was the same as the old, the appeal must have been from provisions which were repeated without change, as in the instant case.

State cases applying the general rule and holding or implying that a modification of a judgment extends the time to appeal from all portions of the judgment include *Hewey* v. *Andrews*, 82 Or. 448, 159 P. 1149; *Billson* v. *Lardner*, 67 Minn. 35, 69 N. W. 477; *Luck* v. *Hopkins*, 92 Tex. 426, 49 S. W. 360.

4. Respondent argues that the Commission did not file a petition for rehearing or request any change in the judgment as to Part III. The title of the document filed is, of course, immaterial. In any event, the critical fact is that the court actually entered a new and different[7] judgment, not what the Commission requested or the name of the paper in which the request was made. The nature of the application is irrelevant when the judgment is changed—although it may be ma-

[7] Many of the authorities cited above indicate that even if the judgment had not been different the result would be the same so long as a new judgment was entered.

terial when such an application is denied. A new judgment would be the basis for appeal if the court acts on its own motion (*Zimmern* v. *United States*, 298 U. S. 167), and the result must be the same irrespective of a formal or informal request by a party.

For the reasons stated, it is respectfully submitted that the petition for certiorari was filed within the statutory 90-day period and that the Court has jurisdiction to entertain the petition.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY, 1952.

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No. 11

In the Supreme Court of the United States

OCTOBER TERM, 1952

FEDERAL TRADE COMMISSION, *Petitioner*

v.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the court of appeals (R. 2308) is reported at 191 F. 2d 786.

JURISDICTION

The "Final Decree" of the court of appeals was entered on September 18, 1951 (R. 2316-2319). Respondent's contention that an earlier order

entered on July 5, 1951, was the judgment of the court of appeals is considered in Point I, *infra*, pp. 34-47. The petition for a writ of certiorari was filed on December 14, 1951, and was granted on March 3, 1952. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petition for the writ of certiorari was filed in time.[1]

2. Whether there is sufficient evidence to support the Federal Trade Commission's finding that the three low-priced brackets of respondent's quantity discount system, which were unjustified by differences in costs, were, or tended to be, injurious to customer and competitor competition.

3. Whether a reviewing court is justified in setting aside findings of fact by an administrative agency because of the reviewing court's conclusion that contrary findings recommended by the trial examiner are supported by substantial evidence or by a preponderance of the evidence.

4. Whether a quantity discount system, the prices of which are fixed in part as a result of consideration of competitive prices but not to meet the low price of any individual competitor, is

[1] This question was raised by respondent in its brief in opposition (p. 2). In its order granting the writ, the Court requested counsel to discuss the question in briefs and on oral argument.

justified as made "in good faith to meet an equally low price of a competitor," within the meaning of the Robinson-Patman Act.

STATUTES INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or

quantities in which such commodities are to such purchasers sold or delivered: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

28 U.S.C., Supp. V, 2101(c) provides as follows:

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. * * *

STATEMENT

The Nature of the Case

This proceeding was instituted by a complaint issued by the Federal Trade Commission on February 23 1943, charging respondent with violations of Section 2(a) and 3 of the Clayton Act, and Section 5 of the Federal Trade Commission Act (R. 2-12). Respondent is one of the country's principal manufacturers of automatic temperature controls used in oil burners (R. 2241). Count I alleged that, in violation of Section 5 of the Federal Trade Commission Act, respondent entered into written contracts with its customers whereunder the latter agreed to purchase all or a majority of their control requirements from respondent, and that respondent sold combustion stoker switches to its customers under so-called exclusive license agreements whereby the customers were required to purchase other devices manufactured by respondent. Count II alleged that in violation of Section 3 of the Clayton Act respondent has sold its automatic temperature controls on the condition that the purchaser should not deal in or use the controls of competitors. Count III of the complaint—the part at issue in this case—alleged that respondent's quantity discount pricing system resulted in price discriminations whose effect "has been or may be substantially to lessen competition in the line of commerce in which respondent is engaged and to injure, destroy and

prevent competition" between respondent and its competitors, and among respondent's customers, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13) (R. 10).

Respondent filed an answer admitting the existence of the quantity discount system, but denying that its effect was to lessen, injure, destroy or prevent competition (R. 22-26). Respondent further alleged that the price differentials reflected differences in costs of manufacture, sale and delivery (R. 25), and that in almost all cases the prices charged by it to oil burner manufacturers were greater than the prices at which they purchased controls from respondent's competitors (*ibid.*).

Following extensive administrative proceeding—protracted hearings before a trial examiner (R. 29-1640),[2] recommended findings by the examiner (R. 2166-2203), exceptions thereto (R. 2204-2239), briefs, and oral argument before the Commission (R. 2240)—the Commission on January 14, 1948, issued its findings, opinion and order in the case (R. 2239-2276). With respect to Count III, the Commission found, contrary to the examiner's conclusion, that the price differentials substantially injured competition between re-

[2] Prior to the convening of the hearings, a number of facts were stipulated between the Commission and respondent (Comm. Ex. 1, R. 1643-1669).

spondent and its competitors, and among its customers (R. 2256, 2260). It further found that the differentials were justified by cost differences only in the four highest of respondent's seven price brackets (R. 2254), and that the differentials in the three lowest price brackets had not been made in good faith to meet an equally low price of a competitor (R. 2257-60).[3] The Commission accordingly ordered respondent to cease and desist, *inter alia*, from giving discriminatory prices not justified by cost differentials (R. 2264).[4]

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[3] Respondent conceded that its cost study did not establish that the price differentials in the three lowest price brackets were justified by cost differences (R. 1261, 1332, 1389). It contended, however, that the differentials in those brackets were the result of meeting competition (R. 2257).

In rejecting respondent's claim that the three lowest price brackets were justified to meet competition, the Commission pointed out that these brackets did not "represent prices made in particular instances to meet competitors' prices, but reflect progressive reductions in a comprehensive price schedule based on increased quantity purchases" (R. 2272). On the question of whether the off-scale prices had been made to meet competition, the Commission noted that this justification was presented as to only 22 of the 76 off-scale accounts (R. 2257-8); that not all the 22 accounts were in the three lowest brackets (R. 2258); and that the prices given to several of the 22 accounts did not involve meeting a competitor's price at all (R. 2258-9). The Commission further found that even if respondent had met a competitor's lower price in the 22 accounts, that fact would not justify respondent's general practice of allowing off-scale prices (R. 2259).

[4] Commissioner Mason, dissenting in part, was of the view that respondent's discriminatory pricing practices had not tended to substantially lessen, injure, prevent or destroy competition (R. 2276-2282).

The cease and desist order also covered violations charged in Counts I and II (R. 2263-2264). Respondent petitioned to review and set aside all three counts of the Commission's order (R. 2283), and the Commission filed a cross-petition to enforce the order (R. 2317). The Court of Appeals affirmed the parts of the order based on Counts I and II; prior to the argument in the Court of Appeals respondent had abandoned its challenge to these parts of the order (R. 2317). The court set aside that portion of the order based upon Count III (R. 2316-18). (Further details as to the precise nature of the court's order, relevant only in relation to the timeliness of the Commission's petition for certiorari, appear in Point I, *infra*, pp. 34-37.) The court held that the Commission's findings that respondent's discriminatory pricing practices had injured or tended to injure competition among respondent's customers, or between it and its competitors, were not supported by substantial evidence (R. 2315). It did not find it necessary to pass upon the other question raised by respondent, whether the discriminatory prices were made in good faith to meet the prices of competitors (R. 2315).

The Conduct of Respondent's Business and the Operation of Its Quantity Discount Pricing System.

The underlying facts relating to the conduct of respondent's business and the operation of its quantity discount pricing system—as found by

the Commission and accepted by the court below—are not in dispute.

Respondent is the country's principal manufacturer of automatic temperature controls (R. 2241). These controls, which constitute an important item in oil burners, are sold by respondent to manufacturers of such burners, and to wholesalers, contractors and dealers in burners and automatic temperature controls (*ibid.*). "The large majority of oil burner manufacturers" do not actually fabricate the burner, but merely purchase the component parts and assemble the burner therefrom (R. 2182, 580, 594-596, 725-6, 1000). The controls generally, although not necessarily, are sold in sets of three[5] (R. 2242), and a set of controls represents the principal cost item among the various parts used in making the burner (R. 2252), costing almost twice as much as

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[5] The three controls ordinarily used in connection with domestic oil burners are a room thermostat, a primary control, and a limit control (R. 2242). The thermostat, which is placed in the area to be heated, starts the burner when the temperature in that area falls below the fixed point (R. 426, 1646). The primary control starts and stops the oil burner's operating cycle (R. 426-427, 1646). The limit control cuts off the burner whenever the temperature or pressure rises above the safety level (R. 427, 1646).

Although some controls made by different manufacturers can be and have been combined to form a set (R. 429, 596-8, 1141), the "usual trade practice" is for an oil burner manufacturer to purchase the three controls in a set from a single manufacturer (R. 228). Servicing of the burner is thereby simplified (*ibid.*). Moreover, certain controls made by different manufacturers cannot be "mixed" (R. 1066).

any other part (R. 1000). The cost of the controls may constitute as much as 40% of the total material cost and sometimes is as much as "one-third the selling price" of the completed burner (R. 634, 940-944, 1000, 2252).[6]

Respondent, since its organization in 1927,[7] has manufactured and sold "the greater part" of the automatic temperature controls used in the United States (R. 2241). It was stipulated that in 1939, 1940 and 1941 it sold approximately 60% of all such controls sold in this country to oil burner manufacturers and dealers (R. 1645).[8] As a result of substantial advertising expenditures—aggregating approximately $4,000,000 during the years 1927 to 1941 (R. 2242)—respondent has developed a large customer demand for and public

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[6] In 1941 the lowest price for respondent's controls, bracket 5, $13.75 (R. 1659), was slightly more than one-third the lowest price for burners, $40 (R. 507, 684) and 27.5% of the moderately low price of $50 (R. 505, 2141). The price in bracket 1, $17.35 (R. 1659) was over one-third of $50, and 24.8% of $70, a reasonably high priced burner. The percentage would, of course, be less for the higher priced burners. The exact percentage—whether 20, 25, 30 or 35—is, of course, unimportant. The significant fact is that the controls represented a substantial portion of the selling price of the complete burner.

[7] Respondent was formed by the combination of the Minneapolis Heat Regulator Company, which had been making heat regulator devices since 1885, and the Honeywell Heating Specialties Company, which had been organized in 1906 (R. 2309).

[8] In 1937-38 respondent had 73% of the controls business (R. 2312).

acceptance of its controls (R. 2242, 866, 995, 1046, 1108). Most oil burner manufacturers were accordingly impelled to supply burners with respondent's controls, either as standard or optional equipment (R. 364, 429, 441, 473, 628, 648, 664, 685-686, 715, 728, 974-975, 995, 1045-1046, 1108, 1136-1137, 1141).[9] In consequence, respondent has been able to sell its controls at higher prices than its competitors; in many instances oil burners equipped with respondent's controls have been sold for $2.50 to $5.00 more than the same burners equipped with controls made by its competitors (R. 2242).[10] The temperature control business is

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[9] For example:

> A. In our particular field as we catered chiefly to builders, that you will understand it, we had to supply Minneapolis-Honeywell controls. They would not have anything else. [R. 628.]
>
> • • • •
>
> Q. I mean did every example of higher priced burners carry always Minneapolis-Honeywell controls?
>
> A. Most of the burners carried Minneapolis. [R. 715.]

One manufacturer who preferred Mercoid controls also had to sell burners with Minneapolis-Honeywell controls, since "Some dealers would not take burners without Minneapolis-Honeywell controls" (R. 728). It was stipulated that between 1936 and 1941 "more than 50% of all the manufacturers of oil burners within the United States" "entered into annual contracts" with respondent (R. 1645). There was testimony that some companies purchased from respondent without entering into annual contracts (R. 926-927, 2253).

[10] In some instances, the higher price of respondent's controls was passed on by the manufacturer to his dealers (R.

keenly competitive (R. 394-396, 749, 801-802).[11]

During the period 1937 through 1941 the prices charged by respondent to oil burner manufacturers were based upon a standard quantity discount pricing system (R. 2250-2252). Under this system, the prices paid by purchasers of 50 or more sets of controls annually varied according to the number of sets purchased.[12] The net prices decreased as the quantity purchased increased. During 1941 respondent had the following price brackets (R. 2252):

Bracket No.	No. of Sets	Net Price Per Set	Discount from Highest Price
1	50-349	$17.35	....
2	350-999	16.45	5.19%
3	1000-2499	15.90	8.36
3A	2500-4999	15.35	11.33
4	5000-7499	14.90	14.12
4A	7500-9999	14.25	17.87
5	10000-up	13.75	23.05

364-365, 1150-1151). Other manufacturers absorbed the higher cost of respondent's controls, thereby cutting down on their profit margin (R. 936, 942, 975).

[11] Respondent's principal competitors during the period involved in this case were the Penn-Electric Switch Company, the Mercoid Corporation, and the Perfex Corporation (R. 2242, 2309). Mercoid entered the controls business in 1922, Penn-Electric in 1932, and Perfex in 1936 (R. 2309). The prices charged by these three companies for controls were generally lower than those charged by respondent (R. 76-77, 2312).

[12] Purchasers of less than 50 sets annually were not recognized by respondent as oil burner manufacturers, and they did not receive the benefit of the discount bracket prices (R. 2250). In 1941, they paid $20.25 per set of controls as against the bracket prices of $17.35 to $13.75 (R. 2253).

Approximately 55% of respondent's total control sales in 1941 were to customers in the three lowest price brackets (brackets 4, 4A, 5) (R. 1630-1631), for which the Commission found the differentials not to be justified by differences in costs (R. 2255). However, in that year only twenty-two of respondent's 150-200 oil burner manufacturer customers (R. 1132) were in those brackets. Ten received bracket 4 prices (R. 1431), one had a 4A price (R. 1433), and eleven were given the lowest (5) price (*ibid.*).

Respondent's practice has been to execute annual contracts covering customer purchases for the following year (R. 1496, 2243). These contracts, generally executed in December or January (*ibid.*), placed the customer in a price bracket based upon respondent's estimate of the customer's prospective purchases. A particular customer's bracket was determined by its purchases during the preceding year, the average of the purchases of two or more preceding years, or the customer's estimate of its probable purchases (R. 2253). Although respondent endeavored to execute contracts with its customers, bracket prices based upon anticipated purchases were given to some customers who did not sign a contract (R. 926-927, 2253).

If a customer's total purchases exceeded the contract figure so as to bring the purchaser into a

lower price bracket, he was given the benefit of such lower price by retroactive discounts or credits (R. 927-8, 1497, 2253). However, if a customer failed to purchase the specified quantity, the price was not increased to the higher level which compliance with the quantity bracket scale would have required (*ibid.*). A number of customers were thus placed in brackets lower than their volume of purchases entitled them. These were known as "off scale sales" (R. 2254).[13] In 1941, 76 out of respondent's 150-200 customers (R. 1132) were "off-scale" accounts (R. 1496, 2256).[14] At least four of these "off scale" accounts resulted from a practice of respondent's known as "dual transactions" (R. 1550, 2257). That was an arrangement whereby an oil burner manufacturer who sold burners without controls to a furnace manufacturer was given credit, in determining his price bracket, for controls purchased by such furnace

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[13] Some of these "off-scale" sales were made to meet a competitive situatio. where it appeared unlikely that the buyer would be able to purchase the quantity called for by the bracket price it was given. For example, respondent gave the May Oil Burner Corporation its lowest price in 1941—bracket 5 calling for 30,000 units at $13.75 a set of three units—because it "knew that any of our competition * * * would give them their lowest bracket" (R. 1620). May's actual purchase of 14,000 units, however, would have entitled it only to a 3-A bracket price of $15.35 (*ibid.*; R. 2252).

[14] A cost study made by respondent showed that approximately 43% of its total manufacturing costs in 1941 was applicable to off-scale customers (R. 1423, 2254).

manufacturer directly from respondent (R. 929-931, 2257).[15]

Injury to Customer Competition.

The Commission's finding of injury to *customer* competition was grounded upon findings that the question of price was important to oil burner manufacturers in the purchase of controls (R. 2260); that a set of controls represents the largest single item of cost among the various parts of a finished oil burner (R. 2252); that oil burner manufacturers who received the lower prices had a "substantial advantage" over their competitors paying the higher prices (R. 2255); and that the latter "must either sell at competitive prices and, in so doing, reduce their possible profits by the amounts of discriminations against them or attempt to sell at higher prices than those which the favored customers of respondent charge for oil burners equipped with respondent's automatic temperature controls, with the result of inability to secure business and a reduction in the volume of their sales" (*ibid.*).

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[15] An example of such a dual transaction was the Automatic Burner Corporation account. In 1940 that company was given a 4A contract calling for 22,500 instruments (7,500 sets). Its actual purchases during that year were only 15,739. However, one of its customers purchased directly from respondent 15,129 units for use with ABC burners. Automatic Burner was thus given credit for 30,868 instruments. This resulted in the company's receiving a retroactive credit, and a 1941 bracket 5 contract. In 1941, Automatic Burner's direct purchases of 19,851 units were again combined with the customer's purchases of 21,315 units to give Automatic Burner a credit of 41,166 instruments (R. 1543-1544).

The record as a whole shows that these findings are supported by substantial evidence.

There was keen competition among oil burner manufacturers during the period 1937 to 1941 (R. 658-9, 713, 992, 1071, 1179). Manufacturers generally fell into two categories: those selling a more expensive burner, and those marketing a cheaper product (R. 452-3, 992, 1135-6, 1152). In 1941, the selling price to dealers of the higher priced burners generally was in the $60 to $75 range (R. 453, 459, 1086, 1113), although a number of manufacturers sold at substantially higher prices which went as high as $114.50 (Resp. Ex. 171, R. 2141; cf. R. 997, 1003). The low priced burner usually fell into the $40 to $50 range (Resp. Ex. 171, R. 2141; R. 453, 505, 507, 684, 1071). The manufacturers of the higher priced burners emphasized quality and service (R. 997, 1044-5, 1153-4). Although a number of firms continued to sell a comparatively expensive burner during the period 1937 to 1941,[16] many others were forced to meet competitive prices to stay in business (R. 459-460, 535, 537, 579, 659).

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[16] Some of these manufacturers testified that, because of their emphasis on quality and service, they could continue to sell a higher priced burner despite competition, and that accordingly their sales of burners were not injured by the fact that other manufacturers were paying lower prices for controls (R. 997, 999, 1086, 1087, 1141, 1142, 1151). One of these firms, however, admittedly lost a customer to Quiet-Heet, which received lower control prices "because of the price" (R. 1155).

Two of the principal manufacturers in the low priced class were the Aldrich Company and the Quiet-Heet Manufacturing Corporation (R. 455). Both of these companies began business in the mid 1930's, and enjoyed a rapid growth. Aldrich was organized in 1935 (R. 1057). In its first year of operation it manufactured 250 burners; by 1941 its output had increased to 20,000 (R. 1059). During the same period, Aldrich went from respondent's highest price bracket (1) in 1936 to its lowest price bracket (5) in 1941 (R. 1070). Its first burner was sold to dealers for $82.50, and the price was steadily reduced until in 1941 it reached $47.50 for large quantities (R. 1071-1072, 1080).

Quiet-Heet was organized in 1936 (R. 495). In 1937 it manufactured 7500 burners; by 1941 the number had increased to 25,000 (R. 496). From the outset, Quiet-Heet emphasized its low price. Operating on a volume basis, it cut manufacturing and distribution costs by eliminating service, sales on credit, a large sales force, and extensive advertising (R. 569-572). In 1936, when it put its first burner on the market at $70 to dealers (R. 504), it was in respondent's highest price bracket (R. 554). Quiet-Heet steadily reduced the price of its burner, and by 1941 it reached a low of $40 to $50 (R. 505, 507, 684). At the same time, the prices paid by Quiet-Heet for respondent's controls dropped sharply. In 1937 and 1938 Quiet-Heet was in respondent's next-to-lowest bracket; thereafter it re-

ceived respondent's lowest prices (Resp. Ex. 185-E, R. 2164; R. 1007-1008, 2251). Quiet-Heet's advertising material emphasized that its burner included respondent's controls (Comm. Exs. 124-125, R. 1871, 1873).

The competition of these low priced manufacturers beginning around 1936 quickly drove the market price of the cheaper burners down (R. 588, 713-714); during the first six months of such competition the price went down "at least $25.00" (R. 579). A number of burner manufacturers lost business to Quiet-Heet (R. 630-631, 639, 658-659, 990, 1126, 1155). One manufacturer, in fact, was unable to meet competition at the prices he was paying respondent for controls (R. 681), so he purchased from Quiet-Heet complete burners which were equipped with respondent's controls, removed the controls, and used them on its own burners (R. 683, 690, 693).

Respondent introduced a tabulation of the results of a survey of oil burner prices in 1941 (Resp. Ex. 171, R. 2133). This survey revealed wide variations in the prices at which burners were sold to dealers in different areas, and showed that in some instances the highest prices were charged by oil burner manufacturers who paid respondent's lowest prices, and *vice versa*. The tabulation, however, merely showed the high and low prices, and did not endeavor to determine the average or median price (See n. 38, p. 64, *infra*).

Although this survey indicated that in some instances there appeared to be no direct correlation between the prices paid for the controls and the selling prices of the burners, it also showed that in 11 of the 15 areas surveyed the lowest dealer price was given by manufacturers in respondent's lowest price bracket (Resp. Ex. 171, R. 2141); see also n. 38, p. 64, *infra*. Moreover, there was direct evidence in the record linking changes in prices charged by respondent for controls to changes in the price of the complete burner.

Thus in 1936 Williams Oil-O-Matic Corporation charged $2.50 more for burners equipped with respondent's controls than for those with Penn-Electric or Mercoid (R. 965, 1035, 1037). In 1937, after respondent had increased the price charged Williams (R. 123-124, 965), the latter in turn increased the extra charge for burners with respondent's controls from $2.50 to $7.50 (*ibid.*, R. 1036). In 1938 Williams received respondent's lowest price of $16.25 (R. 123, 124, 2251)—$5.05 less than it had paid the previous year (Resp. Ex. 185-E, R. 2165; R. 2251). It then reduced the additional charge back to $2.50 (R. 965, 1036). During the period when the $7.50 differential was in effect, many of Williams' dealers, despite their preference for respondent's controls, selected burners with one of the cheaper makes (R. 1046). When Williams reduced the differential to $2.50 the following year, and ultimately eliminated it, a

"greater number" of dealers again selected burners with respondent's controls (R. 1047).

The Penn Boiler and Burner Company, unable to meet competition at the prices it paid respondent for controls (R. 681), purchased from Quiet-Heet complete burners equipped with respondent's controls, removed the controls, and used them on its own burners (R. 683, 690, 693). By so doing the company was able to sell burners equipped with respondent's controls for only $4 more than burners equipped with other controls (R. 685). If the company had purchased directly from respondent and paid the higher prices, it would have had to charge $6 more (*ibid.*).[17]

In its opinion the Commission rejected respondent's argument, based upon the tabulation of high and low prices, that an absence of injury to customer competition was shown by the wide variations in price among oil burners, and by the fact that the highest prices are sometimes charged by oil burner manufacturers who paid respondent's lowest prices for controls (R. 2274). The Commission further stated that the fact that manufacturers may also have received discounts on other component parts of oil burners, and that the whole competitive effect could not be traced solely to respondent, did not relieve respondent of its "real

[17] Some manufacturers had to sell burners to their dealers without controls because the dealers were able to purchase controls directly in the open market for less than the manufacturer could sell them with the burner (R. 527, 540, 578-9).

and substantial" share of responsibility (R. 2275). For, as the Commission pointed out, "Each seller who may have contributed to the aggregate price or cost advantages obtained by the favored burner manufacturers is, in part, responsible for the aggregate competitive result" (*ibid.*). The Commission also rejected respondent's argument that competition was not injured because other controls were available at lower prices. It stated that there was a substantial demand for respondent's controls, and that furnace and oil burner manufacturers had to be able to supply them "in order to be competitive" (*ibid.*).

Injury to Competitor Competition.

The Commission's finding of injury to competition among respondent's *competitors* rested on the finding that the price discriminations had induced oil burner manufacturers to purchase respondent's controls and had thus diverted trade to respondent from its competitors (R. 2256). In its accompanying opinion the Commission noted that respondent's pricing practices encouraged customers to concentrate their purchases in a single source of supply rather than distributing their business among competitors, and concluded that the "very nature" of quantity discounts perforce diverted business to the seller granting such differentials (R. 2274). The Commission rejected the argument relied on by the court below (*infra*, p. 25), that the growth of business among respondent's

competitors and respondent's own relative decline in the industry—from approximately 73% in 1937 to about 60% in 1939-1941—showed that competition had not been injured (R. 2273). The Commission pointed out that "* * * the law does not permit respondent to resort to unfair or discriminatory practices in order to maintain its competitive position in the industry" (R. 2273), and that competition was adversely affected under the Act whether the discriminatory practices resulted in the retention of old business or the securing of new customers (*ibid.*).

The record shows that price was an important consideration to many burner manufacturers in determining from whom they purchased their controls (e.g., R. 374, 593, 786)[18] and that some manufacturers gave respondent's competitors less business in order that they might be granted a larger discount on respondent's controls. Thus, Mercoid was unable to sell the Automatic Burner Corporation because it would "cost money" for the latter if it had failed to purchase a sufficient quantity of respondent's controls to obtain a retroactive credit (R. 150-151, 984). Mercoid similarly lost most of the Cleveland Steel Products Corporation's business to respondent in 1938 and 1939 (R. 153-154);

[18] One manufacturer, for example, testified that "price would be quite an important factor" in determining whether it would purchase controls from Perfex or from respondent (R. 374).

in the latter year Cleveland Steel informed respondent that because Cleveland's 1940 prices would be equal to the lowest in the industry, Cleveland was anticipating giving respondent all of its business (Gov. Ex. 107-B, R. 1854-1855).

Penn Electric Switch Company, another competitor of respondent, similarly lost a considerable volume of the business of customers given the advantages of respondent's lower discounts. Penn Switch's percentage of the business of the Williams Oil-O-Matic Corporation dropped from 77.28% in 1938 to 42.58% in 1941 (Resp. Ex. 126-A, R. 2037-38). During the same period, when respondent gave Williams Oil-O-Matic its lowest price, although not justified by volume (R. 965-968), respondent's percentage increased from 13.16% to 43.24% (Resp. Ex. 126-A; R. 2037-38). Micro-Westco, which respondent had lost to Penn Switch in 1938 (R. 970) following an increase in price (R. 969), was regained by respondent in 1940 after giving it the lowest price (R. 970).

There was also evidence, relied on by the trial examiner (R. 2193-2194) and the court of appeals (R. 2312), that in 1941 respondent lost to competitors varying proportions of the control business of 31 accounts that previously had standardized on respondent's controls and given respondent a "preponderance of their business" (R. 961-964). The percentage of business thus lost ranged from 5% to 95% for particular customers

(*ibid.*). The 31 accounts gave respondent's competitors 53% of their business in 1941 (R. 964). This evidence shows that some customers were induced to purchase from respondent's competitors, presumably because of their lower prices. There were compensating gains to respondent, however, as the evidence summarized (*supra*, pp. 22-23) demonstrates. Respondent not only retained its 60% share of the national market (R. 1645),[19] but increased its sales of controls to burner manufacturers 25% between 1939 and 1941 and 13.6% between 1940 and 1941 (R. 877).

The Decision of the Court of Appeals[20]

In rejecting the Commission's findings of injury to *customer* competition, the court of appeals relied primarily on its conclusion that there was an "absence of causal connection" between the prices which particular manufacturers paid for controls and the prices at which they sold the finished burners (R. 2313, 2314). The court further held that since the controls constituted only one factor that went to determine the cost of burners, the "discriminatory price differentials" could not be said substantially to injure competition or create "any reasonable probability or even possibility" thereof (R. 2315).

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[19] It was stipulated that the percentage was approximately 60% during 1939, 1940 *and* 1941 (R. 1645).

[20] The facts relating to the date of the court's judgment are set forth in the Argument in the discussion of the timeliness of the filing of the petition (*infra*, pp. 34-47).

On the question of injury to *competitor* competition, the court held that since respondent's competitors "were able to enter its field and build thriving businesses in spite of M-H's commanding position and alleged wrongful practices," the effect of such practices could not be said "substantially to injure competition" (R. 2312). Prior to discussing the evidence on this aspect of the case, the court stated that from its examination of the "record as a whole" it was "convinced that the findings of the examiner were supported by very substantial evidence" (R. 2311). After summarizing certain "undisputed facts" as to the effect of respondent's practices on competitor competition,[21] the court held that such facts "fully establish the examiner's finding that competitor competition was not injured," and "outweigh the facts relied upon by the

[21] The facts referred to by the court were: that respondent's competitors generally charged lower prices for controls than respondent, and that there was no evidence that respondent had undercut its competitors; that during the period covered by the complaint there existed the "keenest kind of price competition" among control manufacturers; that the total business of respondent's competitors increased, and that the sales volume of the three new concerns which entered the industry after 1932 grew steadily; that respondent's share of the control business decreased from 73% in 1937-1938 to 60% in 1941; that in 1941 respondent lost to competitors 53% of the control business of 31 customers who previously had standardized on respondent's controls; and that in the same year 126 other customers of respondent also purchased controls from competitors (R. 2312).

Commission in reaching the opposite conclusion" (R. 2312). The court concluded that (*ibid.*)

> while the findings of an examiner are not "as unassailable as a master's" (*Universal Camera Co.* v. *National Labor Relations Board*, 340 U.S. 474, 492), where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary.

In view of its conclusion that respondent's pricing practices did not injure competition, the court did not reach the question whether the discounts in the three lowest price brackets, and the off-scale sales, had been made in good faith to meet an equally low price of a competitor (R. 2315).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred—

(1) In holding that the Commission erred in finding that the effect of respondent's quantity discount pricing system was substantially to lessen or to prevent competition between respondent and its competitors, or among its customers.

(2) In substituting its judgment for that of the Commission as to the effects upon competition of respondent's quantity discount pricing system.

(3) In holding that proof of injury to customer competition required a showing of causal relation-

ship between the seller's discriminatory prices and its customers' prices, and in failing to hold that a finding of injury to customer competition was adequately supported by evidence that substantial price discriminations were given by the seller among customers who were competing with each other.

(4) In holding that the Commission acted arbitrarily in rejecting the trial examiner's recommended findings, and that an examiner's findings which the reviewing court believes to be supported by the preponderance of the evidence are binding upon the Commission.

(5) In reversing Part III of the Commission's order and dismissing Count III of the Commission's complaint.

SUMMARY OF ARGUMENT

I

The petition for a writ of certiorari, filed within 90 days after the court of appeals entered its "Final Decree" on September 18, 1951, was timely. The court's earlier order of July 5, 1951, which related only to Part III of the Federal Trade Commission's cease and desist order and was silent concerning Parts I and II, was not the court's final order in the case. The entire controversy was not finally determined until the court entered the September judgment which dealt with Parts I, II and III.

Both the all-inclusive provisions of the September judgment and its title show that the court obviously intended it to supersede the earlier incomplete judgment. Since the court below had undoubted power to vacate the original judgment and enter a new one, its intention as to which order is its final judgment is controlling. *Rubber Company* v. *Goodyear*, 6 Wall. 153; *United States* v. *Hark*, 320 U.S. 531. The fact that the September judgment did not change the provisions relating to Part III in the July judgment is immaterial, since the entry of a new judgment supersedes the old even if there is no change of substance. *Rubber Company* v. *Goodyear*, *supra*; *Memphis* v. *Brown*, 94 U. S. 715. It is the established rule in this country that an amended judgment extends the time to appeal. Moreover, even an untimely petition to amend in matters of substance, if "considered on its merits," tolls the time for appeal from the entire judgment (not merely from the portion sought to be changed) until the court acts on it. *Bowman* v. *Loperena*, 311 U.S. 262, 266. The Commission's application in this case induced the court to revise the judgment in important respects, and thereby extended the time for appeal. To treat the July judgment as the final one with respect to Part III of the Commission's order would contravene the policy against separate and piecemeal appeals in a single controversy.

II

A. Section 2(a) of the Clayton Act prohibits a seller from discriminating in price between competing purchasers where the effect of such discrimination "may be substantially" to lessen or injure competition with its customers or among its competitors. The Act does not require a showing that the price discriminations actually have injured competition; it is enough that there be a reasonable possibility or reasonable probability of such injury. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37. The evidence in this case clearly meets the standard of either reasonable possibility or reasonable probability. The court below erred because it weighed the evidence to determine whether actual injury to competition had been shown.

B. It is undisputed (1) that respondent charges some oil burner manufacturers substantially lower prices for its automatic temperature controls than it does other manufacturers, and that such discriminations are not justified by cost differentials; (2) that the controls are the most expensive part of an oil burner, often constituting as much as one-third of the total cost; (3) that the oil burner manufacturers who receive the unjustified discounts are in competition with manufacturers who do not; (4) that respondent

sells 60% of the automatic temperature controls sold in the United States; and (5) that the demand for respondent's product makes it necessary for most oil burner manufacturers to stock respondent's controls, at least as optional equipment. This showing "in itself is sufficient" to support the Commission's "obvious" inference of injury to customer competition. *Federal Trade Commission* v. *Morton Salt Co., supra.* Respondent has not shown that its particular industry is so unique that the substantial differentials given to competing customers do not create a reasonable possibility or probability of injury to competition. Respondent's dominant position in the controls industry demonstrates that its price discriminations are even more likely to injure competition than in an industry—such as the salt business in *Morton Salt*—where no single producer controls the major share of the market.

Respondent's discriminatory discounts on the controls were as substantial, even in relation to the price of finished oil burners, as the discounts condemned by this Court in the *Morton Salt* and *Corn Products* cases. The facts that controls constituted only one of the parts used in constructing an oil burner (although the most expensive part) and that many other things affect burner prices do not negate the Commission's finding of injury to competition. Respondent's contrary argument would lead to the conclusion that a manufacturer

of an assembled product could receive unjustified discounts on all of the parts used, and thereby gain a large competitive advantage, since no one of the discounts could be proved substantially to affect competition in the completed product. A similar argument was rejected in the *Morton Salt* case, 334 U.S., at 49.

Nor does the fact that some high price burner manufacturers paid less for controls and *vice versa* prove that the discounts did not give the recipients, who fought very hard for them, a competitive advantage. It shows only that particular manufacturers may have had compensating advantages because of other factors and methods of operation. It still remains true that manufacturers paying more for controls would have been in a better competitive position if they had paid less; they would have been able either to reduce prices or to use their greater net revenues for other purposes. Similarly, the testimony of some oil burner manufacturers that they were not injured by the discrimination because of compensating advantages in their particular cases did not prove that others were not hurt, or that in general those who received greater discounts were not given a competitive advantage—as other oil burner manufacturers testified was the case. Thus, none of the facts upon which respondent relies is sufficient to preclude the Commission from reasonably drawing the obvious inference of probable or possible injury to competition.

C. The evidence clearly supported the Commission's finding of injury to competitor competition. Public demand for respondent's controls compelled most burner manufacturers to have such controls available for their burners. Since under respondent's pricing system the price of controls dropped as the volume purchased increased, the inevitable tendency of the system would be to encourage burner manufacturers to concentrate their purchases in respondent as their single source of supply. The record shows that respondent's discriminatory discounts not only created a reasonable possibility of injury to competition, but resulted in actual injury. In concluding that competitor competition had not been injured, the court of appeals singled out portions of the evidence and disregarded other evidence relied on by the Commission. In so doing, it improperly substituted its judgment for that of the Commission as to the weight of the evidence.

The court below, apparently misunderstanding *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, gave undue weight to the findings of the trial examiner that respondent's discriminatory discounts did not injure competition. Nothing in the *Universal Camera* case or the Administrative Procedure Act suggests that a reviewing court is to substitute the examiner's decision for that of the agency whenever it concludes that the examiner's recommended find-

ings are supported by substantial evidence or by a preponderance of the evidence. For this would mean that the court would be weighing the evidence *de novo* whenever an agency reversed its examiner. Such weighing of the evidence and the drawing of inferences therefrom are for the Commission, not the courts. The Commission's decisional process here did not require the resolution of testimonial conflicts, where the examiner's opportunity to appraise the credibility of witnesses entitles his recommendations to substantial significance, but the drawing of economic inferences as to the effect of uncontradicted facts on competition. The examiner is in no better position than the Commission to determine such matters; indeed Congress has entrusted such decisions to the Commission rather than to examiners because of its belief that the Commission would have superior expertness in the field.

III

The justification allowed by Section 2 (b) of the Clayton Act for discriminations made in good faith to meet an equally low price of a competitor permits only price discriminations made to deal with "individual competitive situations," and not to entire "pricing systems" or "a general system of competition." *Federal Trade Commission* v. *Staley Manufacturing Co.*, 324 U.S. 746. The discounts under respondent's quantity discount

system, which has been in use since 1927, were fixed in relation to the general competitive picture, and not to meet individual competitive situations. As a matter of law, they cannot satisfy the requirements of Section 2(b).

ARGUMENT

I

The Petition for a Writ of Certiorari Was Filed in Time.

The "Final Decree" of the court of appeals—so captioned by the court—was entered on September 18, 1951 (R. 2316). The petition for a writ of certiorari was filed on December 14, 1951. It is undisputed that the petition was filed within 90 days of the entry of the "Final Decree" as required by 28 U.S.C., Supp. V, 2101(c).

Respondent contends however, that the judgment of the court of appeals was not the "Final Decree" of September 18, 1951, but an earlier order entered on July 5, 1951; that the petition was untimely because filed more than 90 days after entry of the latter order; and that accordingly this Court has no jurisdiction to entertain the petition (brief in opp. 1-2, 10-12). Consideration of this contention requires review of the proceedings before the court of appeals.

The Commission's cease and desist order contained three prohibitory parts (R. 2262-2264). Part I related to violation of Section 5 of the Federal Trade Commission Act; Parts II and III

dealt with violation of Sections 3 and 2(a), respectively, of the Clayton Act. Respondent's petition to review challenged the entire order (R. 2284-2298), and the Commission filed a cross-petition to affirm and enforce the entire order (R. 2317).[22] During the court proceedings, however, respondent abandoned its challenge to Parts I and II of the order (R. 2308).

On July 5, 1951, the court handed down an opinion which reversed Part III of the order (R. 2308). On the same day the court entered an order (R. 2316) which

> ordered and adjudged * * * that Part III of the decision of the Federal Trade Commission entered in this cause on January 14, 1948, be, and the same is hereby, Reversed, and Count III of the complaint upon which it is based be, and the same is hereby Dismissed.

The court's opinion discussed only Part III of the Commission's order (R. 2308-2315). The court stated that, since respondent was not challenging Parts I and II, it would "make no further reference to them" (R. 2308), and the court's order of

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[22] Although the cross-petition is not included in the printed record filed with this court, the final decree entered by the court below on September 18, 1951, recites that the Commission has filed a cross-petition praying for enforcement of the order (R. 2317). A copy of the cross-petition will be filed with the Clerk of this Court.

July 5, 1951, was similarly silent as to these Parts (R. 2316). The court thus entered no judgment with respect to those portions of the order.

Despite respondent's failure to continue its challenge to Parts I and II of the order the court was required to enter judgment with respect to their validity, not only because of the cross-petition filed by the Commission, but also because the court had the statutory duty to affirm, modify or set aside the order brought before it for review.[23] Even if respondent's abandonment of its challenge to Parts I and II were to be viewed as a *pro tanto* withdrawal of its petition to review, the entry of judgment with respect to those parts would still be necessary because of the Commission's cross-petition. Since Parts I and II of the Commission's order were not affirmed, modified or set aside by the judgment entered on July 5, 1951, this judgment was not dispositive of the review proceedings.

The Commission, being of the opinion that the court's order of July 5, 1951, had not fully disposed of the case, filed with the court a memorandum dated August 21, 1951, requesting entry of a

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[23] Section 5(c) of the Federal Trade Commission Act (15 U.S.C. 45(c)) (under which Act Part I of the order was entered) and Section 11 of the Clayton Act (15 U.S.C. 21) both require the reviewing court to enter a judgment "affirming, modifying, or setting aside" the order of the Commission. In addition, Section 5(c) of the Trade Commission Act requires the court to enter a decree "enforcing" the order under review "to the extent that such order is affirmed."

judgment affirming and enforcing Parts I and II of its order.[24] Following the filing of an opposing memorandum by respondent and a reply thereto by the Commission, the court on September 18, 1951, entered a judgment which it captioned "Final Decree" (R. 2316). That judgment recites the prior proceedings in the case, including the cross-petition filed by the Commission (R. 2316-2317). It recites that it appears to the court that Parts I and II of the Commission's order should be "affirmed and enforced" and that Part III should be "reversed" (R. 2317). The judgment then provides: "Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed" that Part III of the order "be and the same is hereby reversed" and Count III of the complaint upon which it is based "be and the same is hereby dismissed," and that Parts I and II "be and the same hereby are affirmed" (*ibid.*). In addition, the judgment incorporates the prohibitions of Parts I and II of the Commission's order, and directs that respondent file with the Commission within 90 days a written report setting forth its compliance with the judgment. (R. 2317-2319).

1. We submit that the foregoing facts conclusively show that the court below intended that its later judgment of September 18 should supersede

[24] The memorandum is entitled "Statement of the Position of the Federal Trade Commission Relative to Settlement of a Final Decree Herein." A copy of this memorandum, which is not a part of the record, has been filed with the Clerk.

its earlier, incomplete judgment of July 5. Otherwise the later judgment merely would have affirmed and enforced Parts I and II of the Commission's order. Instead, the September judgment not only affirmed and enforced Parts I and II, but also specifically reversed Part III. The court further manifested its intention to make the September judgment its final judgment covering the entire cause, including Part III, by denominating this judgment its "Final Decree."

The July judgment had been but a partial and incomplete disposition of the controversy. It left undetermined the judgment, if any, which was to be entered with respect to Parts I and II, a matter not settled until the court below entered its September judgment. Then—and not until then—did the court finally adjudicate the entire controversy before it.

If there is doubt as to which of two acts (or orders) of a court constitutes its final judgment, the court's intention on the matter is controlling. *Rubber Company* v. *Goodyear*, 6 Wall. 153, 155-156; *United States* v. *Hark*, 320 U.S. 531, 535; *Monarch Brewing Co.* v. *George J. Meyer Mfg. Co.*, 130 F. 2d 582 (C.A. 9). Here, as in the *Hark* case, it cannot be assumed that the court intended its final decree of September 18 which reversed Part III to be merely "an empty form" (320 U.S. at 535). Yet it would be just that if the court intended its July judgment to stand as its final judgment as

to Part III. See *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689 (C.A. 6). Clearly, the court must have intended to make its September judgment its final order dispositive of the entire cause before it, including Part III.

A court has plenary power to modify or vacate its judgment at any time during the term in which the judgment was rendered. *Zimmern* v. *United States*, 298 U.S. 167, 169-170. Thus the court below could have specifically vacated the July judgment in its September order.[25] Had it done so, the September judgment plainly would govern the time for filing a petition for certiorari. *Hill* v. *Hawes*, 320 U.S. 520. No different result should follow because the court did not formally vacate the earlier judgment, where it obviously intended that the second judgment was to supersede the first. *Rubber Company* v. *Goodyear*, 6 Wall. 153; *Memphis* v. *Brown*, 94 U.S. 715, 718. In the *Goodyear* case an order had been entered on the court's minute book on November 28. On December 5 the court entered another order, captioned "final decree," which was "for the most part in the very language of the (earlier) order" and which made no changes of substance in that order. This Court held that an appeal taken from the December order

[25] The court below has one term annually, which commences on the first Tuesday in October. Rule 2, Rules of the United States Court of Appeals for the Seventh Circuit (effective August 1, 1950).

was timely because the latter order was the final order in the cause. The Court stated (pp. 155-156):

> We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree.

Moreover, the practical effect of the September judgment in the case at bar was to vacate the July judgment, and it must be viewed as so doing. Cf. *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689, 690 (C.A. 6), where the court stated:

> The order of March 18 did not expressly vacate the order of March 7, but we think it should be considered as having that effect. It covered exactly the same subject-matter, and there could have been no object in entering it, unless it was intended to supersede the earlier order.

Respondent contends that the court below intended the July judgment to "make final disposition of the case" (Br. in opp. p. 11). This may have been true in July, when the court presumably was unaware that the judgment was incomplete.

But in September it intended the new judgment to supersede the old one, as the language and title of the September judgment demonstrate. The intention at the time the second judgment was entered necessarily controls, for that determines whether the court meant to vacate and supersede the earlier one. Respondent's argument would have been equally applicable to each of the cases cited in the preceding paragraphs.

It is immaterial that the September judgment, in reversing Part III, did not substantially change the provisions relating to Part III contained in the earlier judgment. The entry of a new judgment supersedes the old even though there is no change of substance. *Rubber Company* v. *Goodyear, supra; Memphis* v. *Brown*, 94 U. S. 715; *Union Guardian Trust Co.* v. *Jastromb, supra.* In *Memphis* v. *Brown*, this Court stated (p. 718):

> the form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the court had the right to do during the term, and for the very purpose of giving it effect for a *supersedeas*.[26]

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[26] In the *Union Trust* case the first order was entered on the court's journal on March 7, the same day on which the court filed its opinion. On March 18 the judge signed another order which "after some recitals, was in substantially the same language as the order of March 7" (47 F. 2d 689). The court held that the March 18 order superseded the earlier one, and that an appeal taken within 30 days of the second order was timely. See *supra*, p. 40.

The same result would seem to follow *a fortiori* where the new judgment is substantially different, as it is here, even though a part of it is taken without change from the earlier decree. Where only a part of the judgment is altered, the conclusion that the new judgment stands in place of the old is reinforced by the policy against piecemeal appeals in a single lawsuit, discussed at pp. 46-47, *infra*.

It is the general rule in this country (subject to an exception for clerical or formal errors) "that where a judgment, order, or decree is amended or modified the time within which an appeal from such determination may be taken begins to run from the date of the amendment or modification." Annotation, 80 Law Ed. 1121, and cases cited. Federal cases applying the general rule include *Memphis* v. *Brown, supra; Zimmern* v. *United States, supra; Fultz* v. *Laird*, 24 F. 2d 172 (C. A. 6); *Union Guardian Trust Co*, v. *Jastromb, supra*. State cases include *Hewey* v. *Andrews*, 82 Ore. 448, 159 P. 1149; *Billson* v. *Lardner*, 67 Minn. 35, 69 N.W. 477; *Luck* v. *Hopkins*, 92 Tex. 426, 49 S.W. 360.

In the instant case the July judgment disposed of only one part of the cause before the court. The entry of the September judgment effected a substantial modification of the earlier, incomplete judgment by broadening it to cover the other two parts of the Commission's order. The cases have held that less substantial modifications of judg-

ments brought into play the general rule that modification of a judgment extends the time to appeal. In *Fultz* v. *Laird, supra,* the original judgment had provided for cancellation of an option and the award of damages; the amended judgment eliminated the damage award. In the *Jastromb* case the amended order was "a more detailed order containing certain recitals."

2. The preceding argument shows that when a court actually changes its judgment, the time to appeal or petition begins to run anew irrespective of whether a petition for rehearing has been filed.

It is also established that the timely filing of a motion to amend or modify a judgment that raises "questions of substance" as distinguished from "mere matters of form" tolls the period for taking an appeal until the court acts on the motion (*Leishman* v. *Associated Electric Co.*, 318 U. S. 203, 205; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177), and that even an untimely petition to amend a judgment, if "entertained or * * * considered on its merits", similarly extends the time for appeal (*Bowman* v. *Loperena*, 311 U. S. 262, 266; cf. *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 149).

In this case, the Commission's application was not filed within the 15 days allowed for petitions for rehearing. But it did induce the court to revise the judgment in matters of substance, and thus was obviously "entertained" and "consid-

ered on its merits". In these circumstances, "the judgment of the court as originally entered does not become final" until the action of the court on such petition, "and the time for appeal runs from the date thereof." *Bowman* v. *Loperena, supra.* In the *Bowman* case and each of the three cases it cites[27] the untimely petition for rehearing, although considered by the lower court, was denied. The problem presented in those cases was therefore more difficult than that raised here, in which the application to change the judgment was successful. It follows *a fortiori* in the latter situation that the entry of a different judgment extends the time to appeal.

Respondent may contend that the memorandum filed by the Commission requesting the change in the judgment was not in form a petition for rehearing. But the substance of the document, not its form or its title, and the manner in which the court treated it determine its legal effect. Respondent also argues that the Commission's memorandum did not request any change with respect to Part III of the judgment, and therefore cannot have the effect of a petition for rehearing on that point. But the critical fact is not what the Commission requested or the name of the paper in which the request was made, but that the docu-

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[27] *Voorhees* v. *John T. Noye Mfg. Co.*, 151 U. S. 135, 137; *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, 499; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137, 138.

ment filed by the Commission induced the court to enter a new and different judgment. The nature of the application is irrelevant when the judgment is changed—although it may be material when such an application is denied. A new judgment would be the basis for an appeal if the court acts on its own motion (*Zimmern* v. *United States*, 298 U. S. 167), and the result must be the same irrespective of a formal or informal request by a party.

Furthermore, the cases indicate that a petition for rehearing or its equivalent (such as a motion for new findings) extends the time to appeal with respect to all parts of a judgment, not merely the portion which the petition or motion seeks to have modified. Thus, in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177, the *plaintiff's* time to appeal was held to be extended by the *defendant's* motion to amend the findings—although the amendments to the findings did not relate to the portion of the judgment from which the plaintiff was appealing. Similarly, in *Johnson* v. *Eisentrager*, 339 U. S. 763, the Government's petition for certiorari was filed within 90 days of the denial of *respondent's* petition for rehearing below, not within 90 days of the original order. In *Reconstruction Finance Corporation* v. *Mouat*, 184 F. 2d 44, 48 (C.A. 9), the *defendant's* appeal pending disposition of *plaintiff's* motion for additional findings was dismissed as premature. In these cases the appellant or petitioner was not challenging the portion of the judgment or findings which

his opponent was seeking to have changed—and yet the time to appeal ran from the order disposing of the opponent's application. This shows that the time to appeal from an entire judgment was tolled by a motion addressed to part of it.

3. The obvious purpose of the rule that an amendment to a judgment or a petition to amend or modify a judgment tolls the time to appeal is to prevent separate and piecemeal appeals in a single controversy. Respondent's contention, however, could lead to just such segmentized litigation. For example, respondent itself might have sought review of the order enforcing Part II, in the absence of any showing of a prior violation of the order. Cf. *Federal Trade Commission* v. *Ruberoid Company*, 343 U. S. 470. Or, if the court had declined enforcement, the Commission might have sought review of that ruling. *Ibid.* In either situation, the rule contended for by respondent would require the filing of separate petitions governed by different time limitations to review issues arising out of a single order of the Commission—issues that had been considered and disposed of by the court below in a single proceeding. Such a result would flout the well settle judicial policy of avoiding the "inconvenience and costs of piecemeal review"[28] by combining "in one review all stages of the proceeding that effectively may be reviewed

[28] *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 511.

and corrected if and when final judgment results." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546.

The purpose of statutes which limit the period for appeals is to set a definite time beyond which prospective appellees may know, if no appeal has been filed, that the litigation is over. *Matton Steamboat Co.* v. *Murphy*, 319 U. S. 412, 415. In the instant case the litigation was not completed by the July judgment, and respondent was put on notice soon thereafter by the Commission's memorandum that further action was required by the court to terminate the case. Within 90 days after the July judgment the court entered its new judgment superseding the earlier one. Respondent was thus fully aware that the period for filing a certiorari petition had been accordingly extended.

We submit that the court below clearly intended to make its judgment of September 18, 1951, its final judgment in the proceedings before it; that the entry of that judgment fixed the time within which the petition for certiorari might be filed; and that the present petition, filed within 90 days of the entry of that judgment, was filed in time.

II

The Commission's Findings of Injury to Competition Were Fully Supported by the Evidence.

A. Introductory Analysis and Governing Principles

The industry involved in this case—the manufacture of automatic temperature controls for oil

burners—is, as respondents insist, a highly competitive one. Those who manufacture such controls, and the oil burner manufacturers who purchase them, seek to secure as much business as they can and to buy at the best prices they can, just like other businessmen. The unjustified discounts allowable under respondents' bracket system were plainly substantial, running in 1941 from 14 to 23% under respondents' highest manufacturers' price and 3 to 12% under the lowest justified bracket (R. 1659). The efforts of the oil burner manufacturers to obtain the lowest prices possible in buying controls (see *infra*, pp. 73-74) would lead most reasonable persons—as it has led the Federal Trade Commission—to conclude that there must be a material advantage in obtaining such lower prices, and a corresponding handicap to manufacturers who are forced to pay more than their competitors.

The one unusual feature in the controls industry is that one control manufacturer—the respondent, Minneapolis-Honeywell—for many years has been the dominant concern. In 1939, 1940 and 1941 it sold 60 per cent of the automatic temperature controls sold in the United States to oil burner manufacturers and dealers (R. 2241, 1645). This proportion had been reduced from 73 per cent, not by reason of any decline in respondent's sales (R. 877), which in fact increased 25 per cent in those years (R. 876-877), but because of a great increase

in the late 1930's in the demand for oil burners and the controls constituting their most expensive part (R. 2631). Moreover, the record shows that, because of public acceptance and demand generated by respondent's advertising and servicing policies, the majority of burner manufacturers found it necessary to use respondent's controls, at least as optional equipment, even at somewhat higher prices (R. 364, 429, 441, 473, 628, 648, 664, 685-686, 715, 728, 974-975, 995, 1045-1046, 1108, 1136-1137, 1141). Thus as a practical matter oil burner manufacturers cannot fully meet the demands of their customers by purchasing from respondent's competitors.[29]

The obvious consequence is that, even more than in other industries, the oil burner manufacturers forced to pay respondent substantially higher prices than their competitors would suffer a competitive disadvantage, for they could not entirely avoid purchasing respondent's controls. And the same factors which impel most oil burner manu-

[29] Although respondent's cash prices were higher, purchasers from respondent were receiving, in addition to the physical controls, the advantages of respondent's servicing system and the consumer demand built up by respondent's advertising and other means of promoting good will (R. 858-861, 866, 995, 1046, 1108, 2242). Although the record does not disclose the comparative value of the facilities furnished by respondent's competitors, it certainly suggests that they did not match respondent in this respect. Vice President Sweatt of respondent testified that "So far as I know, the national advertising of any other control company has been very small." (R. 851).

facturers to buy M-H controls also make the quantity discount system more injurious to respondent's direct competitors than in other industries. For the customers' incentive to obtain respondent's controls at a lower price—not justified by cost differentials—by buying a greater quantity inevitably leads to smaller purchases from other control manufacturers.

These injurious consequences to competition, in the language of this Court in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46-47, "would appear to be obvious." Certainly a reasonable Commission could reasonably infer them from the undisputed facts in this case.

In reviewing the evidence in the succeeding pages (*infra*, pp. 63-83) we will show that even if the standard were "actual injury," it could not be said that the Commission's determination was erroneous, and that the evidence relied upon by respondent, in the light of the record as a whole, cannot be said to require a finding that competition was not injured by respondent's discriminatory price system.

But the Government's burden is not that heavy. For Section 2(a) of the Clayton Act prohibits a seller from discriminating in price between different purchasers of commodities of like grade and quality where the effect of such discrimination

> *may be* substantially to lessen competition or tend to create a monopoly in any line of com-

> merce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *. [Italics supplied]

And this Court has repeatedly held that "§ 2(a) does not require a finding that the discriminations in price *have in fact* had an adverse effect on competition."[30] *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 738, 742; *Morton Salt* case, 334 U. S. at 46; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356-357. "The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products* case, 324 U. S. at 738.

The proper test of injury to competition has been phrased in several ways. In the *Corn Products* case, on page 738, the Court stated, following the *Standard Fashion* case, "the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would *probably* have the defined effect on competition." Later in the *Corn Products* opinion (p. 742) the Court declared, "As we have said, the statute does not require that the discriminations must in fact

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[30] All italics supplied unless otherwise noted.

have harmed competition, but only that there is a *reasonable possibility* that they 'may' have such an effect." The latter passage was repeated in the *Morton Salt* case (p. 46), although with the qualification that it "is to be read also in the light of" the statement on page 738 of *Corn Products* (334 U. S. at 46n). The dissent in *Morton Salt* (pp. 55-58) preferred the first formulation in *Corn Products* to the second.

The statutory phrase is "may be substantially" to lessen or injure competition. The various expressions used to define this concept have all properly held that although it excluded the remote effect on competition described as a "mere possibility," it did not require a certain or proved effect. The Commission had not thought that there was any material distinction between describing the intermediate effect which was sufficient to make a price discrimination unlawful as "reasonably probable" or "reasonably possible."[31] Indeed, the Commission recently has stated that it has been construing the Act as requiring a "reasonable probability" of injury to competition.[32]

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[31] The Brief for the Federal Trade Commission in the *Morton Salt* case stated: "This means that there must be a *probable or reasonably possible;* not a mere remote, effect on competition—but not a certain or proved effect" (p. 37). (Italics supplied.)

[32] A letter dated August 14, 1950, from the Chairman of the Commission in response to inquiries from the Chairman of the Senate Committee on Interstate and Foreign Commerce, printed in "Study of Federal Trade Commission Views on

Certainly for purposes of this case it will not matter whether the test is "reasonable probability" or "reasonable possibility." For whichever standard be applied, the proof before the Commission clearly satisfied it. Under any standard short of *actual* injury to competition[33] this case is a simple one, as we shall show.

The court below erred we believe, because it weighed the evidence in relation to proof of actual

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Freight Absorption", 81st Cong. 2nd. Sess., Confidential Print, page 8, contained the following question and answer:

> QUESTION 9: Does the Commission regard the words "may be" in section 2 of the Clayton Act, referring to the prohibited effect upon competition, as meaning that there is "reasonable possibility" or as meaning that there is "reasonable probability" of the specified effect? Explain answer.
>
> ANSWER: The meaning applied by the Commission to the words "may be" in section 2 of the Clayton Act has been that of "reasonable probability." The Commission is of the opinion that this construction, which has been many times sustained by the courts, permits the protection of competition from destruction or serious crippling by authorizing the institution of proceedings against price discrimination while injury to competition is in the incipient stage. If the Commission were obliged to wait until price discrimination has destroyed or severely crippled competition before a proceeding could be brought, the act would afford little protection. The Commission has not advocated, and does not now advocate, a different construction of the words "may be."

[33] We do not mean to imply that there was not sufficient evidence of actual injury here. See pp. 71-74, 77-79, infra. But the evidence as to this was in conflict, and a closer question would be presented.

injury. Although when stating its conclusion, the court did recite the test approved by this Court, its analysis of the evidence indicates that the court was not applying the rule of reasonable probability or possibility of injury to competition but was overturning the Commission's findings because, in its opinion, actual injury had not been proved. Thus the Court pointed out certain facts establishing that "competition *was* not injured"[34] (R. 2312); "we think it cannot be said that the effect of those practices was substantially to injure competition. And we construe the Act to require substantial, not trivial or sporadic, interference with competition to establish violation of its mandate." (*id.*). With respect to customer competition the court below stated, "Even though some manufacturers did testify that 'the question of price was important * * * and that *they had lost* business to certain competitors who enjoyed lower control prices * * *' we think it is equally significant that other manufacturers who paid the higher prices *testified that they did not lose* business as a result of paying such higher control prices, and that they considered other factors of far greater importance in determining the price of the completed burner." (R. 2313). The court gave great weight to a survey that showed that some customers paying low prices for controls charged high prices for burners and *vice versa*, and concluded that this disproved

[34] Italics herein are supplied.

any relationship between control prices and burner pricing (R. 2313-2314). Again the stress was on actual effect, not upon potential or probable or reasonably possible effect.

In the *Morton Salt* case the Court sustained the Commission's finding of actual injury to competition. The Court held, however, that such a finding was unnecessary, and significantly stated (p. 50):

> The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices. Experts were offered to prove the tendency of injury from such prices. The evidence covers about two thousand pages, largely devoted to this single issue—injury to competition. It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

This case was tried and decided by the Commission prior to this Court's decision in *Morton Salt*, so that the Commission was unable to take advantage of the Court's suggestion that 2,000 pages of record were unnecessary to prove the obvious.

We submit and will show in the following pages that what was obvious in *Morton Salt* is also obvious here.

B. The Evidence Amply Supports the Commission's Finding That the Discriminatory Prices Will Tend to Injure Customer Competition

It is undisputed (1) that respondent charges some oil burner manufacturers substantially lower prices for its controls than it does other such manufacturers, and that the discriminations held unlawful are not justified by differences in costs, (2) that the controls are the most expensive parts of an oil burner, and (3) that oil burner manufacturers who received the unjustified discounts are in competition with manufacturers who do not.

In the paragraph just quoted, p. 55, *supra*, from the *Morton Salt* case, the Court stated that such a showing "in itself is sufficient" to support the Commission's inference of injury to competition.[35]

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[35] Respondent has conceded that proof of discrimination and competition makes out a *prima facie* case for the Commission. Br., in opp. p. 6. To the extent that this overlooks the requirement of substantiality, it goes somewhat further than the *Morton Salt* rule as stated by the Court and as interpreted by the Commission. But where a discount is substantial on its face, as in both the *Salt* case and this case, or where some

The Court had previously stated that it "would appear to be obvious that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay"[36] (334 U. S. at 46-47). The language quoted is equally applicable to the undisputed facts of the instant case.[37]

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other significant circumstance (such as the proportion which the controls bear to the cost of the completed oil burner) demonstrates substantiality, the Commission will have proved enough to support the "obvious" inference. This will not only make out a *prima facie* case, in the absence of testimony to the contrary, but will be enough to support an inference of substantial effect upon competition unless a respondent clearly proves that the industry is atypical. Although this was not spelled out fully in *Morton Salt*, we deem it to be the correct interpretation of that decision.

[36] The dissent also thought the "inference of adverse effect on competition" warrantable except for the one discount applicable only to 1/10 of 1% of the Salt Company's business. 334 U. S. at 60.

[37] The findings of the Commission with respect to customer competition were substantially identical with those in the *Morton Salt* case, as appears from the following comparison:

Morton Salt Findings, Transcript, No. 464, 1947 Term (R. 2088).	*Minneapolis-Honeywell* Findings (R. 2255).
The Commission further finds that customers of the respondent who receive the benefit of the various discriminatory prices, discounts, rebates, and allowances granted by the respondent have a substantial advantage in selling respondent's salt in competition with other customers of	The Commission further finds that oil-burner manufacturers who received the benefit of the various discriminatory prices, discounts, or rebates granted by the respondent have a substantial advantage in selling oil burners equipped with respondent's controls in competition

We do not doubt that a respondent before the Commission is free to try to prove that a particular industry is so unique that competition is not likely to be injured by reason of the fact that one competitor may pay less than another for the materials or parts which both use. But the burden is heavy on one seeking to establish a deviation suf-

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the respondent who do not receive the benefit of such discriminatory prices, discounts, rebates, and allowances or who are obliged to pay respondent's full price for said salt. In order to sell respondent's table salt in competition with customers of the respondent who receive the benefit of respondent's discrimination in price, wholesalers who pay respondent's full price or who are denied the discounts or rebates allowed such favored customers must either sell at competitive prices and in so doing reduce their possible profits by the amount of the discriminations against them, or attempt to sell at higher prices than those which the favored customers of respondent charge for the same product, with the result of inability to secure business and a reduction in the volume of their sales.

with other oil-burner manufacturers purchasing and using respondent's controls who do not receive the benefit of such discriminatory prices, discounts, or rebates and who are obliged to pay respondent's higher cost bracket price. In order to sell their oil burners equipped with respondent's automatic temperature controls in competition with customers of the respondent who receive the benefit of respondent's discriminations in price, oil-burner manufacturers who pay respondent's discount or higher bracket price or who are denied discounts or rebates allowed to such favored customers must either sell at competitive prices and, in so doing, reduce their possible profits by the amounts of discriminations against them or attempt to sell at higher prices than those which the favored customers of respondent charge for oil burners equipped with respondent's automatic temperature controls, with the result of inability to secure business and a reduction in the volume of their sales.

ficient to prevent the Commission from reasonably drawing the inferences which, in the light of general knowledge, this Court has stated to be "obvious." This is not because of any rule of law but because the effort must be to prove that in the particular industry the usual economic forces are not operative. Nothing has been shown in relation to respondent's industry to prevent the drawing of the usual inferences. On the contrary, respondent's dominant position demonstrates that its price discrimination is more likely to harm competition than in other industries where no one producer controls the major share of the market.

No two industries, of course, are exactly alike in their competitive structure, and that is clearly true of the salt and temperature control industries. None of the differences upon which respondent relies, however, would lead reasonable men to believe that price discriminations were less likely to affect customer competition in one than in the other. In order to show that there is no basis for distinguishing this case from *Morton Salt* it seems advisable to take up the differences between the cases *seriatim*.

(1) First, however, there is one important differentiating factor upon which respondent does *not* rely. Although both the salt and the control industries are competitive, the former is not dominated by a single concern like respondent which conducts 60% of the business. Morton Salt Com-

pany was one of the larger producers and distributors of salt in the United States. Transcript in No. 464, 1947 Term, R. 7. But there was no suggestion that its position and power in the salt industry were comparable to respondent's in relation to automatic controls. Price discrimination on the part of a dominant manufacturer, larger than all others combined, whose product is practically a must for oil burner manufacturers, is much *more* likely to injure competition than the discrimination involved in the *Salt* case.

(2) The court below held that since controls constitute only one "of many factors" that determine the cost of burners, discriminatory differentials in the price of controls could not be said to injure competition, that a difference in the price of the controls would be too small to affect competition in the sale of oil burners. In this connection the undisputed facts that the manufacture of an oil burner is largely an assembling operation (R. 580-81, 594-6, 677, 725-6, 942, 1000) and that the controls are the most expensive items, constituting often as much as a third of the total cost (p. 10, *supra*), are highly relevant.

(a) The first answer is a statistical one. Respondent's discounts on the controls were as substantial, even in relation to the prices for finished oil burners, as the discounts in the *Salt* case. In *Morton Salt*, one of the discounts which this Court unanimously condemned was ten cents

per case off of the $1.50 price for purchasers of over 5,000 cases in a single year. This discount amounts to 6 2/3%. Respondent's discount in 1941 in the brackets found to be unlawful (4, 4A and 5) ranged from 14 to 23% under the price in bracket 1. See p. 12, *supra*. In dollars and cents, price bracket 1 ($17.35) was $3.60 higher than price bracket 5 ($13.75), and bracket 2 ($16.45) was $2.70 higher. The record shows that in 1941 the price of oil burners ranged from $40 (R. 507, 684) up, that the minimum price to jobbers in many communities ran from $45 to $50 (R. 2141). The $3.60 difference between the price of controls for oil burner manufacturers in respondent's brackets 1 and 5 constituted 9% of the total price of the oil burner sold at $40, 8% of the price of those sold at $45, 7.2% of those at $50, and 6% of those at $60. For the $2.70 difference between brackets 2 and 5 the corresponding percentages for the completed oil burners were 6¾% at $40, 6% at $45, 5.4% at $50 and 4.5% at $60. These figures show that the percentage of the discounts on the controls to the price of the assembled oil burner roughly approximates the 6 2/3% discount on the salt in the *Morton Salt* case. The Commission certainly was not required to conclude that the discounts were so insubstantial that they would affect competition less in this case than in *Morton Salt*.

(b) A more fundamental answer also has its analogue in the *Morton Salt* case. As we have

seen, the oil burner is customarily assembled from a number of parts of which the most important are controls, motors, pumps, transformers and housing (R. 580, 594-6, 677, 725-6, 941, 1000). The prices of these together constitute the principal elements of the cost of producing the burner, the control being the most expensive part, about 40% of the total cost of parts (R. 940-944, 1000, 2252). If respondent's argument were sound, each part manufacturer could give substantial discriminatory discounts, and a manufacturer of oil burners would have a big advantage over his smaller competitors. Yet no one of the discounts could be said substantially to affect competition because that granted on each part would only be a small proportion of the price of the completed burner. The Commission properly rejected this contention, which would have the effect of taking a large number of manufacturers of assembled products out of the statute. As the Commission stated in its opinion (R. 2275): "Each seller who may have contributed to the aggregate price or cost advantages obtained by the favored burner manufacturers is, in part, responsible for the aggregate competitive result. The fact that the whole competitive effect cannot be traced to respondent alone does not relieve respondent of its share of responsibility * * *." Nor can respondent find exculpation for its injury to competition because similar injuries may have been inflicted by other suppliers who also gave discriminatory discounts.

A similar argument was rejected in *Morton Salt*. There the salt company argued that salt is a small item in most wholesale and retail grocery businesses, constituting less than ½ of 1% of the gross, and that a slight difference in the price of salt would not substantially affect competition in the grocery business. The Court stated, however (p. 49):

> There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store.

(3) The court below and respondent have relied heavily on evidence showing that oil burner prices have not varied in direct relation to the prices of controls. This was stipulated by the Commission at the commencement of the proceeding, when it agreed that *some* burner manufacturers paying higher control prices to respondent sold burners

for less than manufacturers paying lower prices, and *vice versa* (R. 1661). A statistical survey introduced by respondent, which concluded that "a chaotic price condition existed throughout the industry in 1941 * * * and that there was no definite pattern of either wholesaler or dealer oil burner prices" (R. 2135) proved the same thing—that *some* burner manufacturers paying low prices for controls sold oil burners at high prices, and that some manufacturers not receiving controls at the lowest price level were in the low-priced oil burner field. (R. Ex. 171, 1278, 2137-2141).[38]

The industry is divided between low and high priced burner manufacturers. Some of the former, including Quiet Heet, provide no servicing or credit facilities at all, and economize on advertising and selling expenses, *inter alia* (R. 569-572). The fact that some high priced burner manufacturers are among those who pay less for controls and *vice versa* does not prove that the manufacturers who pay less do not have a competitive

[38] Since the exhibit gives only the high and low price for manufacturers in each area studied, a single manufacturer charging an excessively high or unusually low price could cause the table to give an exaggerated impression. The Commission has not questioned the conclusion that no precise mathematical relationship between control and burner prices has been proved. Even respondent's exhibit, however, reveals that in general the lowest priced burners were in respondent's Bracket 5, which pay the least for controls. The median, which seems to be the fairest method of averaging low burner prices in the areas covered by the survey, was $49 and $50 for Bracket 5 burners. The lowest median for any other bracket was $59.75 for Bracket 3. (R. 2137-2140.)

advantage. It shows merely that prices are affected by so many factors that the effect of no single one, such as the price of a part, can be segregated.

It is true that some manufacturers paying higher prices for controls may have absorbed the additional costs and thus reduced their profit margin; and others may have been able, because of manufacturing and distribution economies, to meet the prices of some of the competitors who paid less for controls (*supra*, p. 16). But this does not negate the Commission's finding of injury to competition. For, had these same manufacturers received the benefit of lower control prices, they could have sold their burners at an even cheaper price. This, in turn, would have led either to a larger volume of sales, or to a greater profit if the volume remained constant. And, if they did not reduce their burner price, they would have made a larger profit on each unit sold.[39] Furthermore, if

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[39] The House Committee Report (H. Rep. No. 2287, 74th Cong., 2d Sess.) shows that Congress assumed that price discriminations would generally involve an element of loss, and that these might appear in a reduction of profits. The Report (p. 8) stated in this connection:

> Discriminations in excess of sound economic differences between the customers concerned, in the treatment accorded them, involve generally an element of loss whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them.

See to the same effect the statement of Senator Logan, explaining the proposed legislation to Congress. 80 Cong. Rec. 3113.

[Continued]

the beneficiaries of the lower controls prices did not pass the difference on to customers, they could strengthen their own competitive position by reinvesting the savings in their business or providing more service.

Competitors are equally injured whether they absorb higher costs and thus operate on a smaller margin of profit, or maintain their profit margin but reduce their volume by passing the higher costs on to customers. See notes 10, 39, pp. 11-12, 65, *supra*. Since controls constituted the largest cost item in a burner, the substantial discounts enjoyed by manufacturers in the lowest price brackets obviously gave them a substantial economic advantage over their less favored competitors.

The record shows that some high priced burner manufacturers believed that the price differential on controls was an important factor in their capacity to compete with the low priced manufacturers (*e.g.*, R. 535, 539). Certainly the insistence by most burner manufacturers upon the lowest possible prices for controls implied that they felt low prices were advantageous and high prices a handicap in the competitive struggle. And the record contains examples of the direct relationship be-

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Moreover, the knowledge that the favored manufacturer was enjoying lower control prices would tend to restrain competitors from reducing their prices, since the differentials would give the favored manufacturer a distinct advantage in any retaliatory price competition it might inaugurate.

tween the prices charged particular customers for controls and the prices charged for oil burners. *E.g.*, Williams Oil-O-Matic, Statement, pp.19-20, *supra*. The fact that particular oil burner manufacturers may have compensating advantages because of other factors and other methods of operation does not, of course, mean that they do not suffer a disadvantage because they pay more than their competitors for controls.

The fundamental weakness in respondent's contention, however, is that it applies the wrong test. Even on the assumption that respondent has proved that oil burner prices do not bear a direct relationship to the discounts on the controls, the Commission's order must be upheld. For the evidence need only be strong enough to show a reasonable probability or possibility that competition might be harmed, not that it has been. See *Corn Products* and *Morton Salt* cases, discussed *supra*, pp. 51-52. Indeed, in the *Morton Salt* case the Court admonished the Commission not to waste time proving the actual effect upon competition.

In the *Corn Products* case a similar contention as to the absence of proof of actual effect was made with respect to the special allowance of 50 and 75 cents per ton granted certain purchasers of gluten feed and meal.[40] The parties stipulated, and the Commission found, that the allowances in question were "'sufficient' if and when reflected in whole or in substantial part in resale prices, to

[40] See Transcript, No. 680, 1944 Term (R. 186-191).

attract business to the favored purchasers away from their competitors, 'or to force [their] competitors to resell ... at a substantially reduced profit, or to refrain from reselling.'" (324 U.S. at 742). It was argued, however, that "*there is no evidence that they ever were so reflected*"[41] in the resale prices at any time during the entire period of years during which the contracts were in effect," "that this conclusively negatives the possibility of a finding that the reasonably probable effect of the contracts and the allowances or discounts thereunder, was a substantial lessening of competition * * *", and that "had such recipients cut their prices, it might, perhaps, have been a proper subject of inference * * *" (Br. for Resp., pp. 70-71). In rejecting this contention, the Court said:

> This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition. [324 U. S. at 742.]

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[41] Italics in original.

Respondent cannot distinguish the gluten feed situation on the ground that the discount there was more substantial since the resale of a single product and not of a part was involved. The record in the *Corn Products* case (No. 680, 1944 Term, R. 391-4) shows that the prices per ton for gluten feed and meal ranged from $15 to $43. The fifty and sixty-five cent discounts, therefore, would range from 3-1/3 to 1.16 per cent and from 4½ to 1.3 per cent of the total. As we have seen, the discounts on the controls in the instant case constituted a substantially greater percentage of the price of the completed oil burner. See pp. 60-61 *supra*.

4. Respondent also relies upon the testimony of certain burner manufacturers who stated that they were not injured by the fact that others paid less for M-H controls. The court below noted that some manufacturers so testified, and that others testified to the contrary (R. 2313, quoted at p. 54, *supra*). Of the six manufacturers who testified that their burner sales were not injured because other manufacturers were paying less than they were for respondent's controls (R. 938, 951-3, 999, 1087, 1142, 1151, 1174) five produced a higher priced burner (R. 946, 997, 1086, 1141, 1152). Four of these explained his somewhat unusual statement on the ground that he had compensating advantages, such as superior quality and servicing (R. 1003, 1087, 1142, 1152-1153), which meant, of

course, that he was selling a burner plus services or had other compensating elements which tended to reduce the injury. The fifth, because of operating economies and low distribution and selling costs, was able to achieve savings "which put us on practically even footing with any of our competitors" (R. 953). The sixth, in the low priced field, testified that he was not harmed by the differential because he was already operating at capacity (R. 1174). These explanations, while undoubtedly truthfully reflecting the witnesses' opinions, do not prove that they would not have been in an even better position *vis a vis* their competitors if the latter were not paying less for controls. And even assuming the accuracy of the witnesses' analyses of the effects upon their particular businesses, the statements are far from proving that other burner manufacturers were not harmed by respondent's price discrimination, or that competition was not injured.[42]

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[42] The House Committee Report (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 8) stated with reference to the competition clause of the Robinson-Patman Act:

> This provision accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury in fact can the larger, general injury result. [Continued]

The fact that other witnesses expressed contrary opinions in itself goes a long way to refute any notion that the testimony just described portrayed the typical or generally prevalent situation. Thus, Gillis of Malleable Iron Fitting Company, a high priced manufacturer, testified that the lower prices enjoyed by its competitors made it "more difficult" for it to compete with them "because our prices were higher" (R. 535). Malleable had to lower its prices "as far as we were able" to meet that competition (*ibid.*). He stated further that respondent's price policy gave some manufacturers "a decided disadvantage in trying to compete with some of the cheaper ones because of the larger volume" (R. 539).

Rodler of Oil Equipment Corporation testified that (R. 578-579) "a lot of sales * * * could be made without controls. * * * The major cause as far as I know is that we had to ask too much for the controls that we sold with the burner and that they liked our burner better, but could buy the controls in the market cheaper than we could sell them to them." He subsequently stated that though a $2.65 difference in the price of controls "would not have made the difference necessary"

The Senate Report (S. Rep. No. 1502, 74th Cong., 2d Sess., p. 4) uses substantially identical language, and adds to the last sentence quoted the significant phrase "and to catch the weed in the seed will keep it from coming to flower."

to met Quiet-Heet's competition "it would have made part of the difference but not enough" (R. 582), and again "if you put $2.70 plus a few other items down the line you would have the collective difference" (R. 593). The comparison with Quiet-Heet was with the lowest price competitor, $2.70 might have made a difference in competing with higher price buyers who still were in respondent's low priced brackets.

Herr of Herco, though unable to determine "the effect in dollars and cents", stated that the lower control prices paid by Quiet-Heet "made a big difference" on the business of Herco Oil Burner Corporation in the New York area, and resulted in Herco's failure to secure "some business" (R. 673-674, 676).

Stauffer of Penn Boiler and Burner Manufacturing Company testified that they had a "ten-year fight" with respondent over the fact that they were paying more for controls than some of the competitors (R. 687; Comm. Exs. 205, 206-A, R. 1987-1989). The higher prices it paid respondent for controls precluded it from offering burners with respondent's controls at the same price as those with Mercoid controls, as its competitors were doing (R. 681). In order to compete, Penn Boiler purchased complete burners equipped with respondent's controls from Quiet-Heet, removed

the controls, and used them on its own burners (R. 682-3, 685-6, 690).[43]

There was other, more general, testimony as to the importance of price. An M-H memorandum itself revealed the importance of $1 in the price of controls (Comm. Ex. 35-B, R. 1804):

> Brannon said their lowest price on their burner was $53.50 and that they sold a lot of them at $55.00 and on these jobs he said there was not enough margin to take care of $1.00 difference in controls. On the other hand, he said where they were getting $60.00 or $65.00 for a burner, the $1.00 difference was not too serious * * *.

Shields of Nokol testified that although he did not worry about what Quiet-Heet was doing, they "naturally" got some business from him because "a lot of peope buy on price only" (R. 1126). Many companies, including Quiet-Heet when in the lowest bracket (R. 504), kept insisting that they should be given a better price, obviously because such a price would be advantageous to them

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[43] Stauffer wrote respondent in 1940 (R. 1988-1989):

> In checking over the prices quoted some dealers who handle our boilers and competitive burners, we find that they can buy oil burner controls cheaper than we can with the results that on this basis it would be practically hopeless for us to sell them controls. In fact comparing our dealers' prices with your prices to us, we could still purchase controls cheaper from our own dealers than from you.

(R. 316-318, 320, 351, 622, 676, 786, 969, 1005, 1537, 1539, 1544, 1547-1548; Comm. Ex. 24-A, R. 1785-1786, Comm. Ex. 34, R. 1801-1802; Comm. Ex. 75-B, R. 1829). Indeed respondent itself objected when burner manufacturers charged $5 more for burners with M-H controls (R. 433-4, 965, 1046-7) —presumably because this would reduce the sales of such burners.

This testimony supports the Commission's finding that the discriminatory prices charged by respondent actually injured competition. The fact that some competitors testified that they were not hurt does not prove the contrary; they did not testify that others were not hurt, or even that a substantial portion of the industry was not. Certainly when the record as a whole is considered, it cannot be said that it does not support the Commission's finding that the discriminatory prices have tended "to substantially lessen [and] injure * * * competition between respondent's customers" (R. 2260). The record thus amply satisfies the test of reasonable probability or possibility, which is all that the statute requires the Commission to meet. On the record as a whole it is clear that respondent has not proved that the controls industry was sufficiently different from the salt or other competitive businesses to preclude the Commission from drawing what this Court has termed to be the "obvious" inference from respondent's discriminatory pricing system.

C. The Court Below Improperly Set Aside the Commission's Findings of Injury to Competitor Competition

1. *There was sufficient evidence to support the Commission's finding of injury to competitor competition.*

Section 2(a) of the Clayton Act prohibits price discriminations which may injure competition between the seller and its competitors, as well as among its customers. A finding of injury at either competitive level is sufficient to support a cease and desist order prohibiting the discriminatory pricing practices. The Commission's order in the instant case was based upon findings of injury to competitor competition, as well as to competition among respondent's customers.

As previously noted (*supra*, pp. 50-53), violation of Section 2(a) does not require a showing that the discriminatory prices actually have injured competition. It is sufficient that there be a reasonable probability that they may have done so. The evidence before the Commission clearly established that there was more than such a probability of injury to competitor competition in this case.

As has been pointed out (*supra*, pp. 10-11, 49), public demand for respondent's controls compelled most burner manufacturers to have such controls available as either regular or optional equipment on their burners (R. 364, 429, 441, 473, 628, 648, 664, 685-686, 715, 728, 974-5, 995, 1045-1046, 1108, 1136-1137, 1141, 1152). Since under

respondent's pricing system the price of controls dropped as the volume purchased increased, the inevitable tendency of respondent's system would be to encourage burner manufacturers, most of whom found it necessary to buy some controls from respondent, to concentrate their purchases in respondent as the single source of supply. As the Commission stated in its opinion (R. 2274):

> When an oil burner manufacturer sees that his total control requirements, if concentrated with respondent, will entitle him to a bracket 4 price, for example, but if divided among other sources of supply he may receive only a bracket 2 or a bracket 3 price, the competitive tendency of the discriminatory bracket 4 price is apparent. The very nature of quantity price differentials is to divert business to the seller granting such differentials * * *.

In fact, one burner manufacturer apparently bought more controls from respondent than it needed in its own business and sold the excess on the open market, in order to obtain respondent's lowest prices on its own control requirements (Comm. Ex. 133, R. 1882, R. 579, *supra*, p. 20).[44]

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[44] This practice also injured other burner manufacturers who were compelled to sell their own burners without controls and thus lose their usual profit on the controls (*supra*, n. 17, p. 20; R. 583).

Clearly, the Commission's finding that the price discriminations had the "capacity and tendency" to induce the purchase of respondent's controls and had tended to divert trade to respondent from its competitors (R. 2256) represented a "reasonable inference" from the facts before it. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 742; *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149, 152.

Moreover, the record shows not only that respondent's practices created a reasonable possibility of injury to competitor competition, but that they had caused actual injury. The Commission findings to that effect (R. 2256)—although not necessary to support its order—have ample evidentiary support. Respondent's competitors lost a substantial volume of business to it (*supra*, pp. 22-24). One competitor, for example, lost a particular sale because it would have "cost money" for the purchaser if he had failed to purchase a sufficient quantity of respondent's controls to obtain a retroactive discount; "it would cost us money if we divided our business", he testified (R. 150-151, 984). In another case an oil burner manufacturer wrote respondent that if it was given a lower price "we will go 100 percent with you, and eliminate the other two makes of controls that we have been selling" (Comm. Ex. 75-B, R. 1829).

Respondent itself was well aware that purchasers would often have to cease buying from competitors if they were to secure respondent's lowest prices. Thus, a letter from the vice president of respondent to the Timken Company stated (Comm. Ex. 68, R. 1816):

> Frankly, in view of your recent decision to divide your control requirements with another manufacturer the writer wonders, even in view of your increased sales, if your requirements from us will reach the total of 40,000 units on which your present price is based.

Another letter, from respondent's sales manager, said (Comm. Ex. 34, R. 1802):

> Of course, price has been the stumbling block, and John and I agreed that we would be willing to go to a Bracket V basis if Anchor Post would assure us of the business. * * * If Anchor is going to adopt a policy of splitting their business, I don't think we are going to be able to get very far with them.

Respondent wrote Cleveland Steel Products Company (Comm. E. 74-A, R. 1825): "If you could standardize on our constant ignition controls it would go a long way toward obtaining the lower prices". In another year the same company wrote respondent that it had been paying a higher price (Comm. Ex. 107-B, R. 1854-1855):

> because of your assurance that our prices beginning with 1940 will be the equal of the lowest prices quoted in the Oil Burner Industry and, in return for this, we anticipate giving you our business 100% and doing all within our power to greatly increase our volume of business with you as a whole.

Certainly, a pricing system which would induce customers to seek a discount unjustified by costs by giving 100 percent of their business to a company which already was in possession of 60 percent of the national market, instead of dividing their business with other manufacturers, would tend substantially to injure competition, as the Commission found.

The court of appeals, however, held that the evidence did not sustain the Commission's finding of actual or potential injury to competitor competition. We believe the court reached this conclusion in part because it was applying the erroneous test of actual, not probable or possible, injury to competition, a matter discussed at pp. 50-55, *supra*. Apart from this the court seems plainly to have improperly substituted its judgment as to the weight of the evidence for that of the Commission—and in doing so has demonstrated its lack of familiarity with the economic problems committed by Congress to the administrative body. The evidence summarized above

(pp. 75-79, *supra*) shows that the Commission's judgment as to the effect of discriminatory prices upon respondent's competitors was an entirely reasonable one.

The court below gave great weight to the facts that there was keen competition among control manufacturers, that respondent's prices were higher than its competitors', that competitors of respondent enjoyed a substantial growth during this period, that respondent's relative share of the market declined from 73 per cent in 1937-1938 to 60 per cent in 1939-1941, and that in 1941 respondent lost some of the business of some of its customers to its competitors (R. 2312). These and similar facts, the court stated, "fully establish" the examiner's finding that competitor competition had not been injured, and "outweigh the facts relied upon by the Commission in reaching the opposite conclusion" (*ibid.*). The court recognized that respondent "did succeed in retaining or diverting some business which might otherwise have gone to some of its competitors," but concluded that in view of the competitors' growth despite respondent's commanding position and "alleged wrongful practices," such practices cannot be said "substantially to injure competition" (*ibid.*).

The facts thus singled out by the court below, however, were but part of the record before the Commission when it made its decision. The

reaching of that decision required an evaluation of the effect of respondent's discriminatory practices upon competition in the light of all the data before the Commission. The record showed that respondent for many years had been, and during this period continued to be, the major producer in the industry. The fact that other firms have grown substantially, or that new ones entered the field, does not negative the deleterious effects of respondent's discriminatory prices on competition. Had respondent not interfered with normal competitive processes through its discriminatory pricing system, its competitors presumably would have grown even faster, and respondent's share of the market would have declined even further. The court's reference to respondent's loss of some sales to competitors and to the decline in its percentage of the market should not be taken as meaning that it was losing business. To the contrary, between 1939 and 1941 its sales increased over 25 per cent, from 159,000 primary controls to 201,000 (R. 877).[45] As the Commission pointed out, after considering all of these facts, "* * * the law does not permit respondent to resort to unfair or discriminatory practices in order to maintain its competitive posi-

[45] A temporary drop in 1938 had come about because "the bottom dropped out from the oil burner business in the last quarter of 1937," and "many of our customers at the start of 1938 found themselves quite heavily loaded with inventory" (R. 876).

tion in the industry" (R. 2273). Competition may be adversely affected whether the discriminatory practice result in the retention of customers that competitors otherwise would acquire, or in the diversion of customers from such competitors. *American Can Co.* v. *Ladoga Canning Co.*, 44 F. 2d 763, 767 (C.A. 7), certiorari denied, 282 U.S. 899. The natural effect of competition would be the shifting of a certain volume of business among competitors; what the Act condemns is the artificially-induced diversion of trade resulting from the discriminatory prices given by respondent.[46]

The fact that respondent's prices are higher than its competitors' does not prove that competitors were not injured by the price discrimination. On the contrary, this would seem to establish respondent's dominance in the industry, for without

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[46] In support of its conclusion that respondent's pricing system resulted in injury to competitor competition, the Commission also referred to respondent's own argument that the discriminatory prices were made to meet competition (R. 2273). This contention, the Commission stated, showed that respondent's discriminatory prices were made to retain or secure the business of certain customers, and that they were "largely successful" in doing so (*ibid.*). However, the effect of such price discriminations on competition is in no way related to whether they meet the statutory defense of good faith attempts to meet a competitor's lower price (see *infra*, pp. 89-94). The two questions are separate and distinct, and evidence which is insufficient to satisfy the statutory defense nevertheless may be extremely significant in determining the effect of the discriminatory practices upon competition.

such dominance respondent could not retain 60 per cent of the business and charge higher prices. In any event, the purchasers apparently regarded respondent's controls as worth the extra cost in view of their reputation and the services which accompanied them (R. 851-860). The purchasers were thus in their own view receiving more than the bare product.

The court of appeals gave undue weight to the facts relied on by respondent and not enough to those which supported the Commission. But in this field the function of evaluating the evidence and drawing the appropriate inferences therefrom has been primarily entrusted to the Commission as an expert body with a staff versed in the analysis of the economic matters we have discussed. A court is not warranted in overturning Commission inferences which are entirely reasonable—in this case, we submit, more so than those of the court—in the light of the record as a whole. As this Court stated in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 73:

> * * * what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertainties and conflicting inferences. Statute and decision * * * forbid that exercise of power.

2. *The court of appeals gave undue weight to the findings of the trial examiner.*

The court below also seems to have misunderstood this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, with respect to the significance to be accorded a trial examiner's report when the agency does not follow the examiner's recommendations. In the *Universal Camera* case, this Court held no more in this connection than that in deciding whether an agency's findings are supported by substantial evidence, the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) requires reviewing courts to look at the whole record, not just at those portions sustaining the agency action, that the "whole record" includes the trial examiner's report, and that the examiner's report should be given "such probative force as it intrinsically commands" (p. 495). The Court further pointed out that "the significance of his report, of course, depends largely on the importance of credibility in the particular case" (p. 496).

Questions of credibility were of as great importance in the *Universal Camera* case as they are unimportant here.[47] The significant differences

[47] We do not regard the fact that some oil burner manufacturers testified that the greater discounts on controls allowed competitors did not affect their business while others testified to the contrary as raising an issue of credibility. See pp. 69-

between the Commission and the examiner here were not as to credibility or in findings as to specific facts, but in conclusions or inferences, mainly of an economic nature.[48] The examiner is in no better position to decide such issues than the Commission; the fact that he heard the testimony rather than read it does not give him an advantage in analyzing economic effects. The determination of such matters has been entrusted by Congress to the Commission, presumably because the Commission's judgment was thought to be more expert than an examiner's.

This Court did not suggest in *Universal Camera* that the reviewing court is to substitute the examiner's decision for that of the agency whenever it concludes that the examiner's recommended findings are themselves supported by substantial or even (in the reviewing court's opinion) a preponderance of the evidence. On the contrary,

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73, *supra*. Each was testifying to the effect upon his particular business as he saw it. The Commission could credit all this testimony, and conclude, as it did, that a substantial portion of the industry was harmed by respondent's pricing system. This is the only issue as to which there can possibly be said to be a conflict of testimony.

[48] For example, the examiner found that it was the cutting of oil burner prices by Quiet-Heet, not the price paid for controls, which caused some competitors to lose business (R. 2194). But obviously Quiet-Heet's price advantage on controls was one factor, which, *pro tanto*, permitted it to sell burners for less than its competitors. The Commission's difference with the examiner was with respect to the economic analysis, not the underlying facts.

this Court in *Universal Camera* specifically rejected the "notion" that the agency "has power to reverse an examiner's findings only when they are 'clearly erroneous,'" a "notion" that the Court held would be "wholly inconsistent" with the "responsibility for decision" placed upon the agency by the statute which it administers (340 U.S. at 492).[49]

Yet the court below appears to have given primacy to the examiner's conclusions in reviewing the substantiality of the evidence relating to competitor competition. Prior to discussing such evidence, the court stated that from its examination of the "record as a whole" it was "convinced that the findings of the examiner were supported by very substantial evidence" (R. 2311). After summarizing "various undisputed facts" relating to competitor competition—but omitting the facts relied on by the Commission (see pp. 80-83, *supra*)—the court said (R. 2312):

> The foregoing facts fully establish the examiner's finding that competitor competition was not injured * * * and they outweigh the facts relied upon by the Commission

---

[49] Section 11 of the Clayton Act provides that:

> If upon such hearing the commission * * * shall be of the opinion that any of the provisions [2, 3, 7 and 8] have been or are being violated, it * * * shall issue * * * an order requiring such person to cease and desist from such violations * * *.

> in reaching the opposite conclusion. And while the findings of an examiner are not "as unassailable as a master's" (*Universal Camera Co.* v. *National Labor Relations Board*, 340 U.S. 474, 492), where it appears from the record that they are supported *by a preponderance of the evidence*, the action of the Commission in rejecting them is arbitrary. [Italics supplied.]

The question before the reviewing court was whether the Commission's findings were supported by substantial evidence on the record as a whole, not whether the court agreed with the examiner rather than with the Commission. The Commission, of course, must decide the case in accordance with the preponderance of the evidence, as it sees it. But the fact that it may disagree with the trial examiner in applying this standard does not mean that the reviewing court may reverse because it agrees with the examiner. For the court would then be completely substituting its judgment for that of the Commission as to the weight of the evidence, determining preponderance for itself whenever the examiner was reversed, not weighing for substantiality on the record as a whole. Nothing in the Administrative Procedure Act or the *Universal Camera* case declares or implies that the scope of review was to be so greatly broadened whenever an agency disagreed with its examiner.

It is axiomatic that in Section 2 (a) proceedings, "The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U.S. 726, 739; *Federal Trade Commission* v. *Staley Manufacturing Co.,* 324 U.S. 746, 760. The *Universal Camera* case did not change this standard. The effect of particular pricing practices upon competitive conditions in a complex industry would appear to be a matter particularly within the Commission's expert competence. See *Bruce's Juices* v. *American Can Co.,* 330 U.S. 743, 746. The weight given to the examiner's report by the court below, however, would in effect vitiate the agency's exercise of its own independent judgment on the matter, a judgment based on the entire record before it and its special knowledge in the field. If the agency's function were limited to reviewing the examiner's recommendations to determine whether they were supported by substantial evidence, the public in large measure would be deprived of the benefits of the administrative expertise which is the very *raison d'etre* of the agency's existence. We submit that neither the Administrative Procedure Act nor the *Universal Camera* decision intended thus to subvert the agency's normal independent adjudicatory functions into a mere appellate review of the examiner's conclusions.

This criticism is particularly pertinent where, as here, the evidence did not require the Commission to resolve conflicting testimony as to disputed factual matters. Where there is such conflict, the examiner's opportunity to appraise the credibility of witnesses will entitle his recommendation to substantial significance. Cf. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S., at 496. In the instant case, however, the Commission's decisional process involved the drawing of inferences from uncontradicted facts as to their effect on competition.

For the reasons stated, this Court is not called upon to decide whether it agrees with the examiner or with the Commission as to the preponderance of the evidence—although we believe that the Commission's findings were the more reasonable. The arguments advanced in the preceding pages in support of the reasonableness of the Commission's decision demonstrate that it had sufficient basis for overruling its examiner.

III

Respondent's Discriminatory Prices Were Not Made in Good Faith to Meet an Equally Low Price of a Competitor.

The court of appeals did not pass upon the question whether respondent had justified its quantity discounts in the three lowest price brackets by an adequate showing that such differentials were made in good faith to meet an equally low price

of a competitor. We recognize that ordinarily this Court will not consider such a question in advance of a decision thereon by the lower court. However, the Court recently has indicated that where the only remaining issues in a case involve questions of law "not calling for examination or appraisal of evidence," it will decide them itself rather than remanding the cause to the court of appeals for further proceedings. *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U.S. 211, 214; *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U.S. 469, 473-474. Since we believe that this question raises a matter of law that can be resolved without "examination or appraisal of evidence," and is one whose resolution in our favor will be dispositive of the issue with respect to meeting competition, we urge the Court to consider and decide the question together with the other issues in the case in order that this already prolonged litigation may come to an end.

The Commission, in rejecting respondent's defense that the three lowest price brackets constituted good faith attempts to meet the lower price of a competitor, pointed out that these brackets did not "represent prices made in particular instances to meet competitors' prices, but reflect progressive reductions in a comprehensive price schedule based on increased quantity purchases" (R. 2272). We submit that the decision in *Federal Trade Commission* v. *Staley Manufacturing Co.,*

324 U.S. 746, makes it abundantly clear that the defense of meeting competition cannot serve to justify a discount system whereunder the discriminatory discounts are given to all customers who purchase a given volume without regard to their individual competitive situations.

In the *Staley* case, the Commission, in holding that respondent's basing point delivered price system resulted in illegal price discriminations in violation of Section 2(a) of the Clayton Act, had rejected respondent's contention that the price discriminations had been made in good faith to meet a competitor's equally low price. In sustaining this conclusion by the Commission, the Court pointed out that Section 2(b)

> does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition [p. 753]

The Court further noted that the statutory test in Section 2(b)

> presupposes that the person charged with violating the Act would, by his normal, non-discriminatory pricing methods, have reached

> a price so high that he could reduce it in order to meet the competitor's equally low price. * * * Respondents have never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition. Instead they have slavishly followed in the first instance a pricing system which, in their case, resulted in systematic discriminations * * * [pp. 754-755]

Although the Court in *Staley* was dealing with a basing point pricing system, its reasoning and language are equally applicable to the quantity discount pricing system followed by respondent. Respondent's system of fixing bracket prices solely on the basis of quantities purchased, without regard to whether particular customers falling within those brackets were in fact receiving more favorable treatment from a competitor, has been in use since respondent was organized in 1927, and was employed by one of its predecessor companies at least as far back as 1924 (R. 1017-1018). Thus the system was in operation at a time when two of respondent's three principal competitors had not yet entered the controls business (*supra*, n. 11, p. 12). Just as in the *Staley* case, respondent has "never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition." (324 U.S. 754-755). On the contrary, respondent has from the very beginning "slavishly followed

* * * a pricing system [here its own] which * * * resulted in systematic discriminations" (*ibid.*).

It is true that respondent's sales manager testified that in establishing its annual price schedules, the prices of competitors were "a vital factor" (R. 1020-1021, 1567, 1774). The following colloquy shows, however, that respondent was only taking into account the general competitive picture, not meeting a particular price or price schedule (R. 1021):

> Q. Hasn't it been your experience that your competitors would wait and see what you were going to do in the way of brackets and prices before they get out their brackets and prices?
>
> A. Oftentimes that would happen.
>
> Q. Well, didn't that usually happen?
>
> A. I couldn't say as to that. I know that we always endeavored to have our prices set up very early in the year or late the previous year because the manufacturers were all getting out their price sheets and their literature and it was quite a convenience for them if we could have our price data in their hands early, and when our prices were figured and our quantities were set, we issued our prices.
>
> Now, competition may have followed or they may have been in ahead of us, I don't know.

In this connection the examiner found.[50] (R. 2193):

> Respondent's bracket prices (Paragraph 4) for any given contract year were set up according to information respondent had at the time in reference to the general business situation, trends in the market, information as to prices of competitors gathered by respondent from its salesmen, and in other ways, and the general competitive situation existing at the time.

Competitive prices were thus only one of a number of factors considered by respondent in establishing its price schedules.

Obviously, all pricing systems are adopted and operated in the light of the general price policies of competitors. But Section 2(b) does not permit "a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 725. Section 2(b) relates solely to price discriminations made to deal with particular competitive situations, and not to entire pricing systems.

We accordingly submit that the three lowest price brackets in respondent's quantity discount

---

[50] No exception was taken to this finding.

[51] Similarly, respondent's granting of off-scale prices cannot be justified as good faith attempts to meet a competitor's

system cannot, as a matter of law, be justified as good faith attempts to meet an equally low price of a competitor.[51]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the cause remanded with instructions to affirm Part III of the Commission's order.

Respectfully submitted,

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SEPTEMBER 1952

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lower prices. As the Commission pointed out, respondent's evidence connecting the off-scale prices to particular customers' competitive situations dealt with only 22 of the 76 off-scale accounts, and was not conclusive as to several of them (R. 2257-2259). The Commission further found that even if respondent had met a competitor's lower price in all of the 22 accounts, that fact would not justify respondent's general practice of allowing off-scale prices (R. 2259).

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 11

FEDERAL TRADE COMMISSION,
Petitioner,

v.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT ON THE MERITS

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October 8, 1952.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT ON THE MERITS*

OPINIONS BELOW

The Trial Examiner's recommendations and conclusions of law appear in the Record at page 2203. The majority and dissenting opinions of the Federal Trade Commission (R. 2265-82) are reported at 44 F. T. C. 390. The opinion of the Court of Appeals for the Seventh Circuit (R. 2308-15) is reported at 191 F. 2d 786.

*Respondent has filed a separate brief on jurisdiction.

STATUTES INVOLVED

The applicable portion of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, is as follows (15 U. S. C § 13):

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . .

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebut-

ting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The applicable portion of Section 10 of the Administrative Procedure Act, is as follows (5 U. S. C. § 1009):

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

QUESTION PRESENTED

Whether the court below erred in reversing that portion of the Commission's order (Part III) which was entered under Section 2(a) of the Clayton Act when, upon its review of the record as a whole, the court concluded that the findings upon which it was based were not supported by substantial evidence.

STATEMENT

The Proceedings Below

The proceeding before the Commission was instituted by the issuance of the Commission's complaint (R. 2-11) against respondent (M-H), dated February 23, 1943. Count III of the complaint charged violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.* It alleged that M-H, a manufacturer of automatic temperature controls, had sold its controls to some of its oil burner manufacturer customers at prices different from those charged others of such customers, with resulting unlawful discrimination in price.

Hearings were conducted before a Trial Examiner from August, 1943, to October, 1945. On February 21, 1946, the Trial Examiner filed his Report (R. 2166-2203), wherein he recommended that the charges set forth in Count III be dismissed (R. 2203). The latter recommendation was based upon the Trial Examiner's findings that

> (1) the differentials in M-H's prices did not tend to injure competition either among M-H and its competitors or among M-H's customers; and
>
> (2) in any event, the differentials in M-H's prices were justified, some because of differences in costs and the balance because made in good faith to meet the competition of other control manufacturers.

The majority of the Commission agreed that some of M-H's varying prices were justified by differences in M-H's

*Counts I and II of the complaint, and Parts I and II of the Commission's order entered thereon, are not involved in this proceeding.

costs, but declined to follow the Trial Examiner's recommendation that Count III should be dismissed. Commissioner Mason, dissenting, agreed with the Trial Examiner that Count III should be dismissed (R. 2276-82). The Commission's order to cease and desist was issued January 14, 1948 (R. 2262-65).

Part III of that order (R. 2264), which was entered pursuant to Count III of the complaint, directs that M-H

> ". . . forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among oil-burner manufacturers purchasing said automatic temperature controls and other furnace controls—
>
> "1. By selling such controls to some oil-burner manufacturers at prices materially different from the prices charged other oil-burner manufacturers who in fact compete in the sale and distribution of such furnace controls, when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered."

On March 11, 1948, M-H filed with the Court of Appeals for the Seventh Circuit its petition to review and set aside the order of the Commission (R. 2283-98).

On July 5, 1951, the Court of Appeals handed down its opinion (R. 2308-15) unanimously reversing Part III of the order and dismissing Count III of the complaint, holding that, on the entire record, the Commission acted arbitrarily when it rejected the findings of the Trial Examiner that M-H's pricing practices did not tend to injure competition. That being the basis for its decision, the court did not reach

the further question—and did not decide—whether M-H's varying prices were justified, as M-H also strongly contended, on the ground that the lower of those prices were made in good faith to meet the equally low prices of its competitors (R. 2315).

Judgment in accordance with the court's opinion was entered on July 5, 1951 (R. 2316).* It was therein ordered and adjudged that Part III of the order be reversed and that Count III of the complaint be dismissed.

M-H's Business

M-H is, and for a number of years has been, one of the principal manufacturers of automatic temperature controls for oil burners of the gun and rotary types which are used in domestic heating plants (Com. Ex. 1, R. 1644).

Such controls consist in the main of three kinds (Com. Ex. 1, R. 1646):

(1) a thermostat, which is a control device placed in the room or space to be heated;

(2) a primary control, which is a device controlling the cycle of operation of the oil burner so as to start it and stop it when heat is needed or no longer needed (as governed by the thermostat), and to prevent a hazardous condition from occurring when there is a failure of combustion; and

(3) a limit control, which is a control device placed on the heating plant to prevent the temperature or pressure in the heating plant from exceeding a safe level.

---

*That judgment was subsequently reiterated on September 18, 1951, as an incident to the court's disposition of the Commission's request for affirmance and enforcement of Parts I and II of its order. See our separate brief on jurisdiction.

An oil burner is ordinarily equipped with one set of controls, consisting of a thermostat, a primary control and a limit control. It is customary in the industry for such controls to be sold in sets (FF 4, 6, R. 2241-43).

It has been the policy of M-H to stress particularly sales to oil burner manufacturers (R. 863) who are the principal purchasers of oil burner controls (R. 39). It is only with such sales that Part III of the order is concerned (R. 2264).

M-H, a pioneer in the business of temperature control (R. 851), is well known in the industry because of its program for product development and its emphasis on service (R. 851-61). M-H's engineering and research work has resulted in the constant improvement of M-H's controls (R. 882-909) and in the steady decrease in the prices thereof, which dropped from $39.90 a set in 1929 to $13.75 in 1941, a decrease in price of 66% (R. 909-10).

M-H's Competitors

As the Commission found, M-H is engaged in "active and substantial competition" with other control manufacturers (FF 2, R. 2241). There are in the United States at least fifteen manufacturers of one or more of the three kinds of oil burner controls mentioned above, *i.e.*, thermostats, primary controls and limit controls (R. 48-51; 131-34, 227). Three such manufacturers, each of which manufactures and sells all three kinds of controls, have furnished M-H with especially keen competition in the sale of controls to oil burner manufacturers (R. 48-49; FF6, R. 2242-43), *viz.*:

Mercoid Corporation (Mercoid), which has made and sold oil burner controls since 1922 (R. 146-47);

Penn Electric Switch Company (Penn), which started to manufacture and sell oil burner controls in 1932 (R. 797); and

Perfex Corporation (Perfex), which commenced to sell limit controls in 1936 and which came out with a complete line of controls in 1937 (R. 212-13, 216).

Another important competitor of M-H is Detroit Lubricator Company (Detroit), a wholly owned subsidiary of American Radiator & Standard Sanitary Corporation, which, although manufacturing certain kinds of controls since 1933, did not offer a complete line until 1939 (R. 379, 381).

Thus, at the beginning of the 1930's, the only one of M-H's present major competitors then competing with M-H was Mercoid. During the next decade, M-H's three other principal competitors entered the industry, and, notwithstanding the competition of older companies such as M-H and Mercoid, enjoyed a steady growth in the volume of their sales. Penn claimed that by 1941 it was the second largest control manufacturer (R. 798, 825-26). Perfex had such a substantial increase in its volume of sales that by 1941 it also considered itself to be the second largest manufacturer in the industry (R. 222, 231-32). Detroit's control business also increased after 1939, when its products were redesigned to sell in competition with those of the other control manufacturers (R. 394, 413-21).

Each of the principal control manufacturers solicited business from, and entered into contracts with, most of the oil burner manufacturers, including *all* the larger accounts (M-H—R. 59-60; Perfex—R. 749; Penn—R. 801-02). Since no important oil burner manufacturer used

exclusively the controls of a single control manufacturer, competition was "ever present" (R. 1528).

The Commission found that M-H, because of the large customer demand for, and public acceptance of, its controls, was able at all times to sell its controls at prices higher than those charged by its competitors (FF 5, R. 2242). Indeed, the Commission said that "no instance is shown in which respondent [M-H] actually undercut competitors' prices" (R. 2272).

M-H's share of the available business in automatic temperature controls for burners of the pressure and rotary types was reduced from 73% in 1937-38 to 60% in 1941 (R. 876-77). By 1941, the volume of M-H's sales of automatic temperature controls for all types of oil burners constituted only about 25% of the total sales of such controls (Com. Ex. 1, R. 1645).*

During those years there existed the keenest kind of price competition among control manufacturers (R. 77, 749, 801, 1295-96, 2192-93, FF 2, R. 2241). The total business of M-H's competitors increased, and, as has been shown above, the three new concerns which had entered the control field after 1932 enjoyed a steady growth in sales volume. Indeed, in 1941 M-H lost to its competitors 53% of the control business of 31 customers who previously had used principally M-H's controls; and in the same year, 126 of M-H's

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*Petitioner's repeated statements that it was stipulated that M-H in 1939, 1940 and 1941 sold approximately 60% of all automatic temperature controls sold in the United States (Br., pp. 10, 24, 48) are misleading. The 60% figure in the stipulation relates, not to all automatic temperature controls, but only to controls for oil burners of the pressure and rotary type for domestic heating plants (Com. Ex. 1, R. 1644). The same stipulation states that M-H in 1939, 1940 and 1941 sold approximately 25% of all automatic temperature controls for oil burners sold in the United States (Com. Ex. 1, R. 1645).

other oil burner manufacturer-customers also purchased competitive controls (R. 961-64, 2193-94).

M-H's Oil Burner Manufacturer Customers

The oil burner manufacturing industry was established in the early 1920's (R. 973, 1004, 1044, 1104). In 1941, according to M-H's records, there were upwards of 300 manufacturers in the field. Two of the largest, Quiet Heet Mfg. Co. and Aldrich Company, were not established until the middle 1930's (R. 495, 574, 1057).

The large majority of oil burner manufacturers are not engaged in fabricating the burners they sell, but rather in assembling the various parts thereof, including motors, pumps, transformers, controls, fans and blower wheels, the several parts usually being purchased by the oil burner manufacturers from different sources (R. 2182, 2309). Thus, oil burner manufacturers ordinarily furnish controls to their customers as parts of complete oil burners (R. 1108-09).

Oil burner manufacturers sell burners competitively at widely varying prices (*e.g.*, in 1941 from $45 to $114.50 (Resp. Ex. 171, R. 2141)), with selling prices determined in large part by varying costs of assembly, overhead, sales, installation and service (R. 952-53, 997, 1044-45, 1087, 1111-12, 1146-48). It is and has been the usual practice in the industry for oil burner manufacturers to arrange for their supplies of equipment, including temperature controls, by annual contracts, negotiated in connection with their planning in advance for sales promotional activities (R. 808).

M-H's Prices

The fact that M-H has charged varying prices to oil burner manufacturers for controls was the basis for the charge of unlawful price discrimination made by the Commission in Count III of the complaint in this proceeding (R. 8-11).

M-H's prices to oil burner manufacturers for the year 1941, which are typical of the prices challenged by the Commission, were as follows (Com. Ex. 1, R. 1659):

Bracket	Annual Volume (Sets)	Net Price Per Set
1	50- 349	$17.35
2	350- 999	16.45
3	1,000-2,499	15.90
3A	2,500-4,999	15.35
4	5,000-7,499	14.90
4A	7,500-9,999	14.25
5	10,000-up	13.75

The Commission agreed with its Trial Examiner that M-H's prices in the discount bracket* and in brackets 1-3A, inclusive, made only due allowance for differences in M-H's costs and consequently were not violative of Section 2(a) of the Clayton Act (FF 18, R. 2255).

On the other hand, the Commission held that M-H's prices to customers in brackets 4, 4A and 5 and its prices in certain off-bracket sales, none of which was sought to be justified on a cost basis, resulted in unlawful price dis-

*An oil burner manufacturer who purchased less than 50 sets annually was given a discount from M-H's list price to wholesalers and was classified as being in what was known as the "discount bracket" (R. 2203).

crimination (FF 19, 20, 21, R. 2256-57), thus overruling the Trial Examiner's findings

(a) that the differences in such prices did not tend to injure competition; and

(b) that such prices were made in good faith to meet the lower price competition of M-H's competitors.

The court below, having concluded that the Commission had acted arbitrarily in rejecting the Trial Examiner's findings on the "injury to competition" point and that Part III of the order should therefore be reversed, found it unnecessary to decide the issue whether M-H's challenged prices were justified under the "meeting competition" proviso of Section 2(b) of the Act (R. 2315). As the court pointed out, "Unless its discriminations do or may tend to injure competition there is no need for M-H to justify them" (R. 2311).

SUMMARY OF ARGUMENT

I

The court below, having determined that the findings upon which Part III of the Commission's order was based were contrary to law and contrary to the evidence, was under a statutory duty to set it aside (Administrative Procedure Act § 10 (e)):

1. The court below, in reaching its decision, faithfully followed and correctly applied the standard set up by this Court for the guidance of courts of appeals in reviewing the decisions of administrative agencies (*Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951)).

2. The court below did not hold that Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, requires a showing that price discriminations have actually injured competition. It did hold, correctly, that the presumption of injury to competition which arises under the Act upon a showing of price differences does not preclude proof that there is *in fact* no probability of such injury to competition (*Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726 (1945); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948)); and that the evidence in this case established the fact that M-H's varying prices did not result in the probability of injury to competition.

3. The court below correctly held that the Commission's findings that M-H's varying prices tended substantially to lessen competition among oil burner manufacturers were contrary to the evidence. There is no relationship between prices for M-H controls and prices for oil burners equipped with such controls.

4. The court below correctly held that the Commission's finding that M-H's varying prices tended substantially to lessen competition among control manufacturers was contrary to the evidence. The Commission erred as a matter of law in determining that a seller, by meeting competition, injures or tends to injure competition (*Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 (1951)).

II

The question whether the lower of M-H's varying prices were made in good faith to meet competition is not now

before this Court for consideration. Not only was the question not raised by the petition for a writ of certiorari (*Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242 (1918); *United States* v. *Penn Foundry & Mfg. Co.*, 337 U. S. 198, 205 (1949)), but it is a factual question (*Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 (1951)) which was not reached or decided by the court below (*McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940); *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U. S. 464, 468 (1947)).

ARGUMENT

I

THE UNANIMOUS REVERSAL BY THE COURT BELOW OF PART III OF THE COMMISSION'S ORDER SHOULD BE AFFIRMED.

As this Court recognized in *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 738 (1945), Section 2(a) of the Clayton Act does not prohibit all discriminations in price, but only those discriminations whose effect

> ". . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ."

In the instant case, not only the Trial Examiner and the dissenting Commissioner, but the unanimous court below, upon its review of the record as a whole, reached the

conclusion that M-H's varying prices did not tend to lessen competition. The reversal by the court below of Part III of the Commission's order was based squarely on its conclusion that the majority of the Commission had acted arbitrarily in making unsupported findings to the contrary.

Since, as is shown hereafter, those findings of the Commission majority were based on erroneous theories of law and were clearly contrary to the evidence, it is submitted that the court below could not properly have reached any other conclusion.

In view of the court's statutory duty to set aside any action of the Commission found, upon its review of the whole record, to be unsupported by substantial evidence, or to be arbitrary or otherwise not in accordance with law, and particularly in view of the standard set up by this Court in the *Universal Camera* case for the guidance of the courts of appeals in reviewing the decisions of administrative agencies, the court below had no alternative but to reverse Part III of the Commission's order and to dismiss Count III of the complaint. Administrative Procedure Act § 10(e) (5 U. S. C. § 1009(e)); *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951).

1. The court below correctly applied the decision of this Court in the *Universal Camera* case.

In *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951), this Court held that the Court of Appeals for the Second Circuit had erred in deeming itself bound by the Board's rejection of its Trial Examiner's findings, and remanded the case to that court for reconsideration of the record, with instructions that it should (340 U. S. at 497):

> "accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial."

Elsewhere in its opinion in the *Universal Camera* case, this Court indicated that reviewing courts should give a trial examiner's report "such probative force as it intrinsically commands" (340 U. S. at 495) and recognized "that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case, has drawn conclusions different from the Board's than when he has reached the same conclusion" (340 U. S. at 496).*

In the instant case, as in the *Universal Camera* case, the administrative tribunal, with one member dissenting, rejected the findings of its Trial Examiner.

The court below in the instant case, in reviewing the decision of the Commission, was guided by the principles laid down by this Court in the *Universal Camera* case. The court below noted that, under the rule of that case, it was its duty to examine the record as a whole, including the rejected report of the Trial Examiner, in order to determine whether the evidence supporting the Commission's order was substantial (R. 2311). The court also indicated that the dissent of an experienced member of the Commission from the Commission's findings and conclusions was in itself a reason to scrutinize carefully the evidence relied upon to support the Commission's findings and conclusions

*Although petitioner suggests (Br., pp. 84-85) that questions going to the weight of the evidence and the credibility of the witnesses are unimportant in this case, the fact is that numerous conflicts in the evidence were presented for determination and were determined by the Trial Examiner, as is shown by the Commission's extensive exceptions to the Trial Examiner's Report (R. 2212-39).

(R. 2311). The court recognized, however, that the findings of the Trial Examiner must be considered along with "'the consistency and inherent probability of testimony'" (R. 2311), and that such findings are not "'as unassailable as a master's'" (R. 2312). Clearly, as shown by its opinion, the court carefully followed the principles laid down by this Court, and was aware that those principles were intended to be applied with caution.

Thus guided, the court below came to the conclusion, from its examination of the record as a whole, that the Commission had acted arbitrarily in rejecting the Trial Examiner's findings to the effect that M-H's pricing practices had not tended substantially to lessen competition. The court did not hold that the Commission was arbitrary merely because it reversed the Trial Examiner. On the contrary, it held that the Commission was arbitrary because on the whole record, the Trial Examiner was clearly right and the Commission's findings were not supported by any evidence (R. 2312, 2315).

The court below did not misapply, but rather faithfully followed, the decision of this Court in the *Universal Camera* case. The Commission's position that the court gave more weight to the Trial Examiner's report than it ought to have given, and that the court merely substituted its judgment for that of the Commission, is without foundation. The court below did no more than perform its statutory duty to set aside such action, findings and conclusions of the Commission as it found, upon its review of the whole record, to be unsupported by substantial evidence, arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Administrative Procedure Act § 10(e), 5 U. S. C. § 1009(e).

In the *Universal Camera* case, after stating that a Court of Appeals must set aside the findings of an administrative agency when, upon its review of the record in its entirety, such findings are found not to be supported by substantial evidence, this Court said (340 U. S. at 490-91):

> ". . . Our power [*i.e.*, the power of the Supreme Court] to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." [See also *N. L. R. B.* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 503 (1951); *Radio Corp. of America* v. *United States*, 341 U. S. 412, 415 (1951)]

The court below did not misapprehend the standard established by this Court; it correctly applied that standard.

2. The court below correctly applied the test of probable injury to competition.

Petitioner's argument that the court below erred is predicated upon a fundamental misconception as to the significance of the evidence concerning the complete absence of effect upon competition of M-H's varying prices for controls. The court below did not, as stated by petitioner (Br., pp. 29, 53, 79), apply a test of actual injury, as dis-

tinguished from the probability* of injury to competition, nor is it our contention, as suggested by petitioner (Br., pp. 29, 50-51, 67-69) that the Act requires a showing that price discriminations have actually injured competition.

This Court has specifically held in the *Corn Products* and *Morton Salt* cases that it is not necessary for the Commission to show actual injury to competition, but that a probability of such injury is sufficient. As this Court pointed out in the *Corn Products* case (324 U. S. at 738):

> ". . . The statute is designed to reach such discriminations 'in their incipiency', before the harm to competition is effected. It is enough that they 'may' have the prescribed effect."

It is, therefore, not a defense under the statute for a respondent to show that there has been no actual injury to competition; he must show that there is no probability of such injury. But neither the *Corn Products* case nor the *Morton Salt* case stands for the proposition that the existence or non-existence of probability of injury to competition must be determined in a vacuum, solely as a matter of theorizing, and without regard to proof that the practices

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*The Commission concurs in the view that the words "may be" in the statutory phrase "may be substantially to lessen competition" etc. connote "reasonable probability" (Br., pp. 51-53). We, therefore, use the word "probability" as equivalent to the phrase "reasonable possibility" used in the *Morton Salt* case with the qualification (334 U. S. at 46) that it was to be read in the light of the statement in the *Corn Products* case that "the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition" (324 U. S. at 738).

complained of do not *in fact* result in the probability of such injury*.

Nor does the *prima facie* case of injury to competition which arises under the statute upon a showing of price differences prevail over actual proof that there is *in fact* no probability of injury to competition. A respondent who charges different prices is, nevertheless, entitled to show the facts with respect to the effect, or lack of effect, on competition of such different prices. And if the evidence shows that the discrimination in price does not in fact result in the probability of inj to competition, then there is not a violation of the statute.

In reversing Part III of the Commission's order, the court below showed that it understood and applied the test established by this Court in the *Corn Products* and *Morton Salt* cases (R. 2315):

> ". . . it cannot be said that [M-H's] discriminatory price differentials substantially injure competition or that there is any reasonable probability or even possibility that they will do so. *Cf. Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 738, 742; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46. And a mere pos-

*In the usual case it may be, as petitioner urges, that members of an administrative agency should be regarded as being better able to comprehend and answer the factual questions arising in an administrative proceeding than are members of a judicial tribunal (See, *e.g.*, Br., pp. 79, 83, 85, 88). Undue reliance on that theory, however, would not be justified in this proceeding. The Commission's Trial Examiner, having available to him what the petitioner describes as "a staff versed in the analysis of the economic matters we have discussed" (Br., p. 83), found that M-H's pricing practices had not tended substantially to lessen competition. In so far as concerns the difference of opinion between the Commissioners themselves, there is no basis in the record or in human experience for attributing to the majority any greater "expertness" than to the minority.

sibility of such injury is insufficient to sustain a charge of violation of the Act. *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 742."

3. The court below correctly held that the Commission's findings that M-H's varying prices tended substantially to lessen competition among oil burner manufacturers were contrary to the evidence.

Underlying much of the petitioner's argument on the subject of injury to competition among oil burner manufacturers is the wholly false premise that a discrimination in price between different purchasers is unlawful (in the sense of having the defined effect upon competition) merely because the purchasers are engaged in competition one with the other (see, *e.g.,* Br., pp. 30, 56-59, 65-67).

If that premise were sound, then further argument on this phase of the case would be futile; for it is an undisputed fact that M-H has sold its temperature controls at different prices to different purchasers who were engaged in competition among themselves in the sale of oil burners.

By the same token, however, if the premise is false, a large part of the petitioner's carefully constructed argument collapses completely; for if the fact that purchasers are in competition with one another does not necessarily involve, as a matter of law, the probability of injury to competition, then the petitioner's charge of illegality is not established merely by pointing out the obvious fact that any price discrimination (whether lawful or unlawful) benefits the recipient of the lower price (*e.g.,* Br., pp. 31, 48, 65, 66, 70, 73, 74).

The language of the Act is wholly inconsistent with the construction placed upon it by the petitioner. If it had been

the intent of the Congress to prohibit all price discriminations among competitive purchasers (other than discriminations justified by cost savings or by the seller's competition) that intent could and would have been expressed in the Act. Instead, the Act expressly restricts its prohibition to a situation

> "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition . . ."

There could not, of course, be any injury to competition among purchasers unless such purchasers are in fact in competition with each other; but to argue, as the Commission does (Br., pp. 58-59), that the mere existence of competition among purchasers precludes a seller from lawfully charging different prices to such purchasers is to disregard the fact that price discrimination, to be unlawful under the Act, must tend to have the defined effect upon competition. The Commission's position is contrary to everything that this Court, or any other court, has said on the subject.

In the *Morton Salt* case, this Court interpreted the Act as authorizing the Commission "to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition" (334 U. S. at 47). The Court did not there disregard the requirement that the discrimination among competing purchasers be such as may have "the defined effect on competition". On the contrary, the Court pointed out that the findings of the Commission in that case to the effect that there was a reasonable possibility of injury to competition were supported by the evidence (334 U. S. at 47-51)—specifically, the showing that the seller's differentials in the price of table salt between purchasers who

competed in the resale of such salt were "sufficient in amount to influence their resale prices" (334 U. S. at 47).*

Indeed, in the *Morton Salt* case, the Commission itself recognized, by the proviso in its cease and desist order exempting "price differences of less than five cents per case which do not tend to lessen, injure or destroy competition", that not all price discriminations between competing purchasers necessarily involve a probability of injury to competition (334 U. S. at 53).

The Commission observes (Br., p. 56, n. 35) that there is a distinction between price discriminations which are "substantial" and those which are not substantial. Manifestly, a substantial discrimination in price will more frequently be found to have the probability of having a substantial effect upon competition than an insubstantial discrimination. But the Act does not distinguish between substantial and insubstantial discriminations; it distinguishes between those which tend to have the defined effect upon competition and those which do not. In other words, the issue is the effect upon competition and not the amount of the discrimination.

If the term "substantial discrimination" is to be understood merely as a shorthand method of denoting a discrimination which tends substantially to lessen competition, we have no quarrel with it. The difficulty with petitioner's use of the term "substantial discrimination", however, is that petitioner loses sight of its true significance and fashions arguments predicated upon the wholly erroneous notion that the word "substantial" has some absolute significance in relation to the dollar or percentage amount of the price

*Such a showing was made in the *Corn Products* case by a stipulation of the parties that the allowances in question were sufficient, if and when reflected in whole or substantial part in resale prices, to affect competition among the purchasers (324 U. S. at 742).

differential in question (see, *e.g.*, Br., pp. 30, 48) which can be translated into a mathematical formula for the determination of probable effect upon competition. Thus, petitioner argues, in effect (Br., pp. 60, 61):

> (a) This Court, by holding in the *Morton Salt* case that a discrimination in price among competing purchasers of salt which amounted to as little as 10¢ per $1.50 case (6⅔%) might have the defined effect upon competition, determined that any discrimination in price amounting to 6⅔% of the sales price of the commodity is a "substantial" discrimination which establishes, as between competing purchasers, probable injury to competition; and
>
> (b) The price differentials of M-H controls in the present case in relation to selling prices of oil burners "roughly approximate the 6⅔% discount on the salt in the *Morton Salt* case"* and therefore constitute "sub-

*Although the only differentials in respondent's prices here under attack are those for which respondent was not found to have established cost justification, the petitioner's argument that such differentials are "substantial" is formulated on the basis of differentials which are not under attack. Thus in an effort to show that the ratio between the challenged differentials in the price of controls and the prices of assembled oil burners "roughly approximates the 6⅔% discount on the salt in the *Morton Salt* case", the petitioner refers to bracket differentials of M-H in 1941 of $3.60 between brackets 1 and 5, and of $2.70 between brackets 2 and 5, and then states that such differentials amounted, in relation to 1941 oil burner prices, to from 6% to 9% and from 4.5% to 6¾%, respectively (Br., pp. 60-61). In fact, the only 1941 bracket differentials here in question are the differentials between bracket 3A and lower price brackets, differentials which ranged from 45¢ to a maximum of $1.60 (Com. Ex. 1, R. 1659). With reference to 1941 oil burner prices ranging from $114.50 to $45 (Resp. Ex. 171, R. 2141), the maximum price differential in M-H controls amounted to from 1.4% to 3⅝%. In other words, on the basis of the Commission's own mathematical approach, the ratio of the maximum price differential to the lowest selling price was approximately the same as that of the 5¢ discount exempted by the Commission itself in the *Morton Salt* case to the $1.50 selling price (3⅓%).

stantial" discriminations, which justify the Commission's order without any inquiry into the probable effect of such differentials upon competition.

Quite apart from the factual inaccuracies in petitioner's analysis of the "substantiality" of M-H's price differentials, petitioner's approach to the problem is clearly fallacious. The question to be decided is not whether the challenged price differentials can properly be described as "substantial", either in dollar amount or in terms of a percentage of sales price. The question is, rather, whether such differentials—whatever their amount—involve in fact a probability of substantial injury to competition.

If the competition in question were competition in the resale of such items as grocery store staples, generally sold at uniform competitive prices, it would hardly require extensive testimony to establish the probable effect upon such competition of price differentials even smaller than those in the *Morton Salt* case. As this Court observed in the *Corn Products* case (324 U. S. at 742):

> ". . . the price discriminations here are relatively substantial in a field where differences of a fraction of a cent in the price of candy are sufficient to divert business from one manufacturer to another . . ."

Where, however, the competition in question is competition in the sale of relatively expensive products, sold at widely varying prices, the actual or potential effect on that competition of a discrimination in the price of one of the component parts of the product remains a question of fact, to be determined upon the evidence.

The conclusion of the majority of the Commission that M-H's varying prices tended substantially to lessen competition among oil burner manufacturers purports to be based upon findings which may be summarized as follows:

(1) Differences in control prices necessarily affected oil burner manufacturers' sales and profits (FF 16, R. 2252-53; FF 22, R. 2260);

(2) Some oil burner manufacturers lost business to those of their competitors who "enjoyed" lower control prices from M-H (FF 16, R. 2253; FF 22, R. 2260); and

(3) Since oil burner manufacturers who paid lower prices for M-H's controls had an advantage in selling oil burners equipped with such controls in competition with other oil burner manufacturers who paid M-H's higher prices, those who paid such higher prices (FF 18, R. 2255)

> ". . . must either sell at competitive prices and, in so doing, reduce their possible profits by the amounts of discriminations against them or attempt to sell at higher prices than those which the favored customers of respondent [M-H] charge for oil burners equipped with respondent's [M-H's] automatic temperature controls, with the result of inability to secure business and a reduction in the volume of their sales."

Those general findings, which form the "factual" basis of petitioner's argument on this phase of the case (Br., pp. 15, 31, 65, 66), are not supported by any evidence. The dissenting Commissioner pointed out the insufficiency of such findings when he said (R. 2280):

> "On the record I believe it to be impossible for the Commission to make a specific finding that the

effect of the [M-H's] discrimination was to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition. A general finding is insufficient for this purpose."

(a) There is no relationship between prices for M-H's controls and prices for oil burners equipped with such controls.

At the very outset of this proceeding, the Commission, recognizing that there is not any causal connection between prices for controls and prices for oil burners, stipulated as follows (Com. Ex. 1, R. 1661):

> "Some manufacturers paying higher prices for respondent's [M-H's] automatic temperature controls were able to, and often did, sell their oil burners complete with controls at prices below those which other similar manufacturers paying lower prices for respondent's [M-H's] automatic temperature controls sold their oil burners.
>
> "Some manufacturers paying lower prices for respondent's [M-H's] automatic temperature controls were able to, and often did, sell their oil burners complete with controls at prices below those which other similar manufacturers paying higher prices for respondent's [M-H's] automatic temperature controls sold their oil burners."

That the prices of oil burners did not depend upon the prices paid for controls is conclusively proved by the histories of two relatively new members of the oil burner industry, Quiet Heet Mfg. Co. and Aldrich Company. Although paying the highest prices for M-H's controls when they started in business, Quiet Heet and Aldrich were able to compete effectively with larger, well-established con-

cerns who were then getting M-H's lowest prices. At the time of the hearings before the Trial Examiner, Quiet Heet and Aldrich had become the largest oil burner manufacturers in the industry (R. 574).

Quiet Heet started selling oil burners in 1936, at which time it was paying M-H's highest price for controls. Despite that fact, it was able to sell the lowest priced burner on the market, thus underselling the so-called "old line or pioneer manufacturers" (R. 554; Resp. Ex. 185-E, R. 2164). By 1941, Quiet Heet was selling 25,000 oil burners a year and had the largest sales volume of any oil burner manufacturer in the industry (R. 496).

Aldrich Company started manufacturing oil burners in 1935 (R. 1057), and in 1936, when it first bought M-H's controls (R. 1058), paid M-H's highest price therefor (R. 1070). In 1935, Aldrich manufactured only 250 oil burners; but, by 1941, notwithstanding the competition of manufacturers who were receiving M-H's lower prices, it had increased the volume of its sales to over 20,000 oil burners annually (R. 1059). In 1941, for the first time, Aldrich received M-H's lowest price for controls (R. 1070).

Quiet Heet and Aldrich are not the only oil burner manufacturers whose experiences demonstrate the absence of relationship between control prices and oil burner prices. Several other oil burner manufacturers who, during 1941, were receiving M-H's lowest control prices (Resp. Ex. 185A-F, R. 2160-65) put out burners that were among the higher priced on the market (Automatic Burner Corp., R. 992; Petroleum Heat & Power Co., R. 1112; Williams Oil-O-Matic Heating Corp., R. 1044), while burners manufactured by concerns paying higher prices for M-H's controls

(Resp. Ex. 143, R. 2041) were selling in the lowest price field (Joseph Toker Co., R. 1135-36; Korth Oil Burner Corp., R. 1172).

The absence of relationship between control prices and burner prices is not hard to explain. Factors such as service costs, selling expenses, and other overhead items are of far greater significance in the total cost of an oil burner than is the cost of the controls with which it is equipped (R. 952-53, 997, 1044-45, 1087, 1111-12, 1146-48, 2313).

The absence of any relationship between control prices and oil burner prices is further confirmed by the results of a nation-wide survey of the prices paid by wholesalers and dealers for comparable domestic oil burners during the year 1941 (Resp. Ex. 171, R. 2133-41; R. 1266-85). That survey was made by Ross Federal Research Corporation, an independent commercial research organization which has had long experience in that type of work and whose findings have had wide acceptance (R. 1266-67). It dealt with a broad cross-section of the oil burner industry. The oil burner manufacturers, wholesalers and dealers who were interviewed in the course of the survey numbered 535 and were located in 15 different areas comprising the principal markets for domestic oil burners (R. 1268-69). The questionnaires (Resp. Ex. 172, R. 2143) and instructions (Resp. Ex. 173, R. 2144-48) used in making the survey were carefully worded so as to elicit accurate information and to insure that price comparisons were made only with respect to comparable burner units. As a further precaution, Ross requested verification of the prices reported by wholesalers and dealers from the oil burner manufacturers who supplied such wholesalers and dealers. Only price information so verified was used in formulating the

conclusions reached in the Ross Report (R. 1269-70).

The following table, which is derived from the Ross Report (Resp. Ex. 171, R. 2141), shows, for the year 1941, the range of prices charged to wholesalers for comparable oil burners by oil burner manufacturer-customers in each of M-H's price brackets:

Prices Charged Oil Burner Manufacturers by M-H for Controls		Bracket Differential Not Shown to Have Been Justified by Cost Savings	Range of Prices Charged Wholesalers by Oil Burner Manufacturers for Burners	
Bracket	Price		Low	High
1	$17.35	—	$50.00	$111.00
2	$16.45	—	45.00	96.20
3	$15.90	—	47.50	102.00
3A	$15.35	—	52.50	89.00
4	$14.90	$0.45	61.70	100.00
4A	$14.25	$1.10	55.00	101.25
5	$13.75	$1.60	45.00	114.50

The absence of any relationship between variations in M-H's control prices and oil burner prices is clearly apparent. For example, the prices charged for comparable oil burners by manufacturers who paid $17.35 to M-H for a set of controls ranged from $50 to $111, whereas the prices charged by manufacturers who paid $13.75 per set of controls ranged from $45 to $114.50. The difference in control prices paid to M-H by those two groups of customers was only $3.60, and yet the range in the prices charged by each group for oil burners amounted to over $60.

The highest price for a burner ($114.50) was charged by a manufacturer who paid M-H's *lowest* price ($13.75) for his controls. Such highest price was $69.50 more than the price charged by another manufacturer, who was paying exactly the same price for his controls, and it was also

$69.50 more than the price charged by a manufacturer who paid $2.70 *more* for his controls ($16.45).

Furthermore, it is shown that the price of the lowest priced burner sold by a manufacturer in each of four groups of customers who paid M-H $16.45, $15.90, $15.35 and $14.90, respectively, per set of controls, was $45.00, $47.50, $52.50 and $61.70, respectively. In other words, while the prices paid by such groups of manufacturers to M-H for controls *decreased* successively, the lowest prices charged by them for oil burners *increased* successively.

Thus, the Ross Report demonstrates strikingly the accuracy of the stipulation of the parties to the effect that there is not any connection between variations in M-H's control prices and the prices of oil burners.*

Taken together, the aforesaid stipulation (Com. Ex. 1, R. 1661), the overwhelming evidence from the trade itself —the oil burner manufacturers—and the Ross Report compel a conclusion directly contrary to the finding of the Commission (FF 22, R. 2260) that changes in the prices of controls result in corresponding changes in the prices of oil burners.

(b) No oil burner manufacturer lost business to a competitor because of M-H's varying prices for controls.

The Commission majority found that certain oil burner manufacturers who paid M-H higher prices for controls

*While petitioner concedes (Br., p. 19) that the Ross Report indicates "in some instances" a lack of correlation between the prices paid for controls and the selling prices of burners, it makes a point of the fact that the report "showed that in 11 of the 15 areas surveyed the lowest dealer price was given by manufacturers in respondent's lowest price bracket". Petitioner neglects to point out that also in 11 out of the 15 areas surveyed, the *highest* dealer price was charged by manufacturers in respondent's lowest price bracket.

lost business to certain of their competitors (Quiet Heet is the only one identified by name) who paid M-H lower prices for controls. That finding does not support the Commission's charge of unlawful price discrimination because the Commission, with good reason, refrained from finding any causal connection between the loss of business by such oil burner manufacturers and M-H's varying prices for controls. Thus, the Commission majority found (R. 2260):

> ". . . oil-burner manufacturers [not identified] testified that the question of price was important in the purchase of automatic temperature controls and that they had lost business to certain competitors, including Quiet-Heet, who enjoyed lower control prices from respondent [M-H], although the exact volume of such lost business could not be calculated."

While the Commission properly found that "oil burner manufacturers" [*i.e.*, some of them] lost business to Quiet Heet, *it did not find, and could not find, that they lost business because Quiet Heet paid lower control prices to M-H.* As the Trial Examiner found after an extensive review of the evidence before him (R. 2195-96), Quiet Heet's ability to take customers away from its competitors was entirely attributable to reasons that had nothing to do with the price of controls.

When, in 1936, Quiet Heet started manufacturing and selling oil burners on a small scale, it paid M-H's *highest* price for controls (R. 554). Yet within a few years, as stated above, it had become the largest oil burner manufacturer in the industry (R. 574). In 1936, the then well-established oil burner manufacturers were selling for around $95 oil burners equipped with controls for which

they paid M-H's *lowest* price (R. 556). In that year, Quiet Heet introduced on the market an oil burner, priced at $70, equipped with controls for which it paid M-H's *highest* price.

Despite its low-price policy, Quiet Heet made a profit from the time it started in business (R. 556). Samuel L. Peters, the proprietor of Quiet Heet, who was a witness for the Commission, explained how Quiet Heet, at the outset, was able to market its $70 burner at a profit, as follows (R. 556):

> "I think that was largely due to the fact that my competitors misunderstood the trend of the industry at that time, which was into volume production because the F.H.A. and a large volume building construction program had entered the picture. They still stuck to the old policy of trying to get as much as the traffic would bear out of the commodity, whereas I started out to merchandise it on a volume basis, effecting certain economies, making a few shortcuts here and there and trimming down my overhead and operating costs to the minimum."*

The "economies" and "shortcuts" effected by Quiet Heet were innovations in the oil burner industry. For example,

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*Peters testified (R. 574) that other oil burner manufacturers (especially, Aldrich, Toker and Korth)—some of them after a period of "knocking" Quiet Heet's policies—decided to work along similar lines, the result being that they became outstandingly successful. Peters commented on the oil burner industry as follows (R. 574):

> "It appears to me by studying the manufacturers in the business that there is a clearly defined line between those who made the grade and those who did not. The ones who made the grade worked along the lines that I indicated and the others just stayed where they were or folded up, or went out of the picture."

Quiet Heet, unlike other oil burner manufacturers, did not furnish any service to its dealers. Thus, Peters testified (R. 569):

> "We made up our mind that we would sell only to the competent organizations who knew enough to maintain their own service and knew how to install our equipment, so that we could eliminate entirely the item of field service which was a very costly item that was being furnished by other manufacturers who were getting much more money for the equipment."

Other examples of Quiet Heet's economies: It did only a limited amount of advertising, relying mainly on its dealers to advertise its product (R. 568, 569-70); it effected savings in connection with the packaging of its burner (R. 571); and it initiated the policy of selling for cash only, while other oil burner manufacturers sold on consignment, on open account, and used various other "costly methods of selling" (R. 573).

When in 1936, Quiet Heet reduced the going price for oil burners more than $20 *below* the price of its competitors, it was paying *more* for its controls than those competitors were (R. 554, 556). Obviously, M-H's prices to Quiet Heet for controls had nothing to do with Quiet Heet's ability to initiate its price-reduction program.

During the complaint period (1937-41), Quiet Heet paid, on the average, approximately $1.90 ($1.60 in 1941) less per set for M-H's controls than M-H's customers who received M-H's lowest cost-justified prices (Resp. Ex. 185, R. 2164; Com. Ex. 1, R. 1659). That small price advantage over some of its competitors cannot possibly explain why Quiet Heet was able to sell its burners (containing one set of controls) at a price that was eventually *$55 below*

the lowest price that prevailed for oil burners when it started in business (R. 504-505, 507, 556-57).

Peters, who was in a position to know, attributed Quiet Heet's ability to follow successfully a low-price policy to its revolutionary methods of doing business. Although he was a witness for the Commission, *he did not even mention the price of controls in connection with explaining his ability to reduce the price of oil burners* (R. 495-520; 553-76).

As will be shown by the analysis set forth below, the very evidence relied upon by the Commission (Br., pp. 71-74) establishes that no burner manufacturer lost business either to Quiet Heet or to any other competitor, or was injured in any way, because of M-H's varying control prices.

Herco Oil Burner Corporation—F. E. Herr, President of Herco, made the unsupported statement that the fact that M-H's controls cost Herco more than they did one of its competitors (Quiet Heet) made a difference in sales of Herco's oil burners in the New York territory. He stated, however, that he had no way of determining that effect "in dollars and cents" and said (R. 674):

> ". . . I wouldn't like to make a statement on that anyhow. Some business probably we could have secured but as to what volume or anything, I personally would not know."

That is not evidence of anything. Actually, the lower price paid by Quiet Heet in 1941 for M-H's controls could not have adversely affected Herco. In that year, Herco, which then equipped its burners with Mercoid controls except where customers specified M-H controls (R. 664), paid $15.90 a set for M-H's controls* (as against $13.50

*Unless otherwise indicated, prices paid by customers to M-H for controls are taken from Resp. Ex. 185, R. 2160-65 and Com. Ex. 1, R. 1659.

a set for its Mercoid controls (R. 671; Resp. Ex. 152-C, R. 2049)). In the same year, Quiet Heet paid M-H $13.75 a set for controls, the difference in favor of Quiet Heet being $2.15 per set of controls. When it came to prices at which the two concerns sold their burners, however, there was a difference of $14, Herco's price on quantity orders being $59 (R. 675; Com. Ex. 152, R. 1941) compared to Quiet Heet's price of $45 (Com. Ex. 124, R. 1871). Thus, even if Herco had paid the same price for M-H's controls that Quiet Heet did, and had reduced the price of the Herco burner accordingly, the latter would still have been almost $12 more than Quiet Heet's.

Malleable Iron Fittings Company—Malleable objected to some oil burner manufacturers being given a "price preference" over concerns like Malleable (R. 535)

> "... so that it made it more difficult for us to compete with the other burners because our prices were higher."

Again, the facts do not bear out the charge. In the year 1941, the "price preference" operating against Malleable was at most $2.15 because in that year Malleable was paying $15.90 per set of controls whereas the lowest price for a set of M-H's controls that year was $13.75, which was the price that Quiet Heet was paying. That $2.15 difference in control prices is inconsequential when contrasted with the *$45 spread* between Malleable's lowest burner price of $95 during most of that year,* and Quiet

*Effective November 1, 1941, Malleable reduced its burner prices. Its cheapest burner was then priced at $82.00 (R. 531, Com. Ex. 148, R. 1914).

Heet's burner price of $50 (R. 505, 536; Com. Ex. 144, R. 1903).

The simple fact is that Malleable was reluctant to reduce its burner prices although its competitors did so (R. 536-37), and hence did not attempt to meet the competition of other oil burner manufacturers such as Quiet Heet (R. 539).

Oil Equipment Laboratories, Inc.—This concern was another of the "old fellows" in the industry (R. 579), which found itself adversely affected when Quiet Heet went into the oil burner business and brought about a general drop in the price of oil burners (R. 586-88). While complaining that his Company never got "an equivalent break" in control prices (R. 585), H. F. Rodler, General Manager of the Company, admitted that the difference between what his Company paid for M-H's controls and what Quiet Heet paid, namely $2.65, would not have enabled his Company to meet Quiet Heet's competition (R. 582):

> ". . . $2.65 would not have made the difference necessary. It would have made part of the difference but not enough."

Petitioner refers (Br., pp. 18, 20, 72) to the Penn Boiler and Burner Company as a manufacturer which was "unable to meet competition at the prices it paid respondent for controls (R. 681)", but the testimony referred to had nothing to do with any effect of M-H's varying prices upon competition in the sale of oil burners. It related to a situation in which the Penn Boiler and Burner Company (which had standardized on Mercoid controls) and some of its dealers found it profitable, in certain markets, to sell the

low-priced Quiet Heet burner as well as the high-priced Penn burner, and to add to their profits on occasion by switching the controls with which the respective burners were equipped (R. 682). There is not a scintilla of testimony that the Penn Boiler and Burner Company lost any burner sales because of any variation in the prices of M-H controls.

That is all there is in the record for the Commission's conclusion that competition among oil burner manufacturers was lessened because of M-H's varying prices for controls, and it doesn't amount to anything.

On the other hand, all the testimony of the oil burner manufacturers who actually said anything definite on the subject was to the effect that the sales of their oil burners were not injured by the fact that some of their competitors received somewhat better prices on controls from M-H. The following are typical examples of the unequivocal testimony of such witnesses:

> "Q. Did that fact [that some of M-H's customers who purchased controls in larger volume got somewhat better prices than your Company] hurt the sale of your oil burners?
>
> "A. No, it didn't." (Jeffrey of Acme Oil Burner Co., R. 937-38.)
>
> * * * * *
>
> "Q. Now, speaking generally of your competition, Mr. Westmont, has the fact that other oil burner corporations received better prices [from M-H] because of their volume hurt the sale of your burners, to your knowledge?
>
> "A. Not a bit." (Westmont of Wisconsin Oil Burner Co., R. 999.)
>
> * * * * *

"Q. Were you aware of the fact, Mr. Bendix, that some of the Minneapolis-Honeywell's customers who purchased controls in larger volume got a somewhat better price than Electrol received?

"A. Yes.

"Q. And did that fact hurt the sale of Electrol Burners?

"A. No." (Bendix of Electrol, Inc., R. 1142.)

* * * * *

"Q. Have you been aware of the fact, Mr. Kraber, that some of the Minneapolis-Honeywell's customers purchased controls in larger volume and got a somewhat better price than your company?

"A. Yes, sir.

"Q. Did that fact hurt the sale of your oil burners?

"A. No." (Kraber of York Oil Burner Co., R. 1151.)*

The most that the Commission's evidence with respect to competition among oil burner manufacturers can be said to show is that there was one of them, Quiet Heet, which undersold competitors and thereby brought about a general lowering of oil burner prices. Indeed, according to one of Quiet Heet's competitors, Quiet Heet in one year drove the

*Petitioner's reference to the testimony of this witness (Br., p. 16, n. 16) illustrates the constancy of its effort to fashion the facts to fit its theories. Thus, in referring to the many oil burner manufacturers who testified unequivocally that competition in oil burners was not affected by M-H's variations in price, petitioner states that one of these firms "admittedly lost a customer to Quiet Heet, which received lower control prices 'because of the price' (R. 1155)". However, reference to the record shows not only that the witness did not attribute any loss of business to the price of controls, but that he did not even identify the year in which the incident occurred, so that there is no basis whatever for petitioner's statement that Quiet Heet was then receiving lower control prices from M-H.

dealer price of oil burners down $50 (R. 579), or *well over 30 times* the challenged differential in M-H's control prices to oil burner manufacturers.

The Trial Examiner summed up all the evidence on the point in his finding that (R. 2195):

> ". . . it was the cutting of its oil burner price, and not the price paid for controls by 'Quiet Heet', that was the cause of the competitive situation referred to at that time."

It is significant that Quiet Heet is the *only* oil burner manufacturer whose competition was specifically claimed by the Commission to have hurt other oil burner manufacturers. As has been shown above, even the Commission did not find Quiet Heet's advantage over its competitors attributable to the fact that it was able, eventually, to obtain M-H's lowest price. Indeed, the growth of Quiet Heet's own oil burner business, notwithstanding the fact that it started in paying M-H's highest control price, is in itself a complete answer to the charge that M-H's varying prices had the effect of lessening competition among oil burner manufacturers.

As noted by the court below (R. 2315), petitioner's argument that oil burner competition was injured as a result of M-H's varying prices involves a failure to distinguish between competition in the sale of controls and competition in the sale of oil burners. That confusion on the part of petitioner is illustrated by the statement (Br., p. 74) that M-H objected to the sale of burners with its controls at a $5 increase in price over the same burner equipped with competitive controls "presumably because this would reduce the sale of such burners". The fact is, of course, that M-H

was interested solely in the sale of its controls, and that the imposition by the oil burner manufacturer of an unwarrantedly high extra charge for a burner equipped with M-H controls as against the same burner equipped with competitive controls might well induce the purchaser of the burner to specify the competitive controls—thereby causing a loss of business to M-H in the sale of controls to the oil burner manufacturer. The distinction between competition in the sale of controls and competition in the sale of oil burners is fundamental in this case.

Throughout the complaint period (1937-41), there was the keenest kind of competition between M-H and other control manufacturers, in the course of which not only were all control prices substantially decreased, but the original difference between M-H's prices and the lower prices of its competitors was steadily reduced (see Appendix, *infra*). That difference was obviously an important factor in competition in the sale of *controls* to oil burner manufacturers.

In so far as concerns competition in the sale of *oil burners,* however, the difference between M-H's prices and the lower prices of its competitors was wholly without effect. Oil burner manufacturers generally offered their burners for sale equipped with any make of controls desired by the purchaser, either without varying the price of the burners or, in some cases where individual manufacturers had standardized on competitive controls, with the imposition of an extra charge for burners equipped with M-H controls (R. 942, 975, 364-65, 1150-51, 2242). But the record is abundantly clear that the difference in cost to the oil burner manufacturer between M-H and competitive controls had no effect whatever on competition in the sale

of oil burners. The customer of the Williams Oil-O-Matic Corporation referred to by petitioner (Br., pp. 19, 67), for example, in purchasing the Williams Burner, specified Mercoid controls rather than pay the higher price charged by that manufacturer for burners equipped with M-H controls; but the oil burner that it purchased was the *Williams* burner, not a competitive burner.

The record shows that the proposition advanced by the Commission, *i.e.*, that a difference between the price of M-H controls to one oil burner manufacturer and the price of M-H controls to another oil burner manufacturer affected or tended to affect competitive selling between the two oil burner manufacturers, cannot be supported.

(c) The question whether M-H's price differentials tend substantially to injure competition among oil burner manufacturers does not involve consideration of the independent pricing policies of sellers of other oil burner equipment.

Petitioner's final argument on this phase of the case is that even if M-H's differentials in control prices may not by themselves substantially affect competition in the sale of oil burners, nevertheless, if the aggregate effect of price discriminations by all suppliers of oil burner parts and equipment is to create a tendency to injure competition in the sale of oil burners, then each seller who contributes to the aggregate cost advantage of the favored customer is responsible for the aggregate competitive result (Br., pp. 20-21, 30-31, 61-63).

That argument cannot withstand analysis.

In the first place, the price of oil burners is not determined merely on the basis of the aggregate cost of compo-

nent parts; costs of assembly, overhead, sales, installation and service are of far greater significance (R. 952-53, 997, 1044-45, 1087, 1111-12, 1146-48).

In the second place, the Act prohibits a discrimination in price only "where the effect of *such discrimination* may be substantially to lessen competition", etc. It does not, and could not properly, impose a test of legality based upon the effects of *other* price discriminations by *other* persons, acting independently of the seller whose discriminatory price is under attack.

In any event, the record in the present case is barren of evidence, and there are no findings, as to the effect upon competition in the oil burner industry of any discriminations in the prices of other parts or equipment. It is, therefore, a matter of speculation as to whether any such discriminations exist, and, if they do, whether they have in fact resulted in the probability of injury to competition in the sale of oil burners. If it were to be assumed that each price differential was lawful in and of itself, then it remains lawful notwithstanding the aggregate effect. Conversely, if suppliers of other parts are guilty of illegal discrimination, that illegality cannot be imputed to a seller whose independent price differential is lawful.

Petitioner's suggestion (Br., p. 63) that there is an analogy between supplying temperature controls for oil burners and supplying individual commodities for resale in a grocery store is wholly without merit. It is, of course, no answer to a charge of injury to competition in the sale of table salt to say that the purchasers affected by discriminatory salt prices are able to compete freely in the sale of other commodities. But this simply answers an argument that we have not made and do not make. There is no con-

tention in the present case that a probable injury to competition in the sale of oil burners would be saved from illegality by the fact that the ability of oil burner sellers to compete in the sale of other heating equipment was not affected. *Our point is that the practices complained of do not involve any probability of injury to competition in the sale of oil burners themselves.*

4. The court below correctly held that the Commission's finding that M-H's varying prices tended substantially to lessen competition among control manufacturers was contrary to the evidence.

At the root of the disagreement between the majority of the Commission and the Trial Examiner on the issue whether M-H's varying prices tended to injure competition lie the erroneous theories of the majority of the Commission that

> (1) a seller, by meeting competition, causes "injury" to competition; and
>
> (2) a seller's showing that the lower of his varying prices were made in good faith to meet the equally low prices of his competitors does not constitute a defense to a charge of unlawful price discrimination, but, on the contrary, in some mysterious way, affords irrebuttable proof of "injury" to competition—and hence *conclusively establishes* the Commission's charge of unlawful price discrimination.

Those theories were announced by the majority of the Commission for the first time in the *Standard Oil* case.*

*41 F. T. C. 263, 270 *et seq.* (1945); order modified, Commissioner Mason dissenting, 43 F. T. C. 56, 59 (1946); ***reversed,*** *sub nom. Standard Oil Co. v. Federal Trade Commission,* 340 U. S. 231 (1951).

Illustrative of the Commission's position in that case is the following excerpt from its findings:

> "Based on the record in this case the Commission concludes as a matter of law that it is not material whether the discriminations in price granted by the respondent to the said four dealers were made to meet equally low prices of competitors. . . . Accordingly the Commission does not attempt to find the facts regarding those matters because, even though the lower prices in question may have been made by respondent in good faith to meet the lower prices of competitors, this does not constitute a defense in the face of affirmative proof that the effect of the discrimination was to injure, destroy and prevent competition with the retail stations operated by the said named dealers and with stations operated by their retailer-customers." (*In the Matter of Standard Oil Co.*, 41 F. T. C. at 281-82)

The Commission's decision in the *Standard Oil* case in 1945, which was not reversed by this Court until January, 1951, served as a precedent, so far as the Commission was concerned, for its decision in January, 1948, in the instant case.

The Commission was clearly following its erroneous reasoning in the *Standard Oil* case when it found, in the instant case, that M-H's "price discriminations" had diverted trade to M-H from its competitors and, therefore, had had a "substantial injurious effect upon competition" in the sale and distribution of controls (FF 19, R. 2256). That finding was amplified and explained by the Commission in its opinion (R. 2273), as follows:

> "The competitive effects of respondent's [M-H's] discriminatory prices on other manufacturers of controls are persuasively indicated by its own argu-

> ments that its discriminatory prices were made for the purpose of meeting competition. These arguments show that respondent's [M-H's] discriminatory prices were made to retain the business of certain customers or to secure the business of others and that they were largely successful in doing so. To the extent that business is held by or diverted to respondent [M-H] from its competitors by its discriminatory prices and unfair practices, competition has been adversely affected within the meaning of the law . . .".

Obviously, if M-H were to be prohibited from trying to divert trade from its competitors (*i.e.,* Mercoid, Penn and Perfex), it would be prohibited from competing with them. Such a result is not only not required by the Clayton Act, but is wholly inconsistent with the attainment of the objectives of the anti-trust laws, namely, the promotion and protection of free competition.

It is apparent that in reaching the conclusion set forth above, the majority of the Commission refused to give any application whatever to the "meeting competition" proviso of Section 2(b) of the Act. On the contrary, it found that when M-H made its showing under Section 2(b), *i.e.*, that it had lowered its prices in good faith to meet competition, it thereby proved injury to competition, and hence a violation of the Act.

The Commission's paradoxical theories with respect to Section 2(b) were rejected by this Court in the *Standard Oil* case, where it was held that the natural consequences of meeting competition in good faith do not constitute the kind of "injury to" or "lessening of" competition to which Section 2 of the Clayton Act refers (340 U. S. at 249-50).

Since this Court's decision in the *Standard Oil* case, it has been clear that if a seller sustains his burden of proof under Section 2(b) of the Act by showing that the lower of his varying prices were made in good faith to meet the equally low prices of his competitors, the defense thus established to a charge of unlawful price discrimination is not to be invalidated

(a) because the seller succeeds in securing or retaining, as against his competitors, business he would otherwise have lost;

(b) because the seller's customers who receive the seller's lower prices obtain a price advantage over their competitors who are also customers of the seller; or

(c) because the seller's customers pass along such price advantage to *their* customers, thus affecting (and, according to the Commission, "injuring") competition at the resale level.

It follows that the Commission erred when it held that competition was injured when M-H, in order to meet competition, reduced some of its prices below its other prices in order "to retain the business of certain customers or to secure business of others" (R. 2273). The extent of the Commission's error is fully apparent only when viewed in the light of the Commission's own statement that ". . . . no instance is shown in which respondent actually undercut competitors' prices" (R. 2272).* Then it becomes clear that the

*The fact is, as was recognized by the dissenting Commissioner, that M-H, pressed by competition and losing substantial amounts of business, "in good faith and what appears to be only ordinary common sense, *brought its prices down closer to the level of its competitors*" (R. 2278) [Emphasis supplied.]

"substantial injurious effect upon competition" of which the Commission complains (FF 19, R. 2256) is that M-H allegedly diverted business from its competitors by selling at prices that were *always higher* than those of its competitors! The fundamental error on the part of the majority of the Commission in finding "injury to competition" under such circumstances pervaded its entire decision.

The Commission majority's finding (FF 19, R. 2256) that M-H's varying prices "have tended to, and do, divert trade to the respondent [M-H] from its competitors and have had a substantial injurious effect upon competition", in addition to being wrong as a matter of law, is not supported by the record. As recognized by the court below (R. 2312), the evidence fully establishes the contrary. Thus, it was not disputed

(a) that throughout the complaint period there existed the keenest kind of price competition among control manufacturers (R. 77, 749, 801, 1295-96, 2192-93, FF 2, R. 2241);

(b) that the total business of M-H's competitors increased, and that the three new concerns which entered the industry after 1932 enjoyed a steady growth in sales volume (Penn—R. 798, 826; Perfex—R. 222, 231-32; Detriot—R. 418-21);

(c) that M-H's proportion of sales of controls for oil burners of the pressure and rotary type was reduced from 73% in 1937-1938 to 60%* in 1941 (R. 876-77) and its proportion of total sales of controls for all oil burners constituted only 25% in 1941 (Com. Ex. 1, R. 1645);

*See footnote at p. 8, *supra*.

(d) that the prices charged for controls by M-H's competitors were generally lower than those of M-H and that there is no evidence of any undercutting of its competitors' prices by M-H (FF 5, R. 2242; R. 2203, 2272);

(e) that in 1941 M-H lost to its competitors 53% of the control business of 31 customers who previously had used principally M-H's controls (R. 964); and

(f) that in that same year, 126 of M-H's other oil burner manufacturer-customers also purchased competitive controls (R. 963).

In attempting to support the Commission's finding, counsel for the Commission ignore all of those facts and rely upon fragmentary testimony to the effect that M-H, from time to time, was able to take business away from its competitors (Br., pp. 22-23, 77-79)*. In placing reliance upon such testimony, which merely confirms that control manufacturers were engaged in active competition, it is necessary for the Commission to disregard the evidence that M-H's competitors were taking substantial amounts of business from M-H, as shown above, and the finding of the Commission (FF 5, R. 2242; 2272) that M-H *never* undercut the prices of its competitors, but *always* sold at a premium price.

As the court below said (R. 2312):

"... M-H was entitled to meet the competition built up in its field, and even if it did succeed in re-

*It is far from clear from such testimony that M-H's ability to get the business in those isolated instances had anything whatever to do with the prices of M-H's controls.

taining or diverting some business which might otherwise have gone to some of its competitors, where those competitors were able to enter its field and build thriving businesses in spite of M-H's commanding position and alleged wrongful practices, we think it cannot be said that the effect of those practices was substantially to injure competition. . . ."

That the Commission's position with respect to injury to competition among control manufacturers is wholly theoretical and divorced from reality is demonstrated by the fact that, in support of that position, petitioner is forced to place its primary reliance upon the argument that the "inevitable tendency of the system would be to encourage burner manufacturers to concentrate their purchases in respondent as their single source of supply" (Br., pp. 32, 50, 75-77). Whatever might be said for that argument if we were dealing with abstract theories, in a factual vacuum, it has no basis whatever in the facts of this case, as was determined by the Trial Examiner (R. 2193-94, 2202-03) and the Court of Appeals (R. 2312-13).

In view of the overwhelming evidence summarized above and of the absence of *any* testimony to show that the differences in M-H's prices tended to lessen competition among M-H and its competitors, the court below was amply justified in holding that the Commission's finding of injury to such competition was not supported by substantial evidence.

II

THE QUESTION WHETHER THE LOWER OF M-H'S VARYING PRICES WERE MADE IN GOOD FAITH TO MEET COMPETITION IS NOT NOW BEFORE THIS COURT FOR CONSIDERATION.

In addition to its attack upon the decision of the court below that M-H's varying prices did not tend substantially to injure competition, petitioner also urges in its brief (pp. 2, 3, 7, 33, 89-95) that this Court should now determine that the lower of M-H's varying prices were not made in good faith to meet competition—a question which the court below expressly stated it did not reach (R. 2315).

If, as we believe we have demonstrated, the decision of the court below was correct, then there is not any occasion for this Court to consider M-H's additional contention in the court below that the lower of its varying prices were made in good faith to meet competition and, accordingly, that it had established a separate and complete defense, under Section 2(b) of the Act, to the charge of unlawful price discrimination. *Standard Oil Company* v. *Federal Trade Commission*, 340 U. S. 231 (1951).

If, however, this Court were to reach a conclusion different from that of the court below on the facts with respect to the probability of injury to competition from M-H's varying prices, the separate question as to whether the lower of such varying prices were made in good faith to meet competition would not be before this Court for consideration.

In its petition for a writ of certiorari, the Commission sought review of two questions and two questions only (Petition, p. 2):

(1) whether in a proceeding involving a charge of unlawful price discrimination under Section 2(a) of the Clayton Act, a finding by the Commission of injury to competition among a seller's customers is adequately supported by evidence showing that substantial price differentials have been given to competing customers; and

(2) whether the court below properly applied the standards of *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951), in holding that the Commission erred in its findings.

Rule 38, par. 2, of the Rules of this Court provides that

> ". . . Only the questions specifically brought forward by the petition for writ of certiorari will be considered. . . ."

And it has been repeatedly held that, upon a review by certiorari, this Court confines its consideration to the matter relied on in procuring the writ, except in extraordinary cases. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242 (1918). And see *United States* v. *Penn Foundry & Mfg. Co.*, 337 U. S. 198, 205 (1949); *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 48 (1947). Nor is "a mere reference in a petition for certiorari to a ruling, without a request for review" sufficient to justify its consideration. *Conn. Railway & Lighting Co.* v. *Palmer*, 305 U. S. 493, 496-[illegible] (1939).

Furthermore, quite apart from the fact that the Commission did not, in its petition for a writ of certiorari, raise the "meeting competition" issue, the court below did not reach and did not decide that issue; and it is well settled

that this Court will not, save in extraordinary cases, consider a question urged by a petitioner which was not passed upon in the courts below. *McGoldrick* v. *Campagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940); *Aetna Casualty & Surety Company* v. *Flowers*, 330 U. S. 464, 468 (1947).

In the only two cases relied on by petitioner in support of its position that the question should be considered here [*Kiefer-Stewart Co.* v. *Joseph Seagram & Sons*, 340 U. S. 211, 214 (1951); *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 473-74 (1947)], the *respondent* raised the new matter not passed upon by the court below; the new matter raised "only issues of law not calling for examination or appraisal of evidence . . ." (340 U. S. at 214); and the facts pertinent to the new issue were "not seriously disputed . . ." (330 U. S. at 474). This case is entirely different. Here, *petitioner* seeks to raise the question not decided by the court below, and numerous questions of fact are unresolved.

If it were open to us to urge in this Court the defense of meeting competiton under Section 2(b) of the Act, that defense would afford a separate and independent ground for affirmance of the judgment of the court below.* M-H's prices have been determined each year so as to meet the competitive conditions that have always existed in the control industry (R. 916-17, 1022-30). Information as to prices charged by M-H's competitors was constantly being obtained, and prices were arrived at largely on the basis of

*Contrary to petitioner's assertion (Br., pp. 7, 14, 95), M-H's evidence with respect to meeting competition related to all price differences under attack, as set forth in M-H's brief in the court below, at pages 44-54.

such information (R. 1021-22). Like its competitors, M-H has found that competitive conditions in the industry change continually and that it is, therefore, necessary to change prices to conform to such conditions (R. 916). Indeed, in every year during the complaint period (1937-41), M-H changed all of its prices (Com. Ex. 1; R. 1659).

This Court has, however, made it clear that the sufficiency of a showing of good faith meeting of competition is a factual problem to be resolved in each case. Thus in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945), this Court was explicit in pointing out that the change in the language of Section 2(b) effected by the Robinson-Patman Act

> ". . . was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination" (324 U. S. at 752-53).

And in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 (1951), this Court again pointed out that the meeting-competition defenses failed in both *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726 (1945), and in the *Staley* case because of the "insufficiency of the seller's evidence to establish its defense . . ." (340 U. S. at 243). These factual disputes—a resolution of which has consistently been held to be an indispensable ingredient in passing upon the sufficiency in law of a meeting-competition defense—have not been reviewed by the court below in the present case.

Petitioner urges (Br., pp. 7, 33, 89-95) that the *Staley* case stands for the proposition that, as a matter of law,

the defense afforded by Section 2(b) of the Act is not available as justification for a "general system of competition." In the *Staley* case, however, this Court held that the defense of good faith meeting of the lower price of a competitor was not available as a justification of the basing-point method of pricing used in that case, not because every pricing "system" involving price differentials is unlawful *per se*, but because the Court determined on the facts that the system there in question necessarily involved discriminatory prices meeting the *higher* prices of a competitor, as to which Section 2(b) of the Act did not afford any defense (324 U. S. at 754-56). As this Court said (324 U. S. at 756):

> "The Commission's conclusion seems inescapable that respondents' discriminations, such as those between purchasers in Chicago and Decatur, were established not to meet equally low Chicago prices of competitors there, but in order to establish elsewhere the artificially high prices whose discriminatory effect permeates respondents' entire pricing system . . ."

The pricing practices complained of in the instant case do not involve either the basing-point method of pricing or any other "system" open to attack on similar grounds. On the contrary, the record shows, and the Trial Examiner found (R. 2203), that in M-H's price brackets here under attack, M-H's prices have been made to meet the lower price competition of competitors.

Accordingly, the question whether M-H has sustained its separate defense that the lower of its varying prices were made in good faith to meet competition is not now before this Court for consideration.

CONCLUSION.

The judgment of the court below reversing Part III of the Commission's order and dismissing Count III of the complaint should be affirmed.

Respectfully submitted,

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Of Counsel.

October 8, 1952.

APPENDIX

Comparison of Prices Extended by M-H and Its Competitors to the 88 Oil Burner Manufacturers Referred to in the Commission's Case

M-H's Prices*	Range of Competitive Prices**		Lowest Competitive Price
1937			
Bracket 1—$23.85	Penn	$19.74–21.08	$17.10
	Perfex	19.80–20.65	
	Mercoid	17.10–18.95	
Bracket 2—$22.60	Penn	$17.25–21.08	$16.60
	Perfex	18.60–19.80	
	Mercoid	16.60–17.85	
Bracket 3—$21.30	Penn	$15.73–21.08	$15.00
	Perfex	17.15–18.65	
	Mercoid	15.00–18.20	
Bracket 4—$19.85	Penn	$17.25	$16.15
	Perfex	No sales	
	Mercoid	16.15–16.60	
Bracket 5—$17.85	Penn	$17.25	$14.25
	Perfex	14.25	
	Mercoid	14.70–16.15	
Bracket 6—$16.55	Penn	No sales	$15.00
	Perfex	No sales	
	Mercoid	$15.00	
1938			
Bracket 1—$21.05	Penn	$16.85–19.25	$14.65
	Perfex	18.40–20.75	
	Mercoid	14.65–17.25	
Bracket 2—$19.35	Penn	$15.15–19.25	$15.15
	Perfex	17.15–18.40	
	Mercoid	15.50–16.25	

*For derivation of M-H's prices, see Com. Ex. 1, R. 1659 and Resp. Ex. 185, R. 2160-65.

**For derivation of competitive prices, see Resp. Ex. 182, R. 2159 (Penn); Resp. Exs. 23, 43 and 70, R. 2009-11 (Perfex); Resp. Exs. 73-78, R. 2013-19; Resp. Ex. 149-C, R. 2046; Resp. Ex. 152A-E, R. 2047-51; Resp. Ex. 153, R. 2052-2102; Resp. Exs. 155-167, R. 2103-31; and R. 1292, 1305, 1311-12 (Mercoid).

M-H's Prices	Range of Competitive Prices		Lowest Competitive Price
Bracket 3—$18.35	Penn	$16.75–18.25	$14.65
	Perfex	15.55–17.65	
	Mercoid	14.65	
Bracket 4—$17.25	Penn	$16.85	$14.65
	Perfex	16.05–17.15	
	Mercoid	14.65	
Bracket 5—$16.25	Penn	$14.53	$13.95
	Perfex	13.95	
	Mercoid	14.65	
1939			
Bracket 1—$18.10	Penn	$16.55	$14.65
	Perfex	16.95	
	Mercoid	14.65–16.25	
Bracket 2—$17.25	Penn	$14.65–17.30	$13.50
	Perfex	13.50–16.95	
	Mercoid	14.65–15.60	
Bracket 3—$16.65	Penn	$17.30–19.25	$13.00
	Perfex	14.65–16.20	
	Mercoid	13.00–15.20	
Bracket 4—$15.95	Penn	$15.85	$13.00
	Perfex	14.65–15.70	
	Mercoid	13.00–14.65	
Bracket 5—$14.90	Penn	$14.65	$13.00
	Perfex	13.50	
	Mercoid	13.00–14.65	
1940			
Bracket 1—$18.10	Penn	No sales	$14.80
	Perfex	$16.35	
	Mercoid	14.80–15.45	
Bracket 2—$17.25	Penn	$15.80–17.30	$14.20
	Perfex	No sales	
	Mercoid	14.20–15.45	
Bracket 3—$16.65	Penn	$15.80	$13.05
	Perfex	13.05–16.35	
	Mercoid	13.50–14.80	
Bracket 3A—$16.25	Penn	$15.15	$13.50
	Perfex	15.15	
	Mercoid	13.50–14.20	

M-H's Prices	Range of Competitive Prices		Lowest Competitive Price
Bracket 4—$15.85	Penn	$15.15–15.30	$13.50
	Perfex	14.15	
	Mercoid	13.50–14.20	
Bracket 4A—$15.15	No comparable competitive prices available*		
Bracket 5—$14.65	Penn	$14.30–17.30	$13.05
	Perfex	13.05–13.70	
	Mercoid	13.50	
1941			
Bracket 1—$17.35	Penn	$16.35–17.30	$13.70
	Perfex	16.35	
	Mercoid	13.70–15.75	
Bracket 2—$16.45	Penn	No sales	$13.70
	Perfex	No sales	
	Mercoid	$13.70–15.15	
Bracket 3—$15.90	Penn	$15.55–16.35	$13.05
	Perfex	13.05–16.35	
	Mercoid	13.50–15.45	
Bracket 3A—$15.35	Penn	$14.90	$13.70
	Perfex	13.70	
	Mercoid	13.70–14.90	
Bracket 4—$14.90	Penn	$14.90–15.55	$13.70
	Perfex	13.70–15.00	
	Mercoid	13.70	
Bracket 4A—$14.25	Penn	No sales	$13.50
	Perfex	No sales	
	Mercoid	$13.50	
Bracket 5—$13.75	Penn	$13.30–14.90	$13.05
	Perfex	13.05–13.70	
	Mercoid	13.50–13.70	

*None of the 88 oil burner manufacturers fell within M-H's bracket 4A for the year 1940 (Resp. Ex. 185, R. 2160-65).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 11

FEDERAL TRADE COMMISSION,
Petitioner,

v.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT ON JURISDICTION

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October 8, 1952.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

FEDERAL TRADE COMMISSION, *Petitioner,* *v.* MINNEAPOLIS-HONEYWELL REGULATOR COMPANY, *Respondent.*	No. 11

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT ON JURISDICTION*

Judgment Below

The judgment of the Court of Appeals for the Seventh Circuit, entered in favor of respondent (M-H),* on July 5, 1951, and the opinion of the Court of Appeals (reported at 191 F. 2d 786) upon which such judgment was based, appear in the printed transcript of record, respectively, at pages 2316 and 2308-2315. The decree of the Court of Appeals entered on September 18, 1951, in favor of petitioner appears in the printed transcript of record at pages 2316-2319.

*Respondent has filed a separate brief on the merits.

Jurisdiction

In opposing the petition for a writ of certiorari herein, M-H invited the attention of the Court to the matter of the timeliness of the application for a writ. The petition having been filed on December 14, 1951, more than 90 days had elapsed since the entry, on July 5, 1951, of the judgment which, in reality, is the judgment here sought to be reviewed. Accordingly, it was argued that this Court was without jurisdiction under the Judicial Code [Title 28, United States Code, § 2101(c)] to entertain the application.

In its order of March 3, 1952 (342 U. S. 940), in which a writ of certiorari herein was granted, this Court specifically requested counsel to discuss in briefs and on oral argument the question raised as to the timeliness of the application, thereby preserving the issue of jurisdiction for its further consideration.

Statutes Involved

The issue thus raised is to be determined with reference to Sections 1254(1), 2101(c) and 452 of the Judicial Code and Rules 20, 22 and 30 of the Rules of the Court of Appeals for the Seventh Circuit. The relevant portions of those Sections and Rules are as follows:

Section 1254:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Section 2101:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Section 452:

". . .

"The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."

Rule 20:

"*Opinions of the court.*—All opinions released by the court shall, on the same day, be handed to the Clerk to be filed, and a copy thereof mailed to counsel for each party. In all cases except that of a decree enforcing the order of an administrative tribunal, judgment shall be entered on the date the opinion is filed."

Rule 22:

"*Rehearing.*—Printed petition for rehearing may be filed within 15 days after entry of judgment. Three copies of such petition shall be served forthwith by the clerk of this court upon the opposing party, who within 10 days from such service may file a printed answer, three copies of which shall be served on the opposing party, and the petition shall be determined without oral argument unless otherwise ordered. Thirty copies of such petition and answer shall be filed with the clerk of this court."

Rule 30:

> *"Decrees enforcing orders of administrative tribunals.*—When an opinion of this court is filed directing the entry of a decree enforcing the order of an administrative agency, board or commission, the agency, board or commission concerned shall within ten days serve upon the adverse party and file with the clerk of this court a proposed decree in conformity with the opinion. If the adverse party objects to the proposed decree as not being in conformity with the opinion, he shall within five days after receiving a copy of the decree proposed, serve upon the agency, board or commission concerned and file with the clerk of this court a suggested decree deemed to be in conformity with the opinion. The court will thereupon settle and enter the decree without further hearing or argument."

Question Presented

Was the time of petitioner within which to apply for a writ of certiorari extended as to the issue fully and finally determined by the judgment of July 5, 1951, merely because the Court of Appeals later entered a decree which incidentally reiterated its July 5 judgment, but which was admittedly entered for the sole purpose of formally disposing of certain totally unrelated issues not now, or even then, in controversy?

Summary of Argument

The only contested issue before the Court of Appeals related to Part III of the Federal Trade Commission order. That issue, involving allegations of unlawful price discrimi-

nation under the Robinson-Patman Act, was fully and finally decided on July 5, 1951, when the Court of Appeals handed down its opinion reversing Part III of the order and dismissing Count III of the complaint. On the same day, pursuant to Rule 20 of the Court of Appeals Rules, judgment was entered in accordance with such opinion.

The judgment so entered made complete disposition of the only issue of which review is now sought.

On September 18, 1951, a further decree was entered by the Court of Appeals at the request of the Commission. Although that decree incidentally reiterated the July 5 judgment, its only purpose, even as argued by the Commission, was to affirm and enforce Parts I and II of the Commission's order (involving alleged violations of the Federal Trade Commission Act and of the "tying clause" provisions of the Clayton Act). The Commission specifically did not seek any further action as to Part III, which it recognized as having been finally disposed of by the July 5 judgment. Since M-H two years before had expressly abandoned its contest of Parts I and II of the order, the entry of a decree thereon was at best only a formality. In any event the decree so entered did not modify, and did not purport to modify, the July 5 judgment.*

After entry of the July 5 judgment, which finally determined the only contested issue before the Court of Appeals, the Commission had 90 days within which to seek a review by this Court [Title 28, United States Code, §2101(c)], and that period was not enlarged by the subsequent decree entered solely to dispose formally of certain unrelated and

*There is no difference in substance between the July 5 judgment as originally entered and as subsequently reiterated as part of the September 18 decree.

uncontested matters presented in the same litigation. *Toledo Scale Company* v. *Computing Scale Company*, 261 U. S. 399, 418 (1923); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942); see also *Dickinson* v. *Petroleum Conversion Corporation*, 338 U. S. 507 (1950). Since the petition for a writ of certiorari was not filed until December 14, 1951, this Court is without jurisdiction to consider the decision of the Court of Appeals as to Part III of the Commission's order. To continue the allowance of a writ of certiorari under such circumstances would be to nullify the clear meaning of the statute.

The application for review having been untimely, the writ should be dismissed.

Statement of the Facts

The Complaint. The proceeding before the Commission was instituted by the service upon M-H of a complaint dated February 23, 1943 (R. 2-11). Such complaint was in three counts, and it is important to note—as the Commission does in its brief (p. 5)—that the several counts against M-H are separate and distinct, each involving a different statute, different charges, different evidence and different cease and desist provisions. Thus, Count I of the complaint, charging violation of Section 5 of the Federal Trade Commission Act, alleged that M-H had misused certain patents of which it was the owner or under which it was an exclusive licensee. Various other allegations of Count I relating to certain exclusive dealing contracts entered into by M-H and its customers were restated in Count II as being violative of Section 3 of the Clayton Act. Count III, on the other hand, alleged violation of Section 2(a) of the

Clayton Act, as amended by the Robinson-Patman Act, and was concerned only with discriminations in price which the Commission alleged to be unlawful under that Act, as amended. It is perfectly evident that the charge under Count III alleging unlawful price discrimination was totally unrelated to, and had nothing whatsoever to do with, the charges under Counts I and II of the complaint.

The Decisions Below. On February 21, 1946, at the conclusion of extended hearings, the Trial Examiner filed his report recommending that a cease and desist order be issued as to Counts I and II but that the charges under Count III be dismissed (R. 2166-2203). On January 14, 1948, after the matter had been briefed and argued before the Commission, an order to cease and desist was issued with respect to all three Counts, that order being divided into Parts I, II and III to correspond with the three Counts of the complaint (R. 2262-2265). In making that order, the majority of the Commission, one commissioner dissenting, declined to follow the recommendation of the Trial Examiner that Count III be dismissed (R. 2265-2282).

Contest of Parts I and II abandoned by M-H. On March 11, 1948, M-H filed in the Court of Appeals for the Seventh Circuit its petition to review the Commission's order (R. 2283-2289). However, to the extent that it sought review of Parts I and II of the order, such petition was expressly abandoned by M-H in its brief filed in the Court of Appeals on July 18, 1949, in which M-H advised the Court that Parts I and II of the order were no longer challenged and that *its argument in support of the petition would be addressed only to Part III.* As was specifically stated in that brief (p. 1):

> "The remainder of the Order is not here challenged."

Indeed, the absence of any issue as to Parts I and II was clearly recognized by the Commision in its brief filed on December 13, 1949, in which it stated (p. 27):

> "... All of the alleged errors relating to the Commission's findings as to the facts and its order to cease and desist made under Count I and Count II of the complaint have been abandoned by petitioner, and in its brief petitioner argues only as to the alleged errors relating to the Commission's findings and order entered under Count III of the complaint."

No argument with respect to Parts I and II of the order was ever made to the Court of Appeals either by M-H or by the Commission in any later briefs or on oral argument of the cause.*

The July 5 Judgment. On July 5, 1951, the Court of Appeals rendered its opinion (R. 2308-2315). After stating that the Commission's order was in three parts, the opinion continues (R. 2308):

> "... Since M-H does not challenge Parts I and II of the order based on the first two counts of the complaint we shall make no further reference to them."

The only issue then remaining for decision related to Part III of the order, and as to that issue the Court of Appeals unanimously held that the Commission must be reversed, saying (R. 2315):

---

*The Court of Appeals, on January 21, 1950, deferred oral argument until after the decision by this Court in *Standard Oil Company* v. *Federal Trade Commission* (No. 1, October Term, 1950). After that decision had been handed down [340 U. S. 231 (1951)], the parties filed new briefs. In its substitute brief of March 15, 1951, M-H again declared (p. 1) that it did not challenge Parts I and II of the order.

> "Part III of the order must be reversed and Count III of the complaint upon which it is based, dismissed. It is so ordered."

Copies of the opinion were mailed to counsel for the parties on the day the opinion was filed.

Also on July 5, 1951, pursuant to Rule 20 of the Court of Appeals Rules, judgment was entered in accordance with the Court's opinion of that day. The complete text of such judgment is (R. 2316):

> "This cause came on to be heard on the transcript of the record from the Federal Trade Commission and was argued by counsel.
>
> "On consideration whereof, it is ordered and adjudged by this Court that Part III of the decision of the Federal Trade Commission entered in this cause on January 14, 1948, be, and the same is hereby, Reversed, and Count III of the Complaint upon which it is based be, and the same is hereby Dismissed."

On August 6, 1951, a certified copy of the judgment was sent to the Commission, in lieu of mandate, the forwarding letter stating:

> "Enclosed herewith please find a certified copy of the decree of this Court entered in this cause on July 5, 1951.
>
> "Kindly acknowledge receipt of the same and oblige.
>
> Yours truly,
>
> [/s/ W. P. McCary]
> Deputy Clerk"

The Commission replied on August 8, 1951, as follows:

> "Receipt is acknowledged of your letter of August 6, 1951, enclosing certified copy of the decree entered in the above entitled matter on July 5, 1951.
>
> Very truly yours,
>
> (Signed) D. C. Daniel
> D. C. Daniel,
> Secretary."

A certified copy of each of such letters has been filed with the Clerk of this Court.

The September 18 decree. On August 21, 1951, the Commission presented to the Court of Appeals a memorandum* in support of a proposed decree which it sought to have entered affirming and enforcing Parts I and II of its order. That memorandum, after stating at the outset (par. 1) that Part III had already been disposed of by the July 5 judgment, went on to point out:

> (a) that Parts I and II of the order were unrelated to Part III (par. 2);
>
> (b) that M-H had previously abandoned its contest of Parts I and II (par. 11); and
>
> (c) that the Commission was accordingly entitled to a decree affirming and enforcing Parts I and II (par. 14).

Although the proposed decree accompanying the memorandum contained a reiteration of the July 5 judgment as to Part III, it is perfectly evident that the only relief sought

*Petitioner states in its brief (p. 37, fn. 24) that a copy of such memorandum has been filed with the Clerk of this Court.

by the Commission in requesting entry of the September 18 decree was the affirmance and enforcement of Parts I and II. The memorandum itself makes that fact entirely clear (pp. 1, 4 and 8):

> "*On July 5, 1951, the Court entered its opinion and judgment reversing Part III of the decision* of the Federal Trade Commission dated June 14, 1948, and dismissing Count III of the complaint on which it is based. No disposition has been made of the Cross-Petition filed by the Commission for affirmance and enforcement of the entire decision. . . .
>
> ". . .
>
> "11. In its briefs filed herein the petitioner abandoned its attack upon Parts I and II of the order and challenged only the validity of Part III of the order (see page 1 of petitioner's brief dated March 15, 1951). Thus, petitioner concedes the validity of Parts I and II of the order and does not contest the prayer of the Commission's Cross-Petition and brief with respect to the affirmance and enforcement of Parts I and II of the order.
>
> ". . .
>
> "14. In conclusion, it is submitted that *the Court should make and enter herein a decree affirming and enforcing Parts I and II* of the Commission's order to cease and desist." [Emphasis supplied.]

On September 18, 1951, the Court of Appeals entered the form of decree proposed by the Commission (R. 2316-2319). On December 14, 1951, the Solicitor General filed a petition for certiorari on behalf of the Commission. However, the only issue which that petition presented to this Court for review, *i.e.*, whether Part III of the Commission's order should have been reversed, was adjudicated

with finality by the judgment of the Court of Appeals entered on July 5, 1951.

ARGUMENT

1. An application for a writ of certiorari is untimely if made more than 90 days after entry of the judgment sought to be reviewed.

This Court has time and again held that it does not have jurisdiction to entertain an untimely petition for a writ of certiorari. *Hope Basket Company* v. *Product Advancement Corporation*, 342 U. S. 833 (1951) (petition 91 days after judgment); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942) (petition 124 days after judgment sought to be reviewed). The statute itself [Title 28, United States Code, § 2101(c)] requires that application be made "within ninety days after entry of such judgment or decree".

In the present case the Commission waited from July 5, 1951, to December 14, 1951, before filing its petition for a writ of certiorari—a span of 162 days. The application was, therefore, untimely.

2. The issue here sought to be reviewed was decided by the July 5 judgment and was not affected by the September 18 decree.

The regularity of the July 5 judgment and the finality of its adjudication are not open to question. The judgment was entered on the day the opinion upon which it was based was filed, all pursuant to the applicable provisions of the Court of Appeals Rules (see Rule 20, *supra* at p. 3). Copies of the opinion and judgment were sent to the Commission

and were accepted without protest of any sort. The judgment was not interlocutory in nature, as is apparent on its face, and when read in connection with the opinion pursuant to which it was entered, it compels the conclusion that the Court of Appeals intended thereby to make final disposition of the issue before it. Its purpose and effect were to bring about a complete and unambiguous disposition of Part III of the Commission's order.

The Court of Appeals was never asked by the Commission to alter the July 5 judgment. The fact is, of course, that the Court of Appeals did not alter it.

The proceedings subsequent to the entry of the July 5 judgment were concerned solely with Parts I and II of the Commission's order, the contest of which had long since been abandoned by M-H and as to which the Court of Appeals had made no adjudication. Those proceedings did not affect, nor were they calculated to affect, the finality of the judgment already entered as to Part III. Indeed, they were addressed to parts of the Commission's order which bore no relation at all to its Part III. Those proceedings, which were concerned only with affirmance and enforcement of Parts I and II, did not seek a rehearing* or any modification of the adverse judgment already entered.

It is, therefore, clear that the issue between the parties as to Part III of the Commission's order was disposed of with reviewable finality on July 5, 1951, when the judgment of that date was entered. That is the judgment which, in

*Clearly the memorandum filed by the Commission in support of the entry of a decree affirming and enforcing Parts I and II of the order could not be characterized as a petition for rehearing of the July 5 judgment, which it expressly recognized as dispositive of Part III. The memorandum by its terms limited the relief sought to matters in no way related to the judgment theretofore entered.

reality, is sought to be brought before this Court under the statute [Title 28, United States Code, § 2101(c)]. The time within which to apply for a writ of certiorari to review that judgment commenced to run on the date on which it was entered.

3. The September 18 decree did not start a new period within which to apply for a writ of certiorari as to the issue decided by the July 5 judgment.

If the Commission is correct in its position that entry of the September 18 decree started a new 90-day period within which to seek review of the July 5 judgment, the fixed period of limitation contemplated by Section 2101 (c) would become a completely indefinite period. The only prerequisites for extending the statutory period would be for counsel to develop a plausible reason why some matter—regardless of how unrelated to the real issues between the parties—should be added to what had already been decided and to have an additional decree entered covering the new matter and reiterating the original judgment.

Indeed, this process would not even be limited by the term of the Court of Appeals. Section 452 of the Judicial Code provides (Title 28, United States Code, § 452):

> "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."

Thus, the September 18, 1951, decree could just as well have been entered in 1952, or 1953, so far as the facts of this case are concerned. Section 452 would permit such entry. If the Commission is correct in its position that a decree like the

September 18 decree starts a new 90-day period, then the time within which to apply for a writ of certiorari as to the July 5 judgment would never come to an end.

4. This Court has consistently held that the reiteration of a final judgment in connection with additional matter not affecting the finality of the original judgment does not start a new period within which to apply for certiorari.

With the entry on July 5, 1951, of a judgment disposing of Part III of the Commission's order, the Court of Appeals disposed of the only contested issue in the litigation. The mere fact that such judgment was later reiterated in connection with the disposition of other uncontested issues involved in the action does not enlarge the time within which to seek a review thereof. *Department of Banking* v. *Pink*, 317 U. S. 264 (1942); *Toledo Scale Company* v. *Computing Scale Company*, 261 U. S. 399 (1923); see also *Dickinson* v. *Petroleum Conversion Corporation*, 338 U. S. 507 (1950).

In the *Pink* case the New York Court of Appeals had entered a judgment affirming an order of the New York Supreme Court, and the remittitur thereon had issued on the same day. Thereafter, a motion was filed in the Court of Appeals to amend the remittitur to recite that a federal question had been presented and decided. The Court of Appeals granted that motion, and the remittitur was modified accordingly. A petition for certiorari, filed within three months after the second remittitur but more than three months after the first remittitur, was held untimely. In its opinion this Court stated (317 U. S. at 266):

> "Under the three-months limitation imposed by the statute, 28 USC § 350, the petition for certiorari

> is timely only if the amendment of the remittitur extended the time within which to apply for certiorari. We are unable to conclude that it had such effect. *Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged*; what was sought was merely the court's certification that a federal question had been presented to it for decision, and this could have no different effect on the finality of the judgment than a like amendment of the court's opinion." [Emphasis supplied.]

The factual parallelism between the issue here before the Court and that resolved per curiam in the *Pink* case is obvious. The application of the Commission to enter the September 18 decree did not seek reconsideration in any way of the issue resolved by the Court of Appeals in its July 5 judgment, which was the only issue contested by the parties. The September 18 decree in no way altered that judgment. It merely added provisions relating to Parts I and II of the Commission's order, which were not challenged by M-H and which had not been in controversy since M-H abandoned its petition to review those Parts two years before.

In *Toledo Scale Company* v. *Computing Scale Company*, 261 U. S. 399 (1923), an adverse judgment in a patent infringement suit had been entered against the Toledo Company and affirmed by the Court of Appeals for the Seventh Circuit [279 Fed. 648 (1921)]. A timely petition for certiorari had been denied [257 U. S. 657 (1922)]. Thereafter, the Computing Company applied to the Court of Appeals for a further decree against the Toledo Company enjoining the continuance of certain other litigation calculated

to defeat enforcement of the judgment already obtained. The Court of Appeals thereupon entered a further decree which adhered to its affirmance of the earlier judgment but which contained additional provisions designed to give the complete relief that had been sought. A second petition for certiorari, filed more than 90 days after the entry of the first decree but within 90 days after the entry of the second decree, was granted by this Court. *In deciding the case, however, this Court expressly limited its review to the additional matter added by the new decree.* In doing so, this Court made it clear that the reason for thus limiting the scope of its decision was the jurisdictional statute, not the fact that a previous petition had been denied. In its opinion, the Court said (261 U. S. at 417-18):

> "It is insisted by counsel for the petitioner that it is within our power, and it is our duty on this writ to go into the merits of the issue of the validity of the Smith patent and of the correctness of the money decree for profits. We were asked to do this by an application for writ of certiorari which we denied January 9, 1922. 257 U. S. 657. The decree then sought to be reviewed was entered in October, 1921. The application for this second writ of certiorari which we are now considering was not made until May 22, 1922, more than three months after the final decree in the circuit court of appeals for the payment of profits. Section 6 of the Act of September 6, 1916 . . . directs:
>
> > " 'That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of.'

> *"This deprives us of jurisdiction to consider the merits of the decree of October, 1921..*
>
> "... In the case before us, the decree of October, 1921, which we declined to review in January, 1922, *was a final decree, and we are expressly denied power to review it after three months."* [Emphasis supplied.]

It is also important to note that after this Court had rendered its unanimous opinion in the *Toledo* case, a petition for rehearing was filed addressed in part to the ruling on the timeliness question. It was there argued that this Court had overlooked the fact that the October 1921 decree "was amended by the Court of Appeals and reentered at the same term of Court, on March 25, 1922."* That argument, which is identical with the one urged by petitioner in the present case, was rejected by this Court in the *Toledo* case on May 21, 1923. See Supreme Court Docket for No. 339, October Term, 1922, showing rehearing denied.

In *Dickinson* v. *Petroleum Conversion Corporation*, 338 U. S. 507 (1950), the Petroleum Corporation and certain of its stockholders, as intervenors, asserted claims against two individuals. After trial, the District Court dismissed certain claims of the Corporation, holding in effect that the intervenors as a class were entitled to enforce such claims. That judgment, from which the Petroleum Corporation took no appeal, was entered April 10, 1947, and reserved for future determination the respective rights of the individual participants in the class who were entitled to share in the recovery. Thereafter, on August 3,

*See p. 3, petition for rehearing in No. 339, October Term, 1922, received in the Office of the Clerk of the United States Supreme Court on May 8, 1923.

1948, the court, having made such determination, entered a "Final Decree", which disposed of the issues reserved in the 1947 decree and recited that, those issues having been determined by the court, "the said [1947] decree is hereby made final".* The 1948 decree did not make any adjudication of any issue involving the Corporation or otherwise change the 1947 decree as to it. On September 1, 1948, the Petroleum Corporation's receiver in bankruptcy sought to appeal from "so much of this 1948 decree as dismissed" the Corporation's claims. A motion to dismiss the appeal was denied by the Court of Appeals, but this Court on certiorari reversed, holding that the time within which the Corporation might appeal from the 1947 decree was not enlarged by the subsequent entry of the 1948 decree. This Court pointed out that the 1948 decree did not make any change, so far as concerned the Corporation, in the 1947 decree, and adjudicated only other issues which had been reserved for future determination, saying with reference to such additional issues (338 U. S. at 515-16):

> ". . . The court obviously selected with deliberation the issues it would close by the decree and those it would reserve for future decision. If it had any purpose to leave open any issue concerning Petroleum's contentions, or affecting its interests, half a line in the decree would have done so. But that half-line was not written.
>
> "We hold the decree of April 10, 1947, to have been a final one as to Petroleum and one from which it could have appealed and that its failure to appeal

*Compare the emphasis placed by petitioner on the caption "Final Decree" contained in the September 18 decree in the instant case (Br., pp. 1, 27, 34, 37, 38, 47).

therefrom forfeits its right of review. *Its attempt to review the earlier decree by appealing from the later one is ineffective, and its appeal should be dismissed.*" [Emphasis supplied.]

5. None of petitioner's arguments supports its contention that its application for a writ of certiorari was timely.

Petitioner nowhere seriously disputes the fact that the July 5 judgment settled with reviewable finality the issue as to Part III of the Commission's order; nor does it dispute the fact that a lapse of 90 days, without more, would have terminated its right to apply for a writ of certiorari to bring that judgment before this Court.

Petitioner argues (Br., pp. 46-47), however, that its time within which to apply for a review of the judgment dismissing Part III of its order should not be computed from the date of entry of that judgment because at that time it was open to the Commission to apply to the Court below for a decree affirming and enforcing Parts I and II of its order, and, therefore, that a timely application for a writ of certiorari to review the July 5 judgment would have involved the possibility of multiple review proceedings. Thus it suggests that a review might have been sought by the Commission if affirmance and enforcement of Parts I and II had been denied or by M-H if affirmance and enforcement were decreed. Such a suggestion is, of course, completely unrealistic in view of the fact that for over two years there had been no dispute at all as to the form or substance of Parts I and II of the Commission's order. But even if there had been a real possibility that either party would seek review of the decree entered with respect to Parts I and II, such possibility would not have affected the right of the

Commission to apply for review of the judgment reversing Part III; for this Court has held that successive applications for writs of certiorari to review successive judgments on unrelated issues in the same case are entirely proper. *Toledo Scale Company* v. *Computing Scale Company, supra,* 261 U. S. 399 (1923).

Furthermore, the only authority to which petitioner refers in support of its argument are certain general statements about review procedure contained in the opinions of this Court in *Dickinson* v. *Petroleum Conversion Corporation,* 338 U. S. 507 (1950), discussed *supra* at pp. 18-20, and *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U. S. 541 (1949). Each of those cases, however, is a flat holding by this Court that the reviewable finality of a judgment determining claims of right (like the July 5 judgment here) is not affected by a subsequent decree adjudicating other issues in the same case. Indeed, those cases expressly hold that the time within which to seek review of such earlier judgment is not enlarged by the entry of a subsequent decree.

Recognizing that its petition must be dismissed if it cannot show that the reviewable finality of the July 5 adjudication was affected by the subsequent proceedings, petitioner argues (Br., pp. 37-39) that the Court of Appeals intended the September 18 decree to be its "final decree," superseding the July 5 judgment as to the issue involved in Part III of the Commission's order.

As we have seen, this argument cannot mean that the Court of Appeals on July 5 did not regard its judgment then entered as a final adjudication of that issue. The fact that the Court of Appeals did not immediately enter a decree as to Parts I and II must mean either that the Court did not deem the entry of such a decree of any importance in the light of M-H's abandonment of its contest as to Parts

I and II, or that the Court desired to reserve its final disposition of the uncontested issues involved in those Parts until such time, if ever, as the Commission might decide to submit a formal decree of affirmance and enforcement. That the Court did not immediately dispose of Parts I and II did not, of course, affect the reviewable finality of its judgment entered after careful deliberation as to Part III (the only contested issue)—nor was it so intended.

As we have pointed out under Point 2 (*supra* at pp. 12-14), the instant case is one where the initial judgment of the Court below compels the conclusion that the Court intended thereby to make final disposition of the contested issue before it. The cases cited by petitioner involving mere docket entries followed by formal judgments are, therefore, quite beside the point, being cases where the earlier act of the lower court was demonstrably not intended to be its final judgment.* Nor is petitioner helped by cases in which the earlier act of the court might have been its judgment but for the entry of a second judgment covering only the same ground as the first entry and having no purpose at all unless intended to serve as the court's final judgment with respect to the matters dealt with in the earlier entry.** Such cases are wholly inapplicable to the instant case, since the avowed and only purpose of the September 18 decree was to dispose of additional matters not even considered in the July 5 judgment. We do not believe that petitioner itself takes any stock in the suggestion (Br., p. 38) that the September 18 decree would be only "an empty form" unless the Court of

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United States v. *Hark*, 320 U. S. 531 (1944); *Hill* v. *Hawes*, 320 U. S. 520 (1944); *Monarch Brewing Co.* v. *George J. Meyer Mfg. Co.*, 130 F. 2d 582 (9th Cir. 1942).

**United States* v. *Hark*, 320 U. S. 531 (1931); *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689 (6th Cir. 1931).

Appeals intended it rather than the July 5 judgment to be dispositive as to Part III of the Commission's order.

However that may be, petitioner goes on to argue (Br., pp. 39-41) that the Court of Appeals, merely because of the entry of the September 18 decree, intended that decree to be its final disposition of Part III for purposes of review, even though the Court up to that time had regarded its July 5 judgment as finally determining the issue raised by Part III. That argument is, of course, based entirely upon the assumption that the Court of Appeals intended its September 18 decree in some way to affect the finality of its July 5 judgment. But, since the Court had been careful to point out in its opinion the absence of any contest over the substance or form of Parts I and II of the Commission's order, the entry of a subsequent decree affirming and enforcing those Parts, being at best only a formality, could not possibly indicate an intention to alter the finality of a judgment entered with the admitted purpose of disposing once and for all of the only contest issue in the case, *i.e.*, the propriety of Part III of the Commission's order.

Petitioner's argument that its application for certiorari in this case is timely is manifestly not advanced by reference (Br., pp. 42, 43) to cases* holding that when the adjudication sought to be reviewed has been altered by amendment or modification of a judgment, the time within which an appeal may be taken runs from the date of the amendment or modification. There simply has not been any such amendment or modification in the instant case.

**Zimmern* v. *United States*, 298 U. S. 167 (1936); *Memphis* v. *Brown*, 94 U. S. 715 (1876); *Rubber Co.* v. *Goodyear*, 6 Wall. 153 (U. S. 1867); *Fultz* v. *Laird*, 24 F. 2d 172 (6th Cir. 1928); *Hewey* v. *Andrews*, 82 Ore. 448, 159 P. 1149 (1916); *Luck* v. *Hopkins*, 92 Tex. 426, 49 S. W. 360 (1899); *Billson* v. *Lardner*, 67 Minn. 35, 69 N. W. 477 (1896).

Equally beside the point are the numerous cases* cited by petitioner (Br., p. 45) which hold that the time to appeal is extended by a timely motion for reargument or to modify the judgment sought to be reviewed. In each of such cases the motion in question *did* seek reargument or rehearing, *did* request the Court to change its previously arrived-at legal conclusions, *did* seek the reconsideration of controverted questions contested in the case or *did* request the addition to the judgment of new matter relating to and directly affecting the finality of the original judgment. Thus in the *Leishman* case petitioner's motion requesting amended findings, when entertained by the Court, was held to have extended the time to appeal because (318 U. S. at 205):

> ". . . The motion was not addressed to mere matters of form but raised questions of substance *since it sought reconsideration of certain basic findings of fact and the alteration of the conclusions of the court. In short the necessary effect was to ask that rights already adjudicated be altered.* Consequently it deprived the judgment of that finality which is essential to appealability." [Emphasis supplied.]

Obviously such cases are no authority at all for an enlargement of time within which to seek review, since petitioner did not seek reargument or rehearing, did not challenge the correctness of the Court's earlier disposition of

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**Johnson* v. *Eisentrager*, 339 U. S. 763 (1950); *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944); *Leishman* v. *Associated Electric Co.*, 318 U. S. 203 (1943); *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144 (1942); *Bowman* v. *Loperena*, 311 U. S. 262 (1940); *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131 (1937); *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498 (1927); *Voorhees* v. *John T. Noye Mfg. Co.*, 151 U. S. 135 (1894); *Reconstruction Finance Corp.* v. *Mouat*, 184 F. 2d 44 (9th Cir. 1950).

the case and sought in the subsequent decree the disposition only of unrelated and uncontested issues.

Petitioner states (Br., p. 45) that the cases indicate that a petition for rehearing "extends the time to appeal with respect to all parts of a judgment, not merely the portion which the petition or motion seeks to have modified". While that statement may be true, it is without significance here; for there was no petition for rehearing in this case with respect to any part of the July 5 judgment. Petitioner did not at any time, either before or after the 15-day period allowed by Rule 22 of the Rules of the Court below for petitions for rehearing, seek from the Court below any alteration of the rights adjudicated by the July 5 judgment. Accordingly, petitioner's time within which to apply for certiorari to review that judgment is not affected by considerations applicable to petitions for rehearing.

Petitioner is, in the end, reduced to arguing (Br., p. 41) that the entry of a second judgment which adjudicates wholly different, unrelated issues and incidentally reiterates, without change, an earlier judgment that finally settled other issues, supersedes the earlier judgment for purposes of review. This argument of petitioner parallels the one made to this Court in the petition for rehearing in *Toledo Scale Company* v. *Computing Scale Company*, 261 U. S. 399 (1923), rehearing denied, Supreme Court Docket No. 399, October Term, 1922 (*supra* at pp. 16-18). The argument in the *Toledo* case is repeated here almost without change. Aside from the fact that this Court rejected the argument in the *Toledo* case, the authorities referred to by petitoner*

**Zimmern* v. *United States*, 298 U. S. 167 (1936); *Memphis* v. *Brown*, 94 U. S. 715 (1876); *Rubber Co.* v. *Goodyear*, 6 Wall. 153 (U. S. 1867); *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689 (6th Cir. 1931).

simply do not support the proposition for which they a cited. Thus in *Memphis* v. *Brown*, 94 U. S. 715 (1876 this Court expressly pointed out that the substantial chang effected by the second judgment was the crucial fact whi accounted for treating the earlier judgment as having be superseded (94 U. S. at 717):

> "We think that the order made by the Circu Court, May 20, 1876, upon the motion to subje merchants' capital to the tax was such a final judg ment as may be brought here for reexamination b a writ of error. *The precise question decided by th order had never before been presented in the caus The city was then for the first time required, in e press terms, to subject this particular class of pro erty to the adjudged taxation.* The writ was, ther fore, properly sued out upon the judgment." [Em phasis supplied.]

Petitioner, in arguing that its petition in this case timely, overlooks certain obvious truths:

First: The Commission did not have to wait until th September 18 decree was entered to seek a review of th July 5 judgment. It would not have been hampered i any way in applying for a writ of certiorari to review th July 5 judgment if the September 18 decree had neve been entered.

Second: M-H was entitled to believe on October 4 (9 days after entry of the July 5 judgment) that the proceed ings with respect to Part III of the Commission's orde were at an end. *Matton Steamboat Co.* v. *Murphy*, 31 U. S. 412 (1943). The *Matton Steamboat Co.* case is cite by petitioner itself (Br., p. 47) for the proposition tha

the purpose of statutes limiting the period for review is to "set a definite time beyond which prospective appellees may know, if no appeal has been filed, that the litigation is over."

Third: If the September 18 decree had been intended to supersede the July 5 judgment for purposes of review, without otherwise making any change relating to the issues thereby determined and which are the only issues sought to be reviewed in this Court, the action of the Court of Appeals would have been a flagrant violation of the established rule that a judge or court may not enlarge the time for review beyond the period prescribed by statute. See *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131 (1937); *Credit Company* v. *Arkansas Central Railway Co.*, 128 U. S. 258 (1888).

Conclusion

The writ of certiorari should be dismissed for want of jurisdiction.

Respectfully submitted,

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October 8, 1952.

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No. 11

In the Supreme Court of the United States

OCTOBER TERM, 1952

FEDERAL TRADE COMMISSION, PETITIONER

v.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION ON JURISDICTION

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Respondent's Brief on Jurisdiction relies principally upon three cases decided by this Court in support of its contention that the petition for a writ of certiorari was untimely filed. The primary purpose of this memorandum is to demonstrate that none of these cases supports respondent's position. Respondent's attempt to distinguish *Memphis* v. *Brown*, 94 U. S. 715, on the basis of a mistaken conception as to those facts which are pertinent here, is also considered.

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1. *Department of Banking* v. *Pink, 317 U. S. 264.*—In this case the New York Court of Appeals had amended its remittitur to include a statement that a federal question had been decided. The petition for certiorari, in time if considered from the date of the amended remittitur, was held out of time because it was filed more than ninety days after the original remittitur. This Court stated that the incorporation in a remittitur of a statement that a federal question has been decided "could have no different effect on the finality of the judgment than a like amendment of the court's opinion." 317 U. S. at 266. Such a certification is often asked of a state court as late as after a case has been docketed and argued in this Court. *Hammerstein* v. *Superior Court,* 340 U. S. 622, 341 U. S. 491; *Dixon* v. *Duffy,* 342 U. S. 33, 343 U. S. 393. It has no bearing on the relief sought in the original complaint or bill. It has no effect upon the finality of the judgment. Thus, in the *Pink* case it in no way altered what had been adjudicated, but at most added a new recital. In the instant case, on the other hand, the judgment itself was substantially changed. The September judgment for the first time dealt with all three parts of the Commission's order. It was a new and different adjudication, not the same judgment accompanied by an additional recital or statement of reasons.

2. *Toledo Scale Co.* v. *Computing Scale Co., 261 U. S. 399.*—This was a complex patent controversy which lasted at least 15 years. An adequate explanation of the difference between that litigation and this unfortunately must reflect both its length and its complexity. In 1913 the Court of Appeals for the Seventh Circuit sustained the district court's finding that Computing Company's patents were valid and infringed by Toledo Company. 208 Fed. 410. In May, 1913, prior to the issuance of its mandate, the court of appeals denied Toledo's motion for rehearing on the grounds of newly discovered evidence that the patent had been preceded by the prior art, and ordered an accounting. In May, 1914, the district court approved the master's accounting and finally entered a monetary decree in 1919. On October 4, 1921, the court of appeals affirmed that accounting. Although it doubted that the merits of the controversy were still properly before it, it also denied Toledo's motion to reopen the case on substantially the same grounds as Toledo's 1913 motion. 279 Fed. 648, 674. The court granted a stay of its mandate to permit Toledo to petition this Court for a writ of certiorari. 261 U. S. at 401. Toledo's petition for a writ of certiorari was denied by this Court on January 9, 1922. 257 U. S. 657. That same day, January 9, 1922, Toledo filed a bill in the United States District Court for the Northern District of Ohio, seeking

to enjoin the Computing Company from enforcing the decree of the Court of Appeals for the Seventh Circuit on the grounds that that decree was obtained by fraud. The fraud allegations substantially repeated the grounds of its 1913 and 1921 motions. The Computing Company then filed in the Court of Appeals for the Seventh Circuit a petition for a rule against the Toledo Company to show cause why it should not be enjoined from maintaining its Ohio bill. The Court of Appeals for the Seventh Circuit, after a hearing on the petition for the rule, entered an order (quoted in full at 261 U. S. 402) which stated that it had that day received the order of the Court denying the Toledo Company's petition for certiorari (thereby terminating the stay of the Court of Appeals' mandate), and directed the Clerk to issue the mandate to the district court. That mandate required in part [1] that the court below:

> (1) Enter of record our affirmance of the final decree on accounting.
>
> (2) Enjoin Toledo Company from further maintaining its Ohio bill * * *. [281 Fed. 488, 500]

Toledo Company sought and was granted a writ of certiorari in this Court. 259 U. S. 579. It insisted that this Court had jurisdiction to review the original merits of the validity of the patent

[1] The remaining sections pertained to certain sureties and to expenses and attorney's fees.

and of the accounting, and not merely the issues raised by the rule to show cause, a contention which this Court properly rejected. 261 U. S. 399, 417–418.

This case offers no support for the respondent's position. The portion of the mandate of the court of appeals upon which respondent relies did no more than order the district court to "enter of record", as a routine matter, the affirmance of the final decree of accounting contained in the original judgment of October 1921—which judgment had already been brought before this Court in an unsuccessful petition for certiorari. There was thus no new judgment, but merely a direction in the district court, after expiration of the stay of mandate, to enter the original one. In effect the Toledo Company was attempting to petition for certiorari twice from the same decree, once on the way up to this Court and once on the way down from this Court. The fact that, coincidentally, the Court of Appeals for the Seventh Circuit felt it proper to enjoin the Toledo Company from further prosecuting its Ohio action is irrelevant to the question of the finality of the October, 1921, decree as it was entered.

In the instant case, the September 1951 decree of the court of appeals was a new judgment, the first to dispose of the entire case, not a mere order that a prior judgment be entered in the records. The joinder of this direction in the *Toledo* case

with an injunction enforcing the original judgment of the court of appeals—the enforcement proceeding, of course, constituting an entirely different case—does not make the cases similar.

To respondent's contention that the petition for rehearing filed with this Court in *Toledo* contained many of the same arguments as does our brief on this jurisdictional issue there are two very short answers. First, even if *Toledo's* arguments were similar to those presented in the Government's brief in this case, the facts are so different as to make them inapplicable there and clearly to call for different conclusions. Second, respondent is bold indeed to draw an inference from this Court's denial of a petition for rehearing. Such petitions are seldom granted, and, if we may presume, the reasons for their denial are at least as unknown to the Bar as the reasons for the denial of petitions for writs of certiorari.

3. *Dickinson* v. *Petroleum Corp., 338 U. S. 507.*—The question here was the finality, for the purpose of review by a court of appeals, of a district court's decree, prior to the amendment of F. R. C. P. 54 (b). Petroleum had been allowed to intervene in an action involving the proper disposition of certain shares of stock and claims for damages. It made "the same general allegations and demands for relief" as had the other claimants. 338 U. S. at 509. In 1947 the District Court entered a lengthy decree in which it

disposed of all the claims of Petroleum, but reserved for later hearing claims by other parties. Petroleum took no appeal from this decree. In 1948, the court signed a "final decree" which apportioned the recovery as among the other claimants and recited that the issues reserved in the 1947 decree "having been determined by the Court * * * the said decree is hereby made final." The 1948 judgment did not repeat the provisions entered in 1947 with respect to Petroleum or otherwise deal with the issues which concerned Petroleum. See 338 U. S. at 510, n. 1.

The *Petroleum* case thus involved completely different issues from those herein. No second decree in terms was ever entered by the District Court as to Petroleum. Rather, that court stated in 1948 that the 1947 decree then "became final"—a statement the purport of which was certainly not clear. This Court held that inasmuch as the 1947 decree had completely disposed of Petroleum's claims, it necessarily became effective, for purposes of appeal, in 1947. Here as we have shown, no judgment had been entered as to those parts of the claims brought before the court of appeals by both parties which related to Parts I and II of the Commission's order. It was only by the later decree that all of the claims presented by the parties were adjudicated.

4. *Memphis* v. *Brown, 94 U. S. 715.*—Although we are content to rest our argument upon the

cases cited in our main brief (pp. 38–47), respondent's attempted distinction of *Memphis* v. *Brown*, 94 U. S. 715 (Resp. Br. on Jur. 26) so far misses the point as to warrant correction. In that case Brown had moved in the circuit court for a peremptory writ of mandamus against the city of Memphis, directing the city to levy a tax for the satisfaction of the decree he had formerly obtained (20 Wall. 289) upon all the taxable property of the city. This writ was issued on March 30, 1875. Discovering that the tax collector had not included merchants' capital (treated separately by the laws of Tennessee) in the levy, Brown moved for a further peremptory mandamus directing the city to include merchants' capital in its levy. This motion was granted and judgment entered on March 2, 1876. During that same term, on May 20, 1876, the city moved to set aside the March 2 order. This motion was refused "and that order re-entered as the final judgment of the court in the premises." 94 U. S. at 716.

Since the March 2, 1876 and May 20, 1876 judgments were the same and since this Court allowed the writ of error to be taken from the latter on the ground that the lower court had intended it to supersede the former, the case is in point here. Respondent's reference to "the substantial changes effected by the second judgment" is based upon a quoted excerpt from this Court's opinion which

distinguished between the 1875 judgment and the further preemptory mandamus entered in 1876 (Resp. Br. on Jurisdiction, p. 26)—which "for the first time" subjected "a particular class of property to the adjudged taxation"—not upon any difference between the two 1876 judgments. Respondent's statement that the *Memphis* case does not support the Government's position thus rests entirely upon its misconception of which judgments this Court was talking about in the only portion of the opinion relied upon by the Government and pertinent here.

Respectfully submitted.

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